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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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 531

RIN 3206–AK88

Changes in Pay Administration Rules for General Schedule Employees; Correction

AGENCY: U.S. Office of Personnel Management.

ACTION: Correcting amendment.

SUMMARY: The U.S. Office of Personnel Management issued final regulations on pay setting rules for General Schedule employees on November 7, 2008 (73 FR 66143). This correcting amendment clarifies an instruction.

DATES: Effective on December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Carey Jones, (202) 606–2858.

SUPPLEMENTARY INFORMATION:

Background

As published, the final regulation omitted a definition name in an amendatory instruction for § 531.203. This correcting amendment adds that name to the instruction so that the definition is properly revised in the CFR.

List of Subjects in 5 CFR Part 531

Government employees, Law enforcement officers, Wages.

U.S. Office of Personnel Management.

Jeanne Jacobson,

Manager, Pay Administration Group.

■ Accordingly, 5 CFR part 531 is corrected by making the following correcting amendments:

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 1. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

■ 2. In § 531.203, revise the definitions of *position of record, rate of basic pay, special rate,* and *special rate supplement* to read as follows:

§ 531.203 Definitions.

* * * * *

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by a GS employee before any deductions, including a GS rate, an LEO special base rate, a special rate, a locality rate, and a retained rate, but exclusive of additional pay of any other kind. For the purpose of applying the maximum payable rate rules in §§ 531.216 and 531.221 using a rate under a non-GS pay system as an employee's highest previous rate, *rate of basic pay* means a rate of pay under other legal authority which is equivalent to a rate of basic pay for GS employees, as described in this definition, excluding a rate under § 531.223. (See also 5 CFR 530.308, 531.610, and 536.307.)

* * * * *

Special rate means a rate of pay within a special rate schedule established under 5 CFR part 530, subpart C, or a similar rate for GS employees established under other legal authority (e.g., 38 U.S.C. 7455). The term *special rate* does not include an LEO special base rate or an adjusted rate including market pay under 38 U.S.C. 7431(c).

* * * * *

Special rate supplement means the portion of a special rate paid above an employee's GS rate. However, for a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, the special rate supplement equals the portion of the special rate paid above the officer's LEO special base rate. When a special rate schedule covers both LEO positions and other positions, the value of the special rate supplement will be less for law enforcement officers receiving an LEO special base rate (since that rate is higher than the corresponding GS rate). The payable amount of a special rate supplement is subject to the Executive Schedule level IV limitation on special rates, as provided in 5 CFR 530.304(a).

* * * * *

[FR Doc. E8–30106 Filed 12–17–08; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210 and 245

[FNS–2007–0024]

RIN 0584–AD61

Verification of Eligibility for Free and Reduced Price Meals in the National School Lunch and School Breakfast Programs

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule implements provisions of the Child Nutrition and WIC Reauthorization Act of 2004 relating to verification of applications approved for free or reduced price meals in the National School Lunch Program and the School Breakfast Program. This interim rule includes changes to sample sizes for local education agencies (school districts) when conducting verification which include alternatives when there is an increase in the number

of responses to the requests for verification; direct verification provisions which allow the local educational agency to contact means-tested programs to verify the information on applications without contacting the applicant household for documentation; and revised deadlines for completion of verification efforts. This interim rule also establishes a standard sample size of three percent for local educational agencies that do not qualify for use of an alternative sample size. The direct verification provision will reduce the number of households that must be contacted to submit documentation. This interim rule incorporates other statutory changes designed to assist households in completing the verification process. These changes require the local educational agency to have a telephone number that households may call, without charge, for questions about verification. The local educational agency must also make at least one attempt to follow-up with households selected for verification prior to denying benefits when the household fails to respond. There is also a provision that gives local education agencies the discretion to replace selected applications when households are deemed unlikely to respond to the verification request. These are safeguards to avoid termination of a child's benefits due to misunderstandings or other difficulties that may preclude households from effectively complying with the verification request. The changes made in this interim rule are intended to enhance verification efforts which will improve the accuracy of benefit distribution.

DATES: *Effective date:* This rule is effective February 17, 2009.

Comment dates: Comments on Rule Provisions: Mailed comments on the provisions in this rule must be postmarked on or before March 18, 2009; e-mailed or faxed comments must be submitted by 11:59 p.m. March 18, 2009; and hand-delivered comments must be received by 5 p.m. March 18, 2009.

Comments on Paperwork Reduction Act Requirements: Comments on the information collection requirements associated with this rule must be received by January 20, 2009.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this interim rule. Since comments are being accepted simultaneously on several rulemakings, please include the title (Verification of Eligibility for Free and Reduced Price Meals in the National School Lunch and School Breakfast Programs). Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for submitting comments.
- Fax: 703–305–2879, attention Robert Eadie.
- Mail: Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594.
- Hand Delivery or Courier: Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594, during normal business hours of 8:30 a.m.–5 p.m.

All comments submitted in response to this interim rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. All submissions will be available for public inspection at this location Monday through Friday, 8:30 a.m.–5 p.m. The Food and Nutrition Service may also make the comments available on the Federal eRulemaking portal.

FOR FURTHER INFORMATION CONTACT: Address any questions to Robert M. Eadie, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302 or by telephone at 703–305–2590. A regulatory cost-benefit analysis was completed for this rule. Single copies may be requested from the Food and Nutrition Service's official identified above.

SUPPLEMENTARY INFORMATION:

I. Background

Summary of Changes Affecting Verification Procedures Made by Public Law 108–265

The Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265, June 30, 2004) amended Section 9(b) of the Richard B. Russell National School Lunch Act (NSLA) concerning verification of households' applications for free and reduced price meals in the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). In sections 104 and 105, Public Law 108–265 added a number of provisions and also incorporated into the NSLA provisions concerning verification activities that were previously addressed only in regulations (7 CFR 245.6a) or guidance (primarily an instruction entitled ''Eligibility Guidance for School Meals Manual,'' August, 2001). New requirements and modifications made by Public Law 108–265 to existing procedures are discussed in this preamble.

The primary changes made by Public Law 108–265 concerning verification are:

- Transferring the responsibility for conducting verification from the school food authority (SFA) to the local educational agency (LEA);
- Establishing a new standard verification sample size of three percent which is both the maximum and minimum requirement;
- Reducing sample sizes for LEAs that improve their verification response rates;
- Permitting LEAs to replace applications in the sample, on a case-by-case basis, when complying with the request for verification may pose a particular challenge to the selected household;
- Requiring LEAs to conduct a confirmation review of applications selected for verification to check for approval errors;
- Requiring LEAs to have a telephone number that households may call, at no charge, for assistance with verification;
- Establishing direct verification methods which use records from certain public agencies;
- Requiring follow-up by the LEA with households selected for verification; and
- Revising deadlines for completing verification activities.

This preamble discusses these changes in this order to provide the reader with a sequential overview of the verification process and an understanding of any new procedures as well as how existing procedures are affected. Please note that other related provisions of Public Law 108–265 concerning free and reduced price eligibility and certification are addressed in separate rulemakings.

Implementation Memoranda Issued to Date

Because the statutory amendments addressed in this interim rule became effective on July 1, 2005, the Food and Nutrition Service (FNS) issued a series of implementation memoranda, as required by section 501(a) of Public Law 108–265, to help administering agencies initiate implementation of the statutory provisions and assess how these changes would affect their existing verification procedures. It was especially important for LEAs to know

how verification efforts conducted for School Year 2004–2005 could affect their eligibility for alternative sample sizes in subsequent school years. The first memorandum was dated August 25, 2004 (SP–5) concerning the period for acceptable verification. Another memorandum dated November 15, 2004 (SP–8) concerned direct verification. The purpose of that memorandum, which also discussed the provision on mandatory direct certification of children who are members of households receiving food stamps, was to encourage State child nutrition agencies to work with their counterparts in State agencies administering means-tested programs that could be sources for direct verification. The next memorandum was dated November 19, 2004 (SP–9). That memorandum explained that if the non-response rate for School Year 2004–2005 was less than twenty percent, then the LEA would qualify to use an alternative sample size in School Year 2005–2006, the first year the new verification procedures were to be followed. It also explained that for School Year 2006–2007, an LEA was qualified to use an alternative sample size if there was at least a ten percent improvement between the non-response rate in School Year 2004–2005 and in School Year 2005–2006. Another memorandum was issued on March 10, 2005 (SP–13) addressing the new verification activities for LEAs including confirmation reviews, substitution of applications and follow-up. An April 19, 2005 (SP–14), memorandum discussed State education agency agreements with their counterparts to conduct direct verification. Other memoranda were issued on August 30, 2005 (SP–16), September 14, 2005 (SP–22), September 21, 2005 (SP–19), September 26, 2005 (SP–21), and September 27, 2005 (SP–18). These memoranda discussed and clarified various verification procedures. A July 25, 2006 memorandum (SP–27–2006) clarified that the standard sample size for verification is both a minimum and a maximum. A memorandum dated August 31, 2006 (SP–32–2006), provided clarification for direct certification. All of these memoranda may be found on the Child Nutrition Web site (*http://www.fns.usda.gov/cnd.*)

Terminology: Responsible Entity

Public Law 108–265 specified, in section 105(a), that in newly designated section 9(b)(3)(D)(ii) of the NSLA, the LEA must conduct the verification activities as well as activities related to certifying children as eligible for free or reduced price meals or free milk and section 108(b) added a definition of LEA in section 12(d)(4) of the NSLA. Prior to this amendment, the NSLA indicated that the SFA, which is defined only in regulations, had the responsibility for conducting certification and verification activities. An SFA, as provided in existing regulations at 7 CFR 210.2, is the governing body responsible for the administration of one or more schools and which has the legal authority to operate the NSLP and SBP in those schools. Because the NSLA now specifies that the LEA is responsible for NSLP and SBP certification and verification activities, this rule uses the term LEA. While this change may only have modest immediate effect in implementation and program operations, it is important because it recognizes that income eligibility determinations may be used for a broad array of educational-related benefits and are no longer used exclusively for meal benefits. We note that this distinction was discussed in the House Report 108–445, which accompanied H. R. 3873, a bill related to the Senate bill which eventually became Public Law 108–265. That House Report noted that ''[b]ecause eligibility determinations* * *are used for purposes that extend beyond the receipt of free or reduced-price school meals, the Committee believes that school and district administrators, not food service personnel, should be held accountable for the accuracy of meal certifications reported to the state and the Secretary of Agriculture.''

Terminology: Timing for Acceptable Documentation

The existing regulations at 7 CFR 245.6a(a)(1) specify the period of time for acceptable income documentation; *e.g.*, the household must submit information for the most recent full month available. This rule adds a paragraph at 7 CFR 245.6a(f)(2) to permit households to submit documentation verifying the source, amount and frequency of their income for any point in time within that period. Timing for documentation for direct verification purposes is discussed in V. Direct Verification.

II. Verification Sample Sizes

Background

Each school year, LEAs are required to verify the eligibility of children in a sample of household applications approved for free or reduced price meal benefits. Under the existing regulations at 7 CFR 245.6a(a), the SFA may verify a sample of randomly selected applications or a sample of focused applications. Under random sampling, all applications have an equal chance of being selected for verification and the sample size is the lesser of three percent (3%) or 3,000 approved applications. Under focused sampling, the sample size is the lesser of one percent (1%) or 1,000 of all approved applications selected from applications with household monthly income within $100 ($1200 annually) of the free/reduced price income limit PLUS the lesser of one-half of one percent (.5%) or 500 applications with a Food Stamp Program, Food Distribution Program on Indian Reservations (FDPIR) or Temporary Assistance to Needy Families Program (TANF) case number, provided in lieu of household income information.

Section 105(a) of Public Law 108–265 amended section 9(b)(3) of the NSLA, 42 U.S.C. 1758(b)(3), by specifying a new standard sample size as well as alternative sample sizes for which LEAs may qualify. The law also revised the date for determining the sample size.

Date for Selection of Sample Size

The existing regulatory date for determining the sample size is October 31 of the current school year. Public Law 108–265 amended the NSLA at section 9(b)(3)(D), 42 U.S.C. 1758(b)(3)(D), to establish October 1 of the current school year as the date for determining the sample size based on the number of approved free and reduced price meal applications on file for the current school year. This action changes the date the sample size is determined from October 31 to October 1. The earlier date should assist households selected for verification and should result in changes in eligibility status being acted upon more quickly. The provision on the date for sample size determination may be found in this interim rule at 7 CFR 245.6a(a)(5).

While LEAs must determine the required sample size based on the number of applications on file as of October 1, it may be that they begin their verification activities prior to October 1. This should assist LEAs in completing verification within the required timeframes.

Standard Sample Size

Section 105(a) of Public Law 108–265 amended section 9(b) of the NSLA, which specified that the new standard sample size is the lesser of three percent (3%) of all applications approved by the LEA for the School Year as of October 1 or 3,000 error prone applications approved by the LEA for the School Year as of October 1. Public Law 108–265 also added a definition of error prone application at section

9(b)(3)(D)(i)(I), which is all household applications approved by the LEA as of October 1 that indicate monthly income within $100 of the monthly limit or annual income within $1200 of the annual limit of the applicable income eligibility guidelines. This is similar to the way income applications are selected under the existing focused sampling.

The new standard verification requirement established in Section 105(a) of Public Law 108–265 amended section 9(b) of the NSLA, which concentrates on error prone applications in the interest of improved accuracy of eligibility determinations. The definitions of error prone applications and standard sample size may be found in this interim rule at 7 CFR 245.6a(a)(2) and 7 CFR 245.6a(c)(3), respectively.

Section 105(a) of Public Law 108–265 amended section 9(b)(3)(D)(i)(I)(bb) of the NSLA to permit the Secretary to establish other criteria for error prone applications in lieu of the error prone application standards. At this time, we are not establishing any other criteria and are requesting suggestions on potential criteria for error prone applications. Some possible parameters include different thresholds depending on household size, or different triggers for consideration as an error prone application. Commenters should keep in mind the limited amounts of household information included on the meal benefit application.

Mandatory Standard Sample Size

The NSLA, as amended by Public Law 108–265, specifies that the sample size is three percent or 3,000 applications, whichever is less. This is both a minimum and a maximum sample size. Local educational agencies may no longer choose to verify a larger sample of applications as part of their normal verification activity. This includes LEAs with a small number of free or reduced price applications that have previously verified all applications.

However, LEAs are encouraged, on a case-by-case basis, to verify ''for cause'' any application which is questionable. Verification for cause may include situations in which a household reports zero income or when the LEA is aware of additional income or persons in the household. If the LEA verifies a household's application for cause, the household must be notified in accordance with existing regulatory procedures and, if there is a decrease in benefits, the household would receive a notice of adverse action and would have the opportunity to appeal the LEA's decision. This interim rule is codifying this procedure at 7 CFR 245.6a(c)(7) which previously was only specified in program guidance.

Alternative Sample Sizes

Section 105(a) of Public Law 108–265 amended section 9(b)(3)(d)(iv) to provide two alternative sample sizes available to an LEA which qualifies through its efforts to improve the verification response rate (see below). The alternative sample sizes available to LEAs that qualify are: The lesser of 3,000 or three percent of all approved applications selected at random; or the lesser of 1,000 or one percent of error prone applications plus the lesser of 500 or one-half of one percent (0.5%) of approved applications with a Food Stamp Program, FDPIR or TANF case number provided in lieu of income information. These alternatives are also based on the number of approved applications as of October 1. The alternative sample sizes may be found at 7 CFR 245.6a(c)(4) in this interim rule.

Completing the Sample Size

Some LEAs will not have enough error prone applications to meet the standard or the 1000/1% element of that alternative sample size, as applicable. Section 9(b)(3)(D)(v) of the NSLA, as amended by section 105(a) of Public Law 108–265, states that the LEA must select additional approved applications at random to meet the applicable standard sample size or the 1000/1% element of that alternative. This provision is included in this interim rule at 7 CFR 245.6a(c)(5).

Qualifications Applicable to All LEAs

An LEA may qualify for an alternative verification sample size if it has a non-response rate for the preceding school year of less than twenty percent (20%). This requirement may be found in this interim rule at 7 CFR 245.6a(d)(2). In recognition of the effect of a household's failure to respond to verification requests, Section 105 of Public Law 108–265 added incentives to LEAs to decrease their non-response rates. In 2002, FNS conducted a review of nearly 3,500 applications selected for verification in 14 large SFAs. A key finding of this review was that non-response to the verification process accounted for the most changes in benefits. Seventy-seven to eighty percent (77–80%) of reductions/terminations of benefits were the result of non-response. In an effort to determine the extent of verification non-responses, FNS added a regulatory requirement (68 FR 53483; September 11, 2003) that SFAs report information on verification activities, including the number of non-responses to their State agency. Non-response rates are then reported annually by each State to FNS on the FNS–742, the Verification Summary Report. FNS will use the data from these reports to determine the effects on changes in non-response rates as a result of States' efforts to decrease the number of children who lose benefits because of the household's failure to respond.

The existing regulations do not define non-response rate. Section 105 of Public Law 108–265 added a definition of non-response rate. The statutory definition of non-response rate is the percentage of approved applications for which verification was not obtained after all required attempts; this definition may be found at 7 CFR 245.6a(a)(3) of this interim rule. (Also see the discussion in this preamble concerning what constitutes a non-response for the purposes of the LEAs' obligation for follow-up activities.)

Qualifications Applicable to Large LEAs

Section 105 of Public Law 108–265 amended section 9(b)(3)(D)(iv)(IV) to provide criteria by which large LEAs may qualify for sample size alternatives. A large LEA is defined as one with more than 20,000 children approved by application (excluding children eligible through the direct certification process) as eligible for free or reduced price meals as of October 1 of the school year. To qualify for this alternative, a large LEA must have a non-response rate in the preceding school year which is at least ten percent (10%) below the rate for the second preceding school year. To meet this criterion, a large LEA would compare its non-response rates from one school year to another and determine if there is adequate improvement (at least ten percent (10%)) between the second preceding school year and the preceding school year.

For example, in School Year 2004–2005, the LEA had:

- 21,000 children approved for free and reduced price meal benefits based on a total of 6,000 approved applications; therefore, 180 household applications (3% of 6,000) are subject to verification;
- 45 households failed to respond to verification requests;
- Therefore, the non-response rate is 25% (45 ÷ 180 as a percentage).

The LEA would then calculate the level of improvement needed for School Year 2005–2006 as follows:

- The LEA must improve the non-response by at least 10%, with the 10% improvement determined by taking the previous non-response rate of 25% and multiplying it by 10%, which is 2.5%;

• The improvement level of 2.5% is then subtracted from the previous non-response rate (25.0% − 2.5%) which is 22.5%;

• Therefore, the LEA needs a non-response rate of 22.5% or less to meet the 10% minimum improvement level in order to qualify to use an alternative sample size.

In School Year 2005–2006:

• The LEA again had 6,000 approved applications, so the sample size is 180 (3% of 6,000);

• The number of non-respondents is 40 which is a non-response rate of 22.2% (40 ÷ 180 as a percentage);

• 22.2% is less than the minimum non-response rate of 22.5% needed to qualify for this option; therefore, this LEA may use the alternative sample sizes in School Year 2006–07.

This provision may be found at 7 CFR 245.6a(d)(4) of this interim rule.

Qualifying for Alternative Sample Sizes

As discussed above, Section 105 of Public Law 108–265 permits LEAs to qualify for alternative sample sizes by improving the rate of household responses to their verification efforts. An LEA must annually determine if it can qualify to use an alternative sample size. If the LEA does not reevaluate its eligibility for alternative sample sizes on an annual basis, it must use the standard sample size in 7 CFR 245.6a(c)(3) of this interim rule. Once the LEA determines that it qualifies, it must notify the State agency of the intended use of an alternative sample size, specify which option and indicate the basis for qualifying. The State agency may establish a deadline for notification and may establish criteria for reviewing and approving use of alternative sample sizes. This provision is found at 7 CFR 245.6a(d)(1) of this interim rule.

Declining and Substituting Applications Selected for Verification

Section 105 of Public Law 108–265 amended section 9(b)(3)(J) of the NSLA to allow an LEA to replace up to five percent of approved applications selected for verification upon individual review in accordance with criteria established by the Secretary. This provision effectively allows the LEA some flexibility in verifying applications from families/households that the LEA determines may not be able to satisfactorily respond to the verification request because of instability or communication difficulties. This should minimize the possibility that truly needy families may lose benefits simply due to their inability to fully understand the requirements of the verification process. This interim rule is adopting this approach as the criteria that LEAs would use to remove applications and then select substitutes.

This procedure would be conducted, if the LEA chooses to use this option, once the applications are selected for verification. For each application removed from the verification sample, the LEA would replace it with another approved application. The maximum number of replacements is five percent of the sample selected. Prior to any contact with the selected households, the LEA would consider which households may have difficulties with completing the verification process and replace those applications. Replacement applications would be selected in accordance with the LEA's applicable procedures (*i.e.*, an error-prone application that is selected must be replaced with an error-prone application). Once the replacement process is complete, the LEA would notify the remaining households of the verification process. This provision does not permit an LEA to replace an application once the household is notified of its selection for verification. Further, this provision does not permit the LEA to eliminate a category of applications such as those from a particular group or community. The Department of Agriculture (the Department) will provide additional assistance to LEAs in selecting specific applications if it proves necessary. This provision may be found at 7 CFR 245.6a(e)(2) of this interim final rule.

III. Verification Process/Procedures

Section 105(a) of Public Law 108–265 added provisions concerning follow-up with households selected for verification. These provisions are designed to improve and streamline the process for LEAs as well as to provide additional ways to assist households with completing the verification process, and reduce the non-response rate. Section 105(a) of Public Law 108–265 also added a requirement that LEAs must review applications selected for accuracy of each eligibility determination including math or other errors, prior to contacting the household. Section 105(a) also added section 9(b)(3)(F) allowing LEAs to use direct verification—a process in which information from specific means-tested programs is used as the basis for verifying application data.

Preliminary/Confirmation Reviews

Section 105(a) of Public Law 108–265 added a requirement that the LEA check the accuracy of the certification before proceeding with verification of any application. In the statute, this is referred to as a ''preliminary review.'' The Department is using the term ''confirmation review'' in this preamble and in the regulatory language to emphasize that, while this review is the first verification activity conducted by the LEA, it is a confirmation of the original decision made on the application. The confirmation review must be made by someone other than the person who made the original determination. This procedure is intended to detect any arithmetic or other errors prior to beginning verification so that the LEA can appropriately review the documentation submitted by the household. Please note that any LEA or school that conducts confirmation reviews of all applications as part of its certification process meets this requirement.

The LEA must document that confirmation reviews were conducted. To this end, the prototype free/reduced price application developed by FNS includes a signature line for the person who conducted the confirmation review. The LEA may also maintain a list of applications and their disposition with the reviewer's signature attesting to completing this requirement. The person who conducts the confirmation review must not be the person who makes the initial eligibility determination. However, the provision does not preclude the person who completes the confirmation review from conducting the verification process. These provisions are found at 7 CFR 245.6a(e)(1) in this interim rule.

Section 105(a) of Public Law 108–265 also recognizes that some LEAs use electronic data systems that provide a high level of accuracy in making the initial eligibility determination, in accordance with the certification requirements of the NSLP, on applications for free or reduced price meals. If an LEA uses an electronic data system that rejects inconsistent or incomplete application information and that accurately determines eligibility based on income level and household size or other information establishing categorical eligibility for free meals, it is not subject to the requirement to conduct separate confirmation reviews.

An LEA with such a system must notify the State agency that it is not conducting confirmation reviews because its initial eligibility system accurately processes applications consistent with the income eligibility guidelines. State agencies may require additional documentation of the accuracy of the system and may require the LEA to conduct confirmation

reviews if they consider the system to be inadequate. This provision may be found at 7 CFR 245.6a(e)(1)(ii) of this interim rule.

Disposition of Applications After the Confirmation Review

The confirmation review can occur at one of two times—immediately after the initial review which makes it part of the certification process or as part of the verification process as a double check on only those applications selected for verification. When the confirmation review is part of the application process, the notice of eligibility reflects any adjustments made to the initial determination made as a result of the ''up-front'' confirmation review.

However, when the confirmation review is part of the verification process, the following requirements apply—

- If the confirmation review indicates that there should be an increase in benefits, the LEA must make the change as soon as possible, notify the household and proceed with verification;
- If the confirmation review shows that there should be a decrease in benefits from free to reduced price, the LEA should proceed with and complete verification before any notification of a new eligibility status is given. If the decrease is substantiated by the documentation submitted by the household or the household fails to respond (subsequent to at least one follow-up attempt by the LEA), the LEA will then provide the household with a notice of adverse action which will inform the household of the pending action and of their appeal rights.
- If the confirmation review indicates that the application should have been denied initially, the LEA would remove that application from the verification sample, select another like application (for example, another error prone application) and would provide the household with a notice of adverse action which will inform the household of the pending action to terminate their free or reduced price benefits and of their appeal rights.

These procedures are designed to avoid a possible unnecessary reduction in benefits. The verification notice requirements are not changed by adoption of the confirmation review; that is, the verification notice continues to explain that the application was selected, to detail the process and required documentation, to assign a deadline for receipt of documentation, and to provide a no-charge phone number to call for assistance. These provisions may be found at 7 CFR 245.6a(f) of this interim rule.

Direct Verification: Background

Section 105(a) of Public Law 108–265 provides for a procedure called ''direct verification.'' The NSLA was amended to include, at section 9(b)(3)(F), an option for LEAs to directly verify applications selected for verification. This procedure is similar to the existing direct certification process. Direct verification allows the LEA to request information from an agency administering one of the means-tested programs listed in the NSLA without contacting the household. Contact with one of the means-tested programs is the first verification effort. Although existing regulations do not specifically include direct verification, existing 7 CFR 245.6a(b)(3) provides for use of agency records from a State or local agency that administers the Food Stamp Program, FDPIR or TANF program which have similar eligibility limits and information maintained by the State employment office. This procedure is discussed in detail in this preamble under V. Direct Verification.

Telephone Assistance With Verification

As indicated earlier, the existing regulatory provision requiring that the LEA notify the household in writing of its selection for verification (except for those households' whose eligibility status is verified through direct verification) did not change. However, Section 105(a) of Public Law 108–265 added provisions concerning contacts with households selected for verification.

The existing regulations do not require that the SFA provide a telephone number for households to call concerning verification, but the prototype application and verification forms as well as guidance encourage SFAs to provide a telephone contact for verification activities. Section 105(a) of Public Law 108–265 amended the NSLA to require that the written notification to households concerning verification include a telephone number that the household may call without charge. The telephone number could be toll-free. The toll-free telephone number must be to a source that can respond to the household's questions about the verification process. This provision is found at 7 CFR 245.6a(f)(5) of this interim rule.

Requirement for Follow-Up With Non-respondents

Section 105(a) of Public Law 108–265 also added a requirement that the LEA make at least one follow-up attempt to contact any household that fails to respond to a request for verification. This rule does not specify the method of follow-up or the timing; the follow-up attempt may be in writing, via e-mail, through a telephone call or in person. The LEA must document the attempt. Many LEAs already perform follow-up contacts.

As permitted in section 9(b)(3)(G)(iv) of the NSLA, this rule allows the LEA to contract with a third party to conduct the follow-up activity. Any use of a third party is subject to the confidentiality requirements in Section 9(b) of the NSLA and 7 CFR Part 245. Any contract is also subject to the procurement requirements in existing 7 CFR 210.21. The provision on third party contracts may be found in 7 CFR 245.6a(f)(6) of this interim rule. The use of a third party to perform follow-up contacts would facilitate this process for LEAs which may not have the staff resources to readily absorb this required function. It is important to note, however, that the information the contractors will be using is subject to the use and disclosure requirements in the NSLA and program regulations. All such information must be carefully controlled, remains the property of the LEA and may not be used by the contractor for any other purpose.

Non-Response in Relation to Follow-Up Contacts

A non-response, for the purposes of a follow-up contact, would arise when the LEA is unable to verify the household's status for school meal benefits for which it was certified. A non-respondent household would be a household that failed to provide documentation that enables the LEA to resolve or confirm its eligibility status.

Follow-up contacts can assist families in continuing meal benefits for their children as well as improve LEAs' verification completion rates. Examples of situations which indicate the need for a follow-up contact by the LEA would be—

- The household has not, in any way, contacted the LEA concerning its initial request for verification documentation.
- The household contacted the LEA and has submitted some but not all needed documentation. This could include needed written material from the household itself or the inability of the LEA to complete a collateral contact. In the latter situation, the household may need to indicate another collateral contact or provide other written evidence.
- The household contacted the LEA but the communication was

inconclusive and the LEA needs additional information.

• Information obtained from a public agency is incomplete or inconsistent with information on the application.

IV. Deadlines/Extensions

Deadlines for Completing Verification

The existing regulations establish the deadline for completing verification as December 15. Section 105(a) of Public Law 108–265 changed this date to November 15. This change will result in more timely determinations of the accuracy of children's eligibility for free or reduced price meals or free milk. Shifting this date closer to the beginning of the school year will allow LEAs to more promptly make necessary adjustments to eligibility status and thus target meal benefits more appropriately. The deadline is found at 7 CFR 245.6a(b)(1) of this interim rule.

Please note that the October 31 date for reporting data on the number of children eligible for free and reduced price meals and free milk has not changed. This date is a point in time used to ensure consistent data on program participants. The reference to the verification deadline in 7 CFR 210.18(h)(1)(iv) is also revised by this interim rule.

Extending the Verification Deadline

Section 105(a) of Public Law 108–265 also amended the NSLA to allow the State agency to extend the verification deadline to December 15 under criteria established by the Department. The regulations will now permit extensions of the verification deadline on a case-by-case basis, depending on justification submitted by the LEA. Reasons for extensions may include, but are not limited to, strikes or labor disputes or natural disasters. This provision is found at 7 CFR 245.6a(b)(2)(i) of this interim rule.

Additional Extensions Due to Local Conditions

Section 105(a) of Public Law 108–265 amended the NSLA to address verification alternatives when local conditions warrant. Section 9(b)(3)(I) specifies that the Department may allow alternatives to the sample size, the sample size selection criteria and to the verification deadline when a natural disaster, civil disorder, strike or other similar conditions exist. This allows LEAs flexibility in completing verification activities when circumstances prevent timely or complete compliance with the requirements. The law directs the Secretary to establish criteria for extensions and alternatives. Requests under this provision would be necessary only if the LEA were requesting different sample size and selection criteria and/or an extension for completing verification beyond December 15. We emphasize that these requests would be made on a case-by-case basis and that approval would be given only when necessitated by unusual circumstances. Section 245.6a(b)(1)(ii) will now allow the State agency to request use of alternative sample sizes or sample selection and/or an extension of the deadline beyond December 15 through a written request to FNS.

V. Direct Verification

As discussed briefly above, section 105(a) of Public Law 108–265 amended section 9(b)(3)(F) of the NSLA to permit LEAs to directly verify households through information obtained from the State agency administering the Food Stamp Program, FDPIR, TANF or State Medicaid programs under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*) and any similar income-tested program or other source of information determined by the Secretary.

Direct verification is a procedure that uses information directly obtained from an agency that administers a means-tested program (such as the Food Stamp Program) or that maintains information about income or wages (such as the State unemployment offices). Direct verification is similar to using agency records as a means of verification of information on a household's application. However, direct verification is conducted prior to contacting the household of its selection for verification. If the source of the direct verification information confirms the household's eligibility status, the household will not need to be notified of its selection as verification was completed through the agency contacts.

The use of direct verification can help LEAs in completing the verification process in a timely manner and lower the non-response rate since households do not need to be contacted if the eligibility status can be verified through extant data sources.

The direct verification process is discussed below as follows: (1) Information sources and the age and type of acceptable data; (2) direct verification using Food Stamp Program, FDPIR and TANF sources; (3) direct verification using state Medicaid program sources; (4) direct verification using State Children's Health Insurance Program (SCHIP) sources; and (5) using Medicaid/SCHIP information in States with higher income limits.

Sources for Direct Verification and Timing

Section 9(b)(3)(F)(i) of the NSLA specifies that direct verification may be achieved through systems of records maintained by the public agency administering the Food Stamp Program, FDPIR, TANF, or the State Medicaid program. It also permits the Department to include similar means-tested programs or sources of information. This interim rule incorporates the statutorily identified programs at 7 CFR 245.6a(g). Please note that while children are categorically eligible for free meals if they are in a Food Stamp Program or FDPIR household or in most TANF households (see below for a discussion of the exception), Medicaid recipients are not categorically eligible. In addition, because income eligibility limits for Medicaid vary from State to State and may exceed the threshold for free/reduced price meal benefits, a State agency must first determine what the limits are in its State. It must then determine whether the Medicaid office is able to provide household income information or an indication (such as the percentage of the Federal poverty line) of whether the household's income is within the limits for either free or reduced price benefits. These are the first steps in implementing direct verification with Medicaid.

Under the authority in the NSLA, we have determined that SCHIP, which is authorized under title XXI of the Social Security Act, should be included as a potential source for direct verification as it is an adjunct of the Medicaid program. As with the Medicaid program, SCHIP recipients are not categorically eligible for free or reduced price benefits and the income limits vary by State. Again, the first step for a State agency would be to determine how the SCHIP program is structured in its state. SCHIP is defined in 7 CFR 245.2 of the existing regulations.

Public Law 108–265 specified that the direct verification information from public agencies must be the most recent information available. The ''most recently available information'' is described in the NSLA as information reflecting program participation or income during the 180-day period immediately prior to the date of school meals application. The data need only indicate eligibility for the program at that point in time, not that the child was certified for that program's benefits within the 180-day period.

In order to be consistent with the documentation permitted for households notified of their selection for verification, LEAs have flexibility

with identifying acceptable documentation for direct verification purposes. As discussed earlier, household being verified may provide documentation for any point in time between the month prior to application and the time the household is required to provide income documentation. For consistency between verification and direct verification activities, this interim rule, at 7 CFR 245.6a(g)(5), therefore states that direct verification efforts may use information from any point in time between the month prior to application and the time direct verification is conducted. In other words, for direct verification LEAs must use information (which may never be more than 180 days old) that is the most recent available information; information from any one month from the period one month prior to application through the month direct verification is conducted; or information for all months from the month prior to application through the month direct verification is conducted.

Names Provided to Direct Verification Sources

LEAs or State agencies conducting direct verification must only submit the names of the eligible children and not names of other members of the household, such as parents, grandparents or non-school age siblings. This provision may be found at 7 CFR 245.6a(g)(1) of this interim rule.

How Direct Verification Is Conducted Using Food Stamp Program, FDPIR, and TANF Records

Under section 9(b)(3)(F)(i)(I)–(III) of the NSLA, as amended by Public Law 108–265, LEAs may submit a list of identifiers for children listed on applications selected for verification to the agencies that administer the Food Stamp Program, FDPIR or TANF.

These programs would then indicate if they have information that supports the child's eligibility for free or reduced meal benefits. This may be done even if the school meals application does not indicate receipt of benefits from one of these programs. This ''direct verification'' contact would occur prior to notifying the household of its selection for verification. If the data obtained was within the time frames discussed above and shows that a child was a member of a household participating in one of these programs, the child's eligibility for free meals is validated. If data indicates that one eligible child is a member of a household participating in the FSP, FDPIR, TANF, or Medicaid, all eligible children in that child's household are verified. If none of the children's participation is confirmed by the direct verification source, regular verification procedures must be followed. For consistency, this approach is now applied to applications selected for verification that contain case numbers. This change may be found at 7 CFR 245.6a(f)(3) in this interim rule.

With respect to the TANF program, eligibility for that program continues to be subject to the provision in the NSLA concerning TANF eligibility standards in place in 1995. Section 9(d)(2)(C) of the NSLA specifies that a child is eligible for free meals if the standards used for the State's TANF program are comparable to or more restrictive than the eligibility standards in effect on June 1, 1995. Therefore, direct verification to determine eligibility for free meals based on TANF information may be used only in those States that currently meet this criterion or in States that can provide the household's income level or indicate that the family's income is less than 130% of the applicable poverty guideline. Please note that while this section of the NSLA also addresses eligibility for reduced price meals, children in households receiving Food Stamp Program, TANF or FDPIR benefits are categorically eligible for free meal benefits.

Direct Verification Using State Medicaid Program Sources

Public Law 108–265 amended the NSLA at section 9(b)(3)(F) to allow use of State Medicaid income and program participation information as sources of direct verification. The NSLA specifies that eligibility for free meals may be confirmed when the Medicaid income limit is 133% or less of the official poverty line and that eligibility for reduced price meals may be confirmed when the Medicaid income eligibility limit is no more than 185% of the official poverty line.

The LEA may verify children's eligibility for either free or reduced price meals based on Medicaid data. Medicaid and SCHIP (as added under the discretion provided to the Secretary) eligibility standards vary from State to State. If the State's Medicaid limit is between 133% and 185% of poverty, the Medicaid/SCHIP agency must also be able to provide a household's income and size or the percentage of the official poverty line that the household's income represents; otherwise, direct verification may not be feasible when there are different eligibility standards for receipt of Medicaid.

Verification of Eligibility for Free Meal Benefits

If the State's Medicaid program's eligibility standards are 133% or under of the poverty limits, the LEA can use information from the Medicaid agency to verify free status. While the income limit for free meals is 130% of the applicable poverty guideline, section 105(a) of Public Law 108–265 permits use of the greater percentage. The 133% figure was used because this is the Medicaid limit in a number of states for school-age children. When the Medicaid agency can identify which households are participating, the LEA has documented the child's eligibility for free meals. No additional individual documentation is needed. In states with Medicaid limits of 133% or below, there is no need to have the household's income because eligibility status is confirmed solely through Medicaid participation. These provisions may be found at 7 CFR 245.6a(g)(3) of this interim rule.

Verification of Eligibility for Free or Reduced Price Benefits

If the State's Medicaid limit is between 133% and 185% of the poverty limits and the Medicaid agency can provide the percentage or amount of income used, the LEA could use Medicaid information to verify the child's eligibility either for free or for reduced rice benefits, depending on the basis for the child's Medicaid eligibility. In these states, the agency administering the Medicaid program must be able to provide the income amount and household size used to determine Medicaid eligibility or the percentage of the applicable poverty guideline for that income. That information can be used to confirm the child's status for free or reduced price meals, as appropriate. These provisions may be found at 7 CFR 245.6a(g)(4) of this interim rule.

Direct Verification Using SCHIP

Some States have used their SCHIP grants to expand their Medicaid coverage for children through higher income limits. Other States have separate SCHIP programs. For the latter States, the State agency must determine the income limits and establish the same type of parameters discussed above for State Medicaid programs.

Resolving Discrepancies Between the Application and Information Received Through Direct Verification

For the purposes of direct verification, the LEA submits the names and other identifiers, such as birthdates and addresses for a child certified for free or reduced price meals and selected for

verification. Therefore, direct verification potentially establishes a child's participation in one of the eligible programs, thereby confirming their eligibility for free or reduced price meals. Any child listed on the application who is certified for free or reduced price school meals who is established as participating in one or more sources of direct verification (within the applicable limits for the various programs) is verified. The LEA has completed verification for that household and household contact is not required. If the information received from sources of direct verification is inconsistent or inconclusive, the LEA must notify the household that it is subject to verification and the household must provide documentation of their income.

Use of Direct Verification Is an LEA Option

Public Law 108–265 expanded Section 9(b)(3)(F) of the NSLA to permit the use of direct verification by LEAs, although it is still optional. The law specifies that the decision to use direct verification is made at the LEA level. State agencies must support and assist any LEA's decision to use direct verification. State agencies should also work towards establishing contacts with their state-level counterparts to coordinate direct verification use and to develop a State-wide system to encourage the use of direct verification by LEAs.

If an LEA chooses to use direct verification, the State agency must work with the LEA in determining the best method for doing direct verification and assist in facilitating contacts with State-level agencies, as needed, to establish the mechanism for doing direct verification. Because administrative systems vary greatly among States, the Department is not establishing any specific procedural criteria in the regulations for conducting direct verification. This will provide State agencies with flexibility in developing procedures that best meet their needs.

Agreements To Conduct Direct Verification

Section 104(b) of Public Law 108–265 amended the Food Stamp Act of 1977 by adding Section 11(u), 7 U.S.C. 2020 (u), to require an agreement between the State agency administering the school meals programs and the State agency administering the Food Stamp Program. The Food Stamp Act of 1977 requires that State agencies to establish procedures to conduct direct verification for children eligible for free or reduced price school meals. All States have such agreements in place. For direct verification with other programs, the Department suggests that the State education agency enter into an agreement spelling out procedures, available data, etc., with each different State agency that will be a direct verification source.

Additional Programs for Direct Verification

Public Law 108–265 allows the Secretary to permit direct verification with similar means-tested programs or other sources of information. Prior to extending direct verification to additional programs, the Department would need to determine which programs have comparable eligibility standards and which are accessible to State agencies and/or LEAs. As mentioned above, we have extended direct verification to SCHIP. To assist us in expanding this provision further, we are requesting comments on any additional programs that could be included as sources for direct verification.

VI. Miscellaneous

Effect of Public Law 108–265 on Existing Verification Provisions

Some of the existing regulations in 7 CFR 245.6a are modified by this interim rule while others are unchanged but may be relocated. Under existing regulations, directly certified households are not subject to verification because their status was already determined through contact with the appropriate agency. This exception is not changed. However, the following categories of children were added as not subject to verification as authorized by Public Law 108–265—children who are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); children served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*); or migratory children as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 6399). These groups will also be addressed in separate rulemakings. This provision is relocated by this interim rule from existing 7 CFR 245.6a(a)(5) to 7 CFR 245.6a(c)(2).

Existing regulations also provide for other exceptions from verification for children in residential child care institutions and schools. Further, LEAs using the special certification/reimbursement procedures in 7 CFR 245.9 are not required to conduct verification except in the base year when applications are submitted. These exceptions remain in effect but are relocated from 7 CFR 245.6a(a)(5) to 7 CFR 245.6a(c)(2) by this interim rule.

Clarifying What Information Is Submitted on the Verification Report

LEAs, through their State agencies, submit the FNS–742, School Food Authority Verification Summary Report. We are clarifying, in newly redesignated 7 CFR 245.6a(h), that LEAs and State agencies only report on statutorily required verification activities. For example, an LEA would only report on the results of verifying the required three percent (up to 3,000 applications) of error prone applications. The verification report would not include any applications verified for cause as permitted in 7 CFR 245.6a(c)(7) as set forth in this interim rule.

Unchanged Provisions

The following chart shows other existing verification provisions that have been relocated and rewritten to improve their clarity and conformity with the provisions revised by this interim rule. These policies and procedures provided in these provisions are otherwise unchanged.

Provision	Existing citation	New citation
State agency conducting verification	7 CFR 245.6a(a) Introductory Text	7 CFR 245.6a(c)(1)(i).
Approval with essential documentation	7 CFR 245.6a(a)(1)	7 CFR 245.6a(c)(1)(ii).
Notification of households selected for verification.	7 CFR 245.6a(a)(2) Introductory Text	7 CFR 245.6a(f)(1).
Notification of households/social security numbers.	7 CFR 245.6a(a)(2)(i) through (a)(2)(iv)	7 CFR 245.6a(f)(1)(i) through (f)(1)(v).
Sources of information	7 CFR 245.6a(b) Introductory Text	7 CFR 245.6a(a)(7).
Verification reporting	7 CFR 245.6a(c)	7 CFR 245.6a(h).

Provision	Existing citation	New citation
Nondiscrimination	7 CFR 245.6a(d)	7 CFR 245.6a(i).
Adverse action	7 CFR 245.6a(e)	7 CFR 245.6a(j).

VII. Procedural Matters

Executive Order 12866

This interim rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Impact Analysis

Need for Action

This interim rule amends regulations to reflect changes made to the NSLA by Public Law 108–265, the Child Nutrition and WIC Reauthorization Act of 2004, regarding the verification of applications approved for free or reduced price meals in the NSLP and SBP. The provisions of this interim rule are expected to enhance verification efforts which will improve the accuracy of benefits distribution. FNS estimates that the net increase in administrative burden from implementing the provisions of this interim rule will be outweighed by the benefits of improved accuracy in the targeting of benefits.

Benefits

The interim rule is expected to better target NSLP and SBP benefits to eligible children. The rule's requirement that LEAs make greater use of an error-prone sampling method to select applications for verification is expected to reduce the value of improper federal reimbursements. Increased reliance on focused sampling should also reduce the loss of benefits to otherwise eligible applicants who fail to respond to verification requests. Other provisions, such as moving the verification process closer to the beginning of the school year, and requiring LEAs to help applicants through the verification process, are also expected to better align benefit approval with applicant eligibility. Over the fiscal year 2008–2012 period, FNS estimates that the verification process will reduce improper federal meal reimbursements by $19.7 million. This estimate considers only the direct savings that result from recertifying a subset of children whose applications were selected for verification. Additional savings are expected to follow as the data collected from the verification process, and from the FNS' *Access, Participation, Eligibility and Certification* (APEC) study, facilitates the development of guidance, training, and policy options to further reduce certification error.

Costs

FNS estimates that the net increase in administrative burden to LEAs will total $0.13 million over the fiscal year 2008–2012 period.

Regulatory Flexibility Act

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Nancy Montanez Johner, Under Secretary for Food, Nutrition and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. Local educational agencies already must conduct verification of a sample of applications for free and reduced school meals. This interim regulation provides additional options for local educational agencies that improve their verification techniques. The Department of Agriculture (the Department) does not anticipate any adverse fiscal impact resulting from implementation of this rulemaking; rather, the Department anticipates that benefits will be more targeted towards eligible children and that local educational agencies will have incentives to work towards improvements in their verification efforts to be able to have more flexibility. Although there may be some burdens associated with this rule, the burdens would not be significant and would be outweighed by the benefits of improved accuracy in the targeting of benefits and in enhanced flexibility for local school districts.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes a requirement for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally prepares a written statement, including a cost-benefit analysis. This is done for proposed and final rules that have ''Federal mandates'' which may result in expenditures of $100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates of $100 million or more in any one year (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this interim rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The National School Lunch Program and the School Breakfast Program are listed in the Catalog of Federal Domestic Assistance under Nos. 10.555 and 10.553, respectively. For the reasons set forth in the final rule in 7 CFR Part 3015, Subpart V, and final rule related notice at 48 FR 29114, June 24, 1983, these programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulation describing the agency's considerations in terms of the three categories called for under section (6)(a)(B) of Executive Order 13132:

Prior Consultation With State Officials

Prior to drafting this interim final rule, we received input from State and local agencies at various times including national and regional meetings. The Child Nutrition Programs are State administered, federally funded programs. FNS sponsored a meeting in September 2004 to brief State agencies on the amendments to the NSLA and Child Nutrition Act made by the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265). FNS received a number of comments from participants at that meeting as well as from meetings held within various states. In addition, FNS staff had informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. Upon request,

representatives of FNS have attended state-sponsored meetings to brief both State and local cooperators on the changes and to obtain feedback that forms the basis for any discretionary decisions in this rule.

Nature of Concerns and the Need to Issue This Rule

State and local agencies are generally concerned about the paperwork and financial burdens placed on food service to conduct verification, especially in light of the potential for larger sample sizes and additional follow-up activities while local educational agencies are continuing to implement other changes to the verification reporting process.

The issuance of an interim rule was permitted by amendments made to the Richard B. Russell National School Lunch Act in section 501(b) of Public Law 108–265. This rule implements provision of Public Law 108–265. FNS plans to assist States with implementing the revised verification procedures and to issue additional guidance as needed in response to operational issues. The comment period will also allow States to share their operational concerns so that problems may be addressed in development of the final rule.

Extent to Which We Meet These Concerns

We believe that we adequately address the issues of paperwork and financial burdens by providing State and local flexibility in the manner in which local educational agencies implement the required verification sample sizes and other required activities. Additionally, expansion of the categories of children who are not subject to verification reduces the burden placed on local educational agencies and households. Those local educational agencies can reduce the number of applications/households that are subject to verification by qualifying for one of the verification sample size alternatives.

This rule is intended to have a preemptive effect on any State law that conflicts with its provisions or that would otherwise impede its full implementation. To the extent the rule includes discretionary changes, the Department has established compliance timeframes which give due consideration to State agency processes for notification of customers and stakeholders for the implementation of the new procedures in local offices.

Executive Order 12988

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would impede its full implementation. This rule is not intended to have retroactive effect unless that is specified in the **DATES** section of the preamble of the rule. Before any judicial challenge to the provisions of this rule or the application of its provisions, all administrative procedures that apply must be followed. The only administrative appeal procedures relevant to this interim rule are the hearings that local educational agencies must provide for decisions relating to eligibility for free and reduced price meals and free milk which are found at 7 CFR 245.7 for the NSLP, SBP, and SMP in schools.

Civil Rights Impact Analysis

FNS has reviewed this interim rule in accordance with the Department Regulations 4300–4, ''Civil Rights Impact Analysis,'' to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability. After a careful review of the rule's intent and provisions, FNS has determined that this interim rule facilitates the participation of all eligible participants and does not establish any new burdens.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) this rule contains information collections that are subject to review and approval by the Office of Management and Budget (OMB) before they can be implemented. FNS invites comments on information collection requirements contained in this interim rule for which FNS intends to seek approval. Those requirements will not become effective until approved by OMB. When these information collection requirements have been approved, FNS will publish separate action in the **Federal Register**.

Comments on the information collection requirements contained in this interim rule will be accepted under an abbreviated comment period of 30 days. To be assured of consideration, comments must be received by January 20, 2009.

Comments may be sent to the Office of Information and Regulatory Affairs (OIRA), either by fax to 202–395–6974 or by e-mail to *OIRA submission@omb.eop.gov* marked ''attention, desk office for FNS.'' Please also send a copy of your comments or requests for information to: Ms. Lynn Rodgers-Kuperman, Chief, Program Analysis and Monitoring Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302. Comments will also be accepted if sent through *http://www.regulations.gov* by 11:59 p.m. on January 20, 2009. For further information or copies of the information collection, please contact Ms. Rodgers-Kuperman at the above address.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this Notice will be summarized and included in the request for OMB approval and will become a matter of public record.

Title: 7 CFR Part 245 Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools.

OMB Number: 0584–0026.

Expiration Date: 01/21/2010 .

Type of Request: Revision of currently approved information collection.

Abstract: Section 105 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265), amends section 9(b) of the Richard B. Russell National School Lunch Act (42. U.S.C. 1728(a)) by revising the requirements and procedures for conducting verification of a sample of applications approved for free or reduced price school meals. These new requirements are being codified under 7 CFR Part 245, Determining Eligibility for Free and Reduced Priced Meals and Milk in Schools, and 7 CFR Part 210, National School Lunch Program.

This interim rule implements direct verification procedures that allow local education agencies (LEAs) to request information from a State or local agency administering the Food Stamp Program, Food Distribution Program on Indian Reservations or Temporary Assistance to Needy Families Programs, which have similar eligibility limits without contacting the household directly. Without this provision, all households would be contacted when selected for verification. Also, this rule requires LEAs to follow up with any household

that fails to respond to a request for verification. The paperwork burden for LEAs is due to the requirement to conduct direct verification with the Food Stamp Program and because of the requirement to conduct follow-up with households that fail to respond to the request to provide documentation to verify eligibility.

Affected Public: Local educational agencies.

ESTIMATED ANNUALIZED BURDEN

	7 CFR section	Annual No. of respondents	Number of responses per respondent	Average burden per response	Annual burden
Recordkeeping: Local educational agencies (LEAs) conduct verification using agency records					
Currently Approved	245.6a(b)(3)	16,342	1	.25	4,085.5
Total Proposed LEAs	245.6a(g)	16,342	1	.33	5,392.9
Difference					+1,307.4
Reporting: LEAs conduct one follow-up with verification non-respondents					
Currently Approved		0	0	0	0
Total Proposed LEAs	245.6a(f)(6)	3,824	1	.05	191.2
Difference					+191.2
Total New Burden					+1,498.6

Estimated Number of Respondents: 16,342.

Estimated Number of Responses per Respondent: 2.

Estimated Hours per Response: .09.

Estimated Total Annual Burden: 1,498.6.

E-Government Act Compliance

FNS is committed to compliance 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.

Public Participation

This interim rule is being published without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). In recognition of the need to implement the provisions on verification and direct verification, as promptly as possible, in order to reduce the burden on participants and local educational agencies, section 501(b)(4) of Public Law 108–265 allows the Department to issue interim rules on these and other provisions in that law. This rule implements a number of provisions of Public Law 108–265 which were described in very specific statutory language. Consequently, these procedures were largely non-discretionary; including standard and alternative verification sample sizes, local educational agency qualifications for using an alternative sample size, detailed requirements for confirmation reviews and household contacts and mandatory dates for various aspects of the verification process. Further, due to the statutory mandate in section 501(a) of Public Law 108–265 to implement these provisions as soon as possible through guidance, these procedures have been in effect since School Year 2004–2005. Based on these factors, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and Opportunity for Public Comments prior to codification is unnecessary and contrary to the public interest. However, this rule is being promulgated as an interim rule and, as such, provides for a public comment period of 90 days. Comments received during this period will enable the Department to make, in the final rule, identified and need changes resulting from the experience of local educational agencies.

List of Subjects

7 CFR Part 210

Children, Commodity School Program, Food assistance programs, Grants programs—social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 245

Civil rights, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

■ Accordingly, 7 CFR Parts 210 and 245 are amended to read as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.18:

■ a. Revise paragraph (h)(1)(iii);

■ b. Amend paragraph (h)(1)(iv) by revising the first sentence and by removing the words ''December 15'' from the second sentence and adding in their place the words ''November 15''; and

■ c. Revise paragraph (h)(1)(vi).

The revisions read as follows:

§ 210.18 Administrative reviews.

* * * * *

(h) * * *

(1) * * *

(iii) Determine that applications for verification are selected in accordance with the applicable procedures in § 245.6a(c) of this chapter and that no discrimination exists in the selection process.

(iv) Establish that verification is completed by November 15 (or other date established in accordance with § 245.6a(b)(2)(i) or (b)(2)(ii) of this chapter) including any follow-up activities as required in § 245.6a(f)(6) of this chapter. * * *

* * * * *

(vi) Ensure that verification records are maintained as required by § 245.6a(i) of this chapter.

* * * * *

PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

■ 1. The authority citation is revised to read as follows:

Authority: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 2. In § 245.2, revise the definition of *Verification* to read as follows:

§ 245.2 Definitions.

* * * * *

Verification means confirmation of eligibility for free or reduced price benefits under the National School Lunch Program or School Breakfast Program. Verification shall include confirmation of income eligibility and, at State or local discretion, may also include confirmation of any other information required in the application which is defined as *Documentation* in § 245.2. Such verification may be accomplished by examining information provided by the household such as wage stubs, or by other means as specified in § 245.6a(a)(7). If a Food Stamp Program or TANF case number or a FDPIR case number or other identifier is provided for a child, verification for such child shall only include confirmation that the child is a member of a household receiving food stamps, TANF or FDPIR benefits. Verification may also be completed through direct contact with one or more of the public agencies as specified in § 245.6a(g).

■ 3. In § 245.6a:

■ a. revise paragraphs (a) and (b);

■ b. redesignate paragraphs (c), (d) and (e) as paragraphs (h), (i) and (j), respectively;

■ c. add new paragraphs (c), (d), (e), (f), and (g); and

■ d. amend newly redesignated paragraph (h) by revising the first sentence.

The revisions and additions read as follows:

§ 245.6a Verification requirements.

(a) *Definitions.*

(1) *Eligible programs.* For the purposes of this section, the following programs qualify as programs for which a case number may be provided in lieu of income information and that may be used for direct verification purposes:

(i) The Food Stamp Program established under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*) as defined in § 245.2;

(ii) The Food Distribution Program on Indian Reservations (FDPIR) as defined in § 245.2; and

(iii) A State program funded under the program of block grants to States for temporary assistance for needy families (TANF) as defined in § 245.2.

(2) *Error prone application.* For the purposes of this section, ''error prone application'' means an approved household application that indicates monthly income within $100 or annual income within $1,200 of the applicable income eligibility limit for free or for reduced meals.

(3) *Non-response rate.* For the purposes of this section, ''non-response rate'' means the percentage of approved household applications for which verification information was not obtained by the local educational agency after verification was attempted. The non-response rate is reported on the FNS–742 in accordance with paragraph (h) of this section.

(4) *Official poverty line.* For the purposes of this section, ''official poverty line'' means that described in section 1902(l)(2)(A) of the Social Security Act (42 U.S.C. 1396a(l)(2)(A)).

(5) *Sample size.* For the purposes of this section, ''sample size'' means the number of approved applications that a local educational agency is required to verify based on the number of approved applications on file as of October 1 of the current school year.

(6) *School year.* For the purposes of this section, a school year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

(7) *Sources of information.* For the purposes of this section, sources of information for verification may include written evidence, collateral contacts, and systems of records as follows:

(i) Written evidence shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, and letters from employers. Whenever written evidence is insufficient to confirm income information on the application or current eligibility, the local educational agency may require collateral contacts.

(ii) Collateral contacts are verbal confirmations of a household's circumstances by a person outside of the household. The collateral contact may be made in person or by phone. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable documentation in another form. If the household refuses to choose one of these options, its eligibility shall be terminated in accordance with the normal procedures for failure to cooperate with verification efforts. Collateral contacts could include employers, social service agencies, and migrant agencies.

(iii) Agency records to which the State agency or local educational agency may have access are not considered collateral contacts. Information concerning income, household size, or Food Stamp Program, FDPIR, or TANF eligibility maintained by other government agencies to which the State agency, the local educational agency or school can legally gain access may be used to confirm a household's income, size, or receipt of benefits. Information may also be obtained from individuals or agencies serving the homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); administering a runaway and homeless youth grant program, as established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or serving migratory children, as they are defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Agency records may be used for verification conducted after the household has been notified of its selection for verification or for the direct verification procedures in paragraph (g) of this section. Any information derived from other agencies must be used in accordance with the provisions concerning use and disclosure of eligibility information found in § 245.6(f) through (i) of this part.

(iv) Households which dispute the validity of income information acquired through collateral contacts or a system of records shall be given the opportunity to provide other documentation.

(b) *Deadline and extensions for local educational agencies.*

(1) *Deadline.* The local education agency must complete the verification efforts specified in paragraph (c) of this section not later than November 15 of each school year.

(2) *Deadline extensions.*

(i) The local educational agency may request an extension of the November 15 deadline, in writing, from the State agency. The State agency may approve an extension up to December 15 of the current school year due to natural disaster, civil disorder, strike or other circumstances that prevent the local educational agency from timely completion of verification activities.

(ii) In the case of natural disaster, civil disorder or other local conditions, USDA may substitute alternatives for the verification deadline in paragraph (b)(1) of this section.

(3) *Beginning verification activities.* The local educational agency may conduct verification activity once it begins the application approval process for the current school year and has approved applications on file. However, the final required sample size must be based on the number of approved applications on file as of October 1.

(c) *Verification requirement.*

(1) *General.* The local educational agency must verify eligibility of children in a sample of household applications approved for free and reduced price meal benefits for that school year.

(i) A State may, with the written approval of FNS, assume responsibility for complying with the verification requirements of this section on behalf of its local educational agencies. When assuming such responsibility, States may qualify, if approved by FNS, to use one of the alternative sample sizes provided for in paragraph (c)(4) of this section if qualified under paragraph (d) of this section.

(ii) An application must be approved if it contains the essential documentation specified in the definition of *Documentation* in § 245.2 and, if applicable, the household meets the income eligibility criteria for free or reduced price benefits. Verification efforts must not delay the approval of applications.

(2) *Exceptions from verification.* Verification is not required in residential child care institutions; in schools in which FNS has approved special cash assistance claims based on economic statistics regarding per capita income; or in schools in which all children are served with no separate charge for food service and no special cash assistance is claimed. Local educational agencies in which all schools participate in the special assistance certification and reimbursement alternatives specified in § 245.9 shall meet the verification requirement only in those years in which applications are taken for all children in attendance. Verification of eligibility is not required of households if all children in the household are determined eligible based on documentation provided by the State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF or if all children in the household are determined to be homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399).

(3) *Standard sample size.* Unless eligible for an alternative sample size under paragraph (d) of this section, the sample size for each local educational agency shall equal the lesser of:

(i) Three (3) percent of all applications approved by the local educational agency for the school year, as of October 1 of the school year, selected from error prone applications; or

(ii) 3,000 error prone applications approved by the local educational agency for the school year, as of October 1 of the school year.

(iii) Local educational agencies shall not exceed the standard sample size in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable, and, unless eligible for one of the alternative sample sizes provided in paragraph (c)(4) of this section, the local educational agency shall not use a smaller sample size than those in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable.

(iv) If the number of error-prone applications exceeds the required sample size, the local educational agency shall select the required sample at random, *i.e.*, each application has an equal chance of being selected, from the total number of error-prone applications.

(4) *Alternative sample sizes.* If eligible under paragraph (d) of this section for an alternative sample size, the local educational agency may use one of the following alternative sample sizes:

(i) *Alternative One.* The sample size shall equal the lesser of:

(A) 3,000 of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year; or

(B) Three (3) percent of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year.

(ii) *Alternative Two.* The sample size shall equal the lesser of the sum of:

(A) 1,000 of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications or

(B) One (1) percent of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications PLUS

(C) The lesser of:

(*1*) 500 applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible program as defined in paragraph (a)(1) of this section; or

(*2*) One-half (½) of one (1) percent of applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible program as defined in paragraph (a)(1) of this section.

(5) *Completing the sample size.* When there are an insufficient number of error prone applications or applications with case number to meet the sample sizes provided for in paragraphs (c)(3) or (c)(4) of this section, the local educational agency shall select, at random, additional approved applications to comply with the specified sample size requirements.

(6) *Local conditions.* In the case of natural disaster, civil disorder, strike or other local conditions as determined by FNS, FNS may substitute alternatives for the sample size and sample selection criteria in paragraphs (c)(3) and (c)(4) of this section.

(7) *Verification for cause.* In addition to the required verification sample, local educational agencies must verify any questionable application and should, on a case-by-case basis, verify any application for cause such as an application on which a household reports zero income or when the local educational agency is aware of additional income or persons in the household. Any application verified for cause is not considered part of the required sample size. If the local educational agency verifies a household's application for cause, all verification procedures in this section must be followed.

(d) *Eligibility for alternative sample sizes.*

(1) *State agency oversight.* At a minimum, the State agency shall establish a procedure for local educational agencies to designate use of an alternative sample size and may set a deadline for such notification. The State agency may also establish criteria for reviewing and approving the use of an alternative sample size, including deadlines for submissions.

(2) *Lowered non-response rate.* Any local educational agency is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is less than twenty percent.

(3) *Improved non-response rate.* A local educational agency with more than 20,000 children approved by application as eligible for free or reduced price meals as of October 1 of the school year is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is at least ten percent below the non-response rate for the second preceding school year.

(4) *Continuing eligibility for alternative sample sizes.* The local

educational agency must annually determine if it is eligible to use one of the alternative sample sizes provided in paragraph (c)(4) of this section. If qualified, the local educational agency shall contact the State agency in accordance with procedures established by the State agency under paragraph (d)(1) of this section.

(e) *Activities prior to household notification.*

(1) *Confirmation of a household's initial eligibility.*

(i) Prior to conducting any other verification activity, an individual, other than the individual who made the initial eligibility determination, shall review for accuracy each approved application selected for verification to ensure that the initial determination was correct. If the initial determination was correct, the local educational agency shall verify the approved application. If the initial determination was incorrect, the local educational agency must:

(A) If the eligibility status changes from reduced price to free, make the increased benefits immediately available and notify the household of the change in benefits; the local educational agency will then verify the application;

(B) if the eligibility status changes from free to reduced price, first verify the application and then notify the household of the correct eligibility status after verification is completed and, if required, send the household a notice of adverse action in accordance with paragraph (j) of this section; or

(C) if the eligibility status changes from free or reduced price to paid, send the household a notice of adverse action in accordance with paragraph (j) of this section and do not conduct verification on this application and select a similar application (for example, another error-prone application) to replace it.

(ii) The requirements in paragraph (e)(1)(i) of this section are waived if the local educational agency is using a technology-based system that demonstrates a high level of accuracy in processing an initial eligibility determination based on the income eligibility guidelines for the National School Lunch Program. Any local educational agency that conducts a confirmation review of all applications at the time of certification meets this requirement. The State agency may request documentation to support the accuracy of the local educational agency's system. If the State agency determines that the technology-based system is inadequate, it may require that the local educational agency conduct a confirmation review of each application selected for verification.

(2) *Replacing applications.* The local educational agency may, on a case-by-case basis, replace up to five percent of applications selected and confirmed for verification. Applications may be replaced when the local educational agency determines that the household would be unable to satisfactorily respond to the verification request. Any application removed shall be replaced with another approved application selected on the same basis (*i.e.*, an error-prone application must be substituted for a withdrawn error-prone application).

(f) *Verification procedures and assistance for households.*

(1) *Notification of selection.* Other than households verified through the direct verification process in paragraph (g) of this section, households selected for verification shall be provided written notice that their applications were selected for verification and that they are required, by such date as determined by the local educational agency, to submit the requested information to verify eligibility for free or reduced price meals. Any communications with households concerning verification must be in an understandable and uniform format and, to the maximum extent practicable, in a language that parents and guardians can understand. The written notice shall also include a telephone number for assistance in accordance with paragraph (f)(5) of this section. These households shall be advised of the type or types of information and/or documents acceptable to the school. This information must include a social security number for each adult household member or an indication that such member does not have one. Local educational agencies must inform selected households that:

(i) Section 9 of the Richard B. Russell National School Lunch Act requires that, unless the child's Food Stamp Program/FDPIR case number or other FDPIR identifier or TANF case number was provided, households selected for verification must provide the social security number of each adult household member;

(ii) In an adult member does not posses a social security number, that adult member must indicate that s/he does not possess one;

(iii) Provision of a social security number is not mandatory but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(iv) The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting offices administering means-tested programs or the State employment security office and checking documentation produced by household members to prove the amount of income received. These verification efforts may also include contacting employers to determine income.

(v) The provisos in paragraphs (f)(1)(i) through (f)(1)(iv) of this section must be provided to the attention of each adult household member disclosing his/her social security number. State agencies and local educational agencies must ensure that the notice complies with section 7 of Public Law 93–579 (Privacy Act of 1974).

(vi) Households notified of their selection for verification must also be informed that, in lieu of any information that would otherwise be required, they can submit proof that the children are members of a household receiving assistance under the Food Stamp Program, FDPIR or TANF as described in paragraph (f)(3) of this section to verify the free meal eligibility of a child who is a member of a household receiving assistance under the Food Stamp Program, FDPIR or TANF household. Households must also be informed that, in lieu of any information that would otherwise be required, they may request that the local educational agency contact the appropriate officials to confirm that their children are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); are served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Households notified of their selection for verification shall be advised that failure to cooperate with verification efforts will result in the termination of benefits.

(2) *Documentation timeframe.* Households selected and notified of their selection for verification must provide documentation of income. The documentation must indicate the source, amount and frequency of all income and can be for any point in time between the month prior to application for school meal benefits and the time

the household is requested to provide income documentation.

(3) *Food Stamp FDPIR or TANF recipients.* On applications where households have furnished Food Stamp Program or TANF case numbers or FDPIR case numbers or other FDPIR identifiers, verification shall be accomplished by confirming with the Food Stamp Program, FDPIR, or TANF office that at least one child who is eligible because a case number was furnished, is a member of a household participating in one of the eligible programs in paragraph (a)(1) of this section. The household may also provide a copy of ''Notice of Eligibility'' for the Food Stamp Program, FDPIR or the TANF Program or equivalent official documentation issued by the Food Stamp Program, FDPIR or TANF office which confirms that at least one child who is eligible because a case number was provided is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program. An identification card for these programs is not acceptable as verification unless it contains an expiration date. If it is not established that at least one child is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program (in accordance with the timeframe in paragraph (f)(2) of this section), the procedures for adverse action specified in paragraph (j) of this section must be followed.

(4) *Household cooperation.* If a household refuses to cooperate with efforts to verify, eligibility for free or reduced price benefits shall be terminated in accordance with paragraph (j) of this section. Households which refuse to complete the verification process and which are consequently determined ineligible for such benefits shall be counted toward meeting the local educational agency's required sample of verified applications.

(5) *Telephone assistance.* The local educational agency shall provide a telephone number to households selected for verification to call free of charge to obtain information about the verification process. The telephone number must be prominently displayed on the letter to households selected for verification.

(6) *Followup attempts.* The local educational agency shall make at least one attempt to contact any household that does not respond to a verification request. The attempt may be through a telephone call, e-mail, mail or in person and must be documented by the local educational agency. Non-response to the initial request for verification includes no response and incomplete or ambiguous responses that do not permit the local educational agency to resolve the children's eligibility for free or reduced price meal and milk benefits. The local educational agency may contract with another entity to conduct followup activity in accordance with § 210.21 of this chapter, the use and disclosure of information requirements of the Richard B. Russell National School Lunch Act and this section.

(7) *Eligibility changes.* Based on the verification activities, the local educational agency shall make appropriate modifications to the eligibility determinations made initially. The local educational agency must notify the household of any change. Households must be notified of any reduction in benefits in accordance with paragraph (j) of this section. Households with reduced benefits or that are longer eligible for free or reduced price meals must be notified of their right to reapply at any time with documentation of income or participation in one of the eligible programs in paragraph (a)(1) of this section.

(g) *Direct verification.* Local educational agencies may conduct direct verification activities with the eligible programs defined in paragraph (a)(1) of this section and with the public agency that administers the State plan for medical assistance under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*), (Medicaid), and under title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*), the State Children's Health Insurance Program (SCHIP) as defined in § 245.2. Records from the public agency may be used to verify income and program participation. The public agency's records are subject to the timeframe in paragraph (g)(5) of this section. Direct verification must be conducted prior to contacting the household for documentation.

(1) *Names submitted.* The local educational agency must only submit the names of school children certified for free or reduced price meal benefits or free milk to the agency administering an eligible program, the Medicaid program or the SCHIP program. Names and other identifiers of adult or non-school children must not be submitted for direct verification purposes.

(2) *Eligible programs.* If information obtained through direct verification of an application for free or reduced price meal benefits indicates a child is participating in one of the eligible programs in paragraph (a)(1) of this section, no additional verification is required.

(3) *States with Medicaid Income Limits of 133%.* In States in which the income eligibility limit applied in the Medicaid program or in SCHIP is not more than 133% of the official poverty line or in States that otherwise identify households that have income that is not more than 133% of the official poverty line, records from these agencies may be used to verify eligibility. If information obtained through direct verification with these programs verifies the household's eligibility status, no additional verification is required.

(4) *States with Medicaid Income Limits between 133%–185%.* In States in which the income eligibility limit applied in the Medicaid program or in SCHIP exceeds 133% of the official poverty line, direct verification information must include either the percentage of the official poverty line upon which the applicant's Medicaid participation is based or Medicaid income and Medicaid household size in order to determine that the applicant is either at or below 133% of the Federal poverty line, or is between 133% and 185% of the Federal poverty line. Verification for children approved for free meals is complete if Medicaid data indicates that the percentage is at or below 133% of the Federal poverty line. Verification for children approved for reduced price meals is complete if Medicaid data indicates that the percentage is at or below 185% of the Federal poverty line. If information obtained through direct verification with these programs verifies eligibility status, no additional verification is required.

(5) *Documentation timeframe.* For the purposes of direct verification, documentation must be the most recent available but such documentation must indicate eligibility for participation or income within the 180-day period ending on the date of application. In addition, local educational agencies may use documentation, which must be within the 180-day period ending on the date of application, for any one month or for all months in the period from the month prior to application through the month direct verification is conducted. The information provided only needs to indicate eligibility for participation in the program at that point in time, not that the child was certified for that program's benefits within the 180-day period.

(6) *Incomplete information.* If it is the information provided by the public agency does not verify eligibility, the local educational agency must conduct verification in accordance with paragraph (f) of this section. In addition, households must be able to dispute the validity of income information acquired through direct verification and shall be

given the opportunity to provide other documentation.

(h) *Verification reporting and recordkeeping requirements.* By March 1, each local educational agency must report information related to its annual statutorily required verification activity, which excludes verification conducted in accordance with paragraph (c)(7) of this section, to the State agency in accordance with guidelines provided by FNS.

* * * * *

Dated: December 8, 2008.

Nancy Montanez Johner,

Under Secretary Food, Nutrition and Consumer Services.

[FR Doc. E8–29904 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2007–0111]

RIN 0579–AC87

Importation of Ash Plants

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the regulations governing the importation of nursery stock to prohibit or restrict the importation of ash (*Fraxinus* spp.) plants for planting, except seed, from all foreign countries except for certain areas in Canada that are not regulated areas for emerald ash borer. The interim rule was necessary to prevent further introductions of emerald ash borer into the United States and to prevent the artificial spread of this destructive plant pest.

DATES: Effective on December 18, 2008, we are adopting as a final rule the interim rule published at 73 FR 54665–54667 on September 23, 2008.

FOR FURTHER INFORMATION CONTACT: Dr. Arnold Tschanz, Senior Risk Manager, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–5306.

SUPPLEMENTARY INFORMATION:

Background

The emerald ash borer (EAB, *Agrilus planipennis*) is a highly destructive wood-boring insect that attacks ash trees (*Fraxinus* spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, and Taiwan, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues. We do not know the full extent of the distribution of EAB throughout Asia and in other regions, nor do we know if there are other serious plant pests affecting *Fraxinus* spp. plants for planting present elsewhere in the world.

The regulations in 7 CFR part 319, ''Foreign Quarantine Notices,'' prohibit or restrict the importation of certain plants and plant products to prevent the introduction or dissemination of plant pests and noxious weeds in the United States. In an interim rule [1] effective and published in the **Federal Register** on September 23, 2008 (73 FR 54665–54667, Docket No. APHIS–2007–0111), we amended the regulations in § 319.37–2(a) to prohibit imports of ash (*Fraxinus* spp.) plants for planting, except seed, from all foreign countries, with the exception of areas of Canada that are not regulated for EAB. To reflect that prohibition, we also amended § 319.37–7(a)(3) by removing *Fraxinus* spp. from the list of plants requiring postentry quarantine.

Comments on the interim rule were required to be received on or before November 24, 2008. We received one comment by that date. The comment was from a State entomologist who expressed support for the interim rule. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Order 12988, and the Paperwork Reduction Act. Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

[1] To view the interim rule and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0111.*

PART 319—FOREIGN QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 319 and that was published at 73 FR 54665–54667 on September 23, 2008.

Done in Washington, DC, this 12th day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–30077 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2007–0144]

RIN 0579–AC76

Importation of Baby Squash and Baby Courgettes From Zambia

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the fruits and vegetables regulations to allow the importation into the continental United States of baby squash and baby courgettes from Zambia. As a condition of entry, both commodities must be produced in accordance with a systems approach that includes requirements for pest exclusion at the production site, fruit fly trapping inside and outside the production site, and pest-excluding packinghouse procedures. Both commodities must also be accompanied by a phytosanitary certificate with an additional declaration stating that the baby squash or baby courgettes have been produced in accordance with the requirements of the systems approach. This action will allow the importation of baby squash and baby courgettes from Zambia into the United States while continuing to provide protection against the introduction of quarantine pests.

DATES: Effective Date: January 20, 2009.

FOR FURTHER INFORMATION CONTACT: Shirley Wager Page, Branch Chief, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–8758.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56 through

319.56–47, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

On May 16, 2008, we published in the **Federal Register** (73 FR 28372–28377, Docket No. APHIS–2007–0144) a proposal [1] to amend the fruits and vegetables regulations to allow the importation into the continental United States of baby squash and baby courgettes from Zambia. As a condition of entry, we proposed to require that both commodities be produced in accordance with a systems approach that would include requirements for pest exclusion at the production site, fruit fly trapping inside and outside the production site, and pest-excluding packinghouse procedures. We also proposed to require that both commodities be accompanied by a phytosanitary certificate with an additional declaration stating that the baby squash or baby courgettes have been produced in accordance with the proposed requirements.

We solicited comments concerning our proposal for 60 days ending July 15, 2008. We received one comment by that date, from a representative of a State government. The issues raised in that comment are discussed below.

The systems approach we proposed was designed to mitigate, among other quarantine pests, three moths, *Diaphania indica, Helicoverpa armigera,* and *Spodoptera littoralis.* The commenter stated that, because these pests are internal feeders, inspection and detection at origin and destination are problematic, and reliance on inspection places the commenter's State at high risk of introduction of these pests. The commenter further stated that the two pests that have the highest unmitigated risk, *H. armigera* and *S. littoralis,* are of great concern in the commenter's State. Yet, the commenter stated, there are no real mitigative measures to exclude these pests other than insect-exclusionary greenhouses; there is no trapping requirement or specific inspection regime to assure there have been no breaches of greenhouses.

Under the final rule, the greenhouses and packinghouses will have to be approved jointly by the Zambian national plant protection organization (NPPO) and APHIS and designed to be pest-free. In addition, inspection will not be performed solely on the commodities; the greenhouses themselves will be inspected monthly for the presence of the pests. If any quarantine pests are found in a greenhouse, that greenhouse will be prohibited from exporting until corrective action is taken. Thus, we are employing more mitigations than simple commodity inspection to prevent baby squash and baby courgettes imported from Zambia from being infested with these pests.

We have employed measures similar to the ones we proposed to mitigate the risk associated with *H. armigera* and *S. littoralis* in other import programs. For example, the regulations in § 319.56–28(e), which allow the importation of tomatoes from Australia under certain conditions, require greenhouses to be registered with and approved by the Australian NPPO and to be inspected by the Australian NPPO to establish freedom from *H. armigera* and *S. littoralis.* Similar measures are used to mitigate the risk associated with *H. armigera* and *S. littoralis* in the regulations governing the importation of peppers from Korea in § 319.56–42. These measures have been effective at preventing the introduction of *H. armigera* and *S. littoralis* into the United States via the importation of those commodities. We have determined that they will be equally effective when employed to prevent the introduction of these pests via baby squash and baby courgettes from Zambia.

We proposed that the Zambian NPPO or its approved designee be authorized to carry out certain functions. The commenter asked who would be the designee and who would approve the designee.

As discussed in the proposed rule, an approved designee is an entity with which the NPPO creates a formal agreement that allows that entity to certify that the appropriate procedures have been followed. Thus, the NPPO approves an approved designee. The approved designee can be a contracted entity, a coalition of growers, or the growers themselves. APHIS authorizes NPPOs to use designees to perform certain phytosanitary functions in other import programs, such as the cut flower import program described in § 319.74–2.

The commenter stated that the proposal indicates APHIS can monitor the production sites before and during harvest. The commenter further stated that the word ''can'' is meaningless and recommended that the text in question read ''APHIS will monitor the production sites.''

The proposed language specifically stated that APHIS must be allowed to inspect or monitor the greenhouses. We consider this language to be appropriate, as it may not be necessary for APHIS to inspect or monitor the greenhouses in all cases. We will inspect or monitor the greenhouses if we have reason to believe that the risks associated with the quarantine pests might not be effectively mitigated in the greenhouses.

The commenter stated that the use of McPhail traps as a detection tool is problematic, as they have very limited sensitivity in detecting low-level fruit fly populations.

We have determined that McPhail traps are the appropriate type to use for the trapping due to their capacity to catch important fruit fly species of quarantine significance for which no specific lures exist, such as the *Dacus* spp. fruit flies identified as quarantine pests in the pest risk assessment. Accordingly, the risk management document provided along with the proposed rule reflects this. However, the regulations specifically require the use of traps approved by APHIS, meaning that we can change the type of fruit fly trap used if a trap better suited to *Dacus* spp. fruit flies becomes available.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities.

This analysis examines potential impacts for U.S. small entities from the importation of baby squash and baby courgettes (zucchini) from Zambia into the United States. The analysis is set forth in terms of squash generally. As background, we provide a brief overview of squash production and trade by the United States. This is followed with an estimate of price and welfare effects of the rule based on assumed levels of squash imports from Zambia. Finally, we describe the expected impact on small entities.

[1] To view the proposed rule and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0144.*

U.S. Squash Production and Trade

The United States is a major squash producer and importer.[2] The United States produced 430,100 metric tons (MT) of squash valued at $229 million in 2006, while imports that year totaled 240,590 MT. Squash production occurs in many States. However, the top 10 States (Georgia, Florida, California, New York, Michigan, Ohio, Texas, North Carolina, Oregon, and New Jersey) accounted for 98 percent of total cash receipts in 2006.[3]

As shown in table 1, U.S. squash production increased from 398,800 MT in 2002 to 430,100 MT in 2006, an annual growth rate of about 1.6 percent. Similarly, consumption increased from 605,970 MT to 665,730 MT. During the same period, U.S. squash imports increased from 210,930 MT in 2002 to 240,590 MT in 2006. Mexico accounted by far for the largest share of U.S. imports (95.6 percent), followed distantly by Costa Rica (1.6 percent), and Canada (1.1 percent). Other minor suppliers include Honduras, Panama, New Zealand, Guatemala, and Nicaragua. The United States was a net importer throughout this period, with average annual imports (over 234,000 MT) dwarfing exports (less than 4,300 MT). Imports from Zambia will be small compared to an already large import base.[4]

TABLE 1—U.S. SQUASH PRODUCTION, CONSUMPTION, PRICE, EXPORTS AND IMPORTS, 2002–2006

Year	Production (MT)	Consumption (MT)	Price per MT	Exports in MT	Imports in MT
2002	398,800	605,970	$882	3,770	210,930
2003	365,650	602,880	1,047	3,810	241,040
2004	401,330	637,650	992	4,090	240,410
2005	378,030	611,090	1,047	4,820	237,880
2006	430,100	665,730	1,157	4,960	240,590
5-year average (2002–2006)	394,780	624,670	1,025	4,290	234,170

Sources: USDA/NASS, Vegetables 2006 Summary, January 2007; wholesale prices are from USDA/NASS, Fresh market vegetables prices and yield data, 2002–2006; trade data are from USDA/Foreign Agricultural Service, The Global Trade Atlas: Global Trade Information Services, Inc., Country Edition, August 2007.

Impact of Potential Fresh Squash Imports

We estimate the impact of baby squash and baby courgettes imports from Zambia on U.S. production, consumption, and prices using a net trade welfare model. The data used were obtained from the Foreign Agricultural Service (FAS); The Global Trade Atlas: Global Trade Information Services, Inc., Country Edition, August 2007; and United Nations' Food and Agriculture Organization FAOstat data (*http://faostat.fao.org*). The demand and supply elasticities used are −0.66 and 0.12, respectively.[5]

Our analysis is in terms of the overall squash industry of the United States. If data were available that would allow us to estimate the impact of this rule only in terms of the markets for baby squash and baby courgettes, we would expect the effects to be somewhat larger than those reported here, but still insignificant.

We model three levels of squash exports to the United States from Zambia: (1) 260 MT, average annual global exports of squash by Zambia (2004–2006); (2) 400 MT, the amount of squash that the Government of Zambia has projected would be exported to the United States; and (3) 1,000 MT, a quantity that is 2½ times Zambia's projected exports to the United States.

Table 2 presents the changes that we estimate could result from the final rule. These include annual changes in U.S. consumption, production, wholesale price, consumer welfare, producer welfare, and net welfare. The medium level of assumed squash exports to the United States of 400 MT (as projected by the Government of Zambia) would result in a decline of $0.89 per MT in the wholesale price of squash and a fall in U.S. production of 41 MT. Consumption would increase by 359 MT. Producer welfare would decline by $347,180 and consumer welfare would increase by $558,240, yielding an annual net benefit of about $211,060. Other results are as shown in table 2 below.

TABLE 2—ESTIMATED IMPACT OF SQUASH IMPORTS FROM ZAMBIA ON THE UNITED STATES ECONOMY FOR THREE IMPORT SCENARIOS

Assumed annual squash imports, MT	[1] 260	[2] 400	[3] 1,000
Change in U.S. consumption, MT	234	359	898
Change in U.S. production, MT	−26	−41	−102
Change in wholesale price of squash, dollars per MT	−$0.58	−$0.89	−$2.22
Change in consumer welfare	$362,820	$558,240	$1,396,210
Change in producer welfare	−$225,670	−$347,180	−$867,890

[2] Squash can be classified depending on whether it is harvested as immature fruit (summer squash) or mature fruit (winter squash). Summer squash, such as zucchini (also known as courgette), pattypan, and yellow crookneck are harvested and consumed during the growing season, while the skin is still tender and the fruit relatively small. Winter squash such as butternut, hubbard, buttercup, ambercup, acorn, spaghetti squash, and pumpkin are harvested at maturity, generally the end of summer, cured to further harden the skin, and stored in a cool place for eating later. They generally require longer cooking time than summer squash.

[3] USDA/National Agricultural Statistics Service (NASS), Vegetables 2006 Summary, January 2007.

[4] Reliable production data are not available for Zambia. Squash exported to the United States are to be grown in insect-proof, pest-free greenhouses at approved production sites. These sites are in the process of being constructed. The Zambian Government expects to export around 400 MT of fresh squash to the United States annually. It is not clear whether some additional amount would be produced for export to other countries.

[5] Jaime E. Malaga, Gary W. Williams, and Stephen W. Fuller, ''U.S.-Mexico fresh vegetable trade: the effects of trade liberalization and economic growth,'' *Agricultural Economics,* Vol. 26 (October 2001): 45–55.

TABLE 2—ESTIMATED IMPACT OF SQUASH IMPORTS FROM ZAMBIA ON THE UNITED STATES ECONOMY FOR THREE IMPORT SCENARIOS—Continued

Annual net benefit	$137,150	$211,060	$528,330

Note: The baseline data used are 5-year annual averages for production, consumption, prices, exports, and imports, as reported in the last row of table 1. The demand and supply elasticities used are −0.66 and 0.12, respectively (Jaime E. Malaga, Gary W. Williams, and Stephen W. Fuller, "U.S.-Mexico fresh vegetable trade: the effects of trade liberalization and economic growth," *Agricultural Economics,* Vol. 26 (October 2001): 45–55).

[1] Three-year (2004 to 2006) average total squash exports by Zambia.

[2] Annual exports of fresh baby squash and baby courgettes to the United States, as projected by the Government of Zambia.

[3] Two-and-one-half times the projected level of exports of baby squash and baby courgettes by Zambia to the United States.

In all three scenarios, consumer welfare gains would outweigh producer welfare losses. Even in the third scenario, in which we assume imports would total 2½ times the level projected by the Government of Zambia, the decline in producer welfare would represent only about two-tenths of 1 percent of cash receipts received from the sale of domestic squash products. The price decline in this third scenario also would be only about two-tenths of 1 percent. Thus, our analysis indicates that U.S. entities will be unlikely to be significantly affected by this rule.

Impact on Small Entities

The Small Business Administration (SBA) has established guidelines for determining which types of firms are considered to be small entities under the Regulatory Flexibility Act. This rule could affect U.S. producers of fresh vegetables (North American Industry Classification System 111219) and some importers of fresh squash. Vegetable-producing establishments are classified as small if their annual receipts are not more than $750,000.[6] According to the 2002 Census of Agriculture, there were 11,035 squash operations with production valued at $288 million. These facilities are considered to be small if their annual receipts are not more than $750,000. Over 98.6 percent of these operations (10,883) are considered to be small while the rest (152) are considered large. Based on share of acreage (nearly 60 percent of the total), the small operations had combined annual cash receipts of about $168 million and an average income of about $15,500, while the large operations had combined sales of about $120 million with an average income of about $787,900. As shown in table 3, the impact of potential squash imports on U.S. producers as a result of this rule will be small. The decrease in producer welfare per small entity is less than $47, or about 0.30 percent of average annual sales of small entities, when we assume 1,000 MT of squash are exported to the United States from Zambia (2½ times Zambia's projected annual exports).

TABLE 3—ECONOMIC IMPACT OF POTENTIAL SQUASH IMPORTS FROM ZAMBIA ON U.S. SMALL ENTITIES, ASSUMING ANNUAL EXPORTS OF 1,000 MT TO THE UNITED STATES, 2006 DOLLARS

Total decline in producer welfare [1]	−$867,890
Decrease in welfare incurred by small entities [2]	−$506,850
Average decrease per acre, small entities [3]	−$12.18
Average decrease per small entity [4]	−$46.50
Average decrease as percentage of average sales, small entities [5]	−0.30 percent

[1] From table 2.

[2] Change in producer welfare multiplied by 58.4 percent, the percentage of total acreage planted by producers with annual revenues of not more than $750,000, that is, small entities. We assume that the change in producer welfare would be proportional to acreage share.

[3] Decrease in producer welfare for small entities divided by 41,619, the number of acres planted by small entities.

[4] Average decrease per acre multiplied by 3.82, the average number of acres per small entity.

[5] Average decrease per small entity divided by $15,500, the average annual revenue per small entity.

Again, table 3 considers a level of importation that is 2½ times the projected imports of baby squash and baby courgettes; at expected levels of importation, the expected economic impacts would be even smaller. In addition, this analysis assumes that gains to Zambian exporters do not come at the expense of any exporting countries; if any displacement occurs, the impact of the rule would be reduced further.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This final rule allows baby squash and baby courgettes to be imported into the United States from Zambia. State and local laws and regulations regarding baby squash and baby courgettes imported under this rule will be preempted while the fruit is in foreign commerce. Fresh vegetables are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0347.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to

[6] SBA, Small business size standards matched to the North American Industry Classification System 2002, effective October 2007 (*http://www.sba.gov/size/sizetable2002.html*).

provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. A new § 319.56–48 is added to read as follows:

§ 319.56–48 Conditions governing the entry of baby squash and baby courgettes from Zambia.

Baby squash (*Curcurbita maxima* Duchesne) and baby courgettes (C. pepo. L.) measuring 10 to 25 millimeters (0.39 to 0.98 inches) in diameter and 60 to 105 millimeters (2.36 to 4.13 inches) in length may be imported into the continental United States from Zambia only under the conditions described in this section. These conditions are designed to prevent the introduction of the following quarantine pests: *Aulacaspis tubercularis, Dacus bivitattus, Dacus ciliatus, Dacus frontalis, Dacus lounsburyii, Dacus punctatifrons, Dacus vertebratus, Diaphania indica, Helicoverpa armigera,* and *Spodoptera littoralis.*

(a) *Approved greenhouses.* The baby squash and baby courgettes must be grown in Zambia in insect-proof, pest-free greenhouses approved jointly by the Zambian national plant protection organization (NPPO) and APHIS.

(1) The greenhouses must be equipped with double self-closing doors.

(2) Any vents or openings in the greenhouses (other than the double self-closing doors) must be covered with 1.6 mm screening in order to prevent the entry of pests into the greenhouse.

(3) The greenhouses must be inspected periodically by the Zambian NPPO or its approved designee to ensure that sanitary procedures are employed to exclude plant pests and diseases and to verify that the screening is intact.

(4) The greenhouses also must be inspected monthly for the quarantine pests listed in the introductory text of this section by the Zambian NPPO or its approved designee, beginning 2 months before harvest and continuing for the duration of the harvest. APHIS must be allowed to inspect or monitor the greenhouses during this period as well. If, during these inspections, any of the quarantine pests listed in the introductory text of this section is found inside the greenhouse, the Zambian NPPO will immediately prohibit that greenhouse from exporting baby squash or baby courgettes to the United States and notify APHIS of the action. The prohibition will remain in effect until the Zambian NPPO and APHIS agree that the risk has been mitigated.

(b) *Trapping for Dacus spp. fruit flies.* Trapping for *Dacus bivitattus, Dacus ciliatus, Dacus frontalis, Dacus lounsburyii, Dacus punctatifrons,* and *Dacus vertebratus* (referred to in paragraph (b) of this section, collectively, as *Dacus* spp. fruit flies) is required both inside and outside the greenhouse. Trapping must be conducted beginning 2 months before harvest and continue for the duration of the harvest.

(1) *Inside the greenhouse.* Approved fruit fly traps with an approved protein bait must be placed inside the greenhouses at a density of four traps per hectare, with a minimum of at least two traps per greenhouse. The traps must be serviced at least once every 7 days. If a *Dacus* spp. fruit fly is found in a trap inside the greenhouse, the Zambian NPPO will immediately prohibit that greenhouse from exporting baby squash or baby courgettes to the United States and notify APHIS of the action. The prohibition will remain in effect until the Zambian NPPO and APHIS agree that the risk has been mitigated.

(2) *Outside the greenhouse.* (i) Approved fruit fly traps with an approved protein bait must be placed inside a buffer area 500 meters wide around the greenhouse at a density of 1 trap per 10 hectares, with a total of at least 10 traps. At least one of these traps must be placed near the greenhouse. These traps must be serviced at least once every 7 days.

(ii) No shade trees are permitted within 10 meters of the entry door of the greenhouse, and no fruit fly host plants are permitted within 50 meters of the entry door of the greenhouse. While trapping is being conducted, no fruit fly host material (such as fruit) may be brought into the greenhouse or be discarded within 50 meters of the entry door of the greenhouse. Ground applications of an approved protein bait spray for the *Dacus* spp. fruit flies must be used on all shade trees and host plants within 200 meters surrounding the greenhouse every 6 to 10 days starting at least 30 days before and during harvest.

(iii) *Dacus* spp. fruit fly prevalence levels lower than 0.7 flies per trap per week (F/T/W) must be maintained outside the greenhouse for the duration of the trapping. If the F/T/W is 0.7 or greater outside the greenhouse, the Zambian NPPO will immediately prohibit that greenhouse from exporting baby squash or baby courgettes to the United States and notify APHIS of the action. The prohibition will remain in effect until the Zambian NPPO and APHIS agree that the risk has been mitigated.

(3) *Records and monitoring.* The Zambian NPPO or its approved designee must maintain records of trap placement, trap servicing, and any *Dacus* spp. captures. The Zambian NPPO must maintain an APHIS-approved quality control program to audit the trapping program. APHIS must be given access to review 1 year's worth of trapping data for any approved greenhouse upon request.

(c) *Packinghouse procedures.* Baby squash and baby courgettes must be packed within 24 hours of harvest in a pest-exclusionary packinghouse. No shade trees are permitted within 10 meters of the entry door of the packinghouse, and no fruit fly host plants are permitted within 50 meters of the entry door of the packinghouse. In addition, during packing, no fruit fly host material other than the baby squash and baby courgettes may be brought into the packinghouse, and no fruit fly host material may be discarded within 50 meters of the entry door of the packinghouse. The baby squash or baby courgettes must be safeguarded by a pest-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. The baby squash or baby courgettes must be packed in insect-proof cartons for shipment to the United States. These cartons must be labeled with the identity of the greenhouse. While packing the baby squash or baby courgettes for export to the United States, the packinghouse may only accept baby squash or baby courgettes from approved greenhouses. These safeguards must remain intact until the arrival of the baby squash or baby courgettes in the United States. If the safeguards do not remain intact, the

consignment will not be allowed to enter the United States.

(d) *Commercial consignments.* Baby squash and baby courgettes from Zambia may be imported in commercial consignments only.

(e) *Phytosanitary certificate.* Each consignment of baby squash and baby courgettes must be accompanied by a phytosanitary certificate of inspection issued by the Zambian NPPO with an additional declaration reading as follows: ''These baby squash or baby courgettes were produced in accordance with 7 CFR 319.56–48.''

(Approved by the Office of Management and Budget under control number 0579–0347)

Done in Washington, DC, this 12th day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–30080 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 400, 407, and 457

RIN 0563–AB73

General Administrative Regulations; Administrative Remedies for Non-Compliance

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes the General Administrative Regulations; Administrative Remedies for Non-Compliance to add additional administrative remedies that are available as a result of the enactment of section 515(h) of the Federal Crop Insurance Act (Act) (7 U.S.C. 1515(h)), make such other changes as are necessary to implement the provisions of section 515(h) of the Act, and to clarify existing administrative remedies.

DATES: *Effective Date:* This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: For further information, contact Cynthia Simpson, Director, Appeals, Litigation and Legal Liaison Staff, Risk Management Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 4619, Stop 0806, Washington, DC 20250, telephone (202) 720–0642.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and budget (OMB) has determined that this rule is non-significant for the purposes of Executive Order 12866 and, therefore, it has not been reviewed by OMB.

Paperwork Reduction Act of 1995

This rule does not constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

E-Government Act Compliance

FCIC is committed to complying with the E-Government Act of 2002, 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.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

It has been determined under section 1(a) of Executive Order 13132, Federalism, that this rule does not have sufficient implications to warrant consultation with the States. The provisions contained in this rule 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.

Regulatory Flexibility Act

FCIC certifies that this regulation will not have a significant economic impact on a substantial number of small entities. All similarly situated participants are required to comply with the same standard of conduct contained in the Act, the regulations published at 7 CFR chapter IV, the crop policies, and the applicable procedures. For example, any producer, whether growing 10 acres or 10,000 acres, submits the same documentation for insurance and for a claim. All agents, whether selling and servicing five policies or a hundred and five policies, are required to perform the same tasks for each. The consequences for failure to comply with the standards of conduct are also the same for all participants and other persons regardless of the size of their business. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have a significant impact on a substantial number of small entities, and, therefore, this regulation is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605).

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12988

This proposed rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith.

Environmental Evaluation

This action is not expected to have a significant economic impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Background

This rule finalizes changes made to 7 CFR part 400, subpart R, Administrative Remedies for Non-Compliance that was published by FCIC on May 18, 2007, as a notice of proposed rulemaking in the **Federal Register** at 72 FR 27981–27988. In the Administrative Remedies for Non-Compliance, FCIC proposed to include provisions in its regulation that were enacted with the passage of the Agricultural Rick Protection Act of 2000 (ARPA). Through the enactment of section 515(h) of the Act in ARPA, Congress significantly strengthened FCIC's ability to combat fraud, waste and abuse by establishing a strong system of administrative actions that are now applicable to all participants in the Federal crop insurance program.

Now, producers, agents, loss adjusters, insurance providers and their employees and contractors, and any

other persons who willfully and intentionally provide any false or inaccurate information to FCIC or to an approved insurance provider with respect to a policy or plan of insurance or willfully and intentionally failed to comply with a requirement of FCIC are subject to remedial administrative remedies. In addition to disqualification from participating in the Federal crop insurance program, producers will be disqualified from receiving benefits under other various United States Department of Agriculture programs. In addition, civil fines have been increased. Now a civil fine can be imposed for each violation and the civil fine is the greater of $10,000 or the amount of pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of FCIC.

The public was afforded 30 days to submit written comments after the regulation was published in the **Federal Register**. A total of 128 comments were received from 17 commenters. The commenters were seven insurance services organizations, one grower association, four insurance providers, two law firms, one public citizen, one agent, and one government employee. The comments received and FCIC's responses are as follows:

Comment: One commenter stated that FCIC has taken significant actions since the implementation of the Act in 2000 to reduce fraud, waste and abuse of the crop insurance program. The commenter strongly supports FCIC's efforts to combat waste, abuse and fraud in FCIC programs and believes that those who knowingly and willfully abuse the program must be punished.

Response: FCIC will continue to take such actions as are necessary to improve program integrity.

Length of Comment Period

Comment: Several commenters stated that the thirty-day comment period was inadequate. The commenters asked that the comment period be extended by sixty days because of the serious nature of the proposed rule and in order for other affected individuals to comment and to fully understand the legal exposure they could face under the proposed rule.

Response: FCIC usually gives 30 or 60 day comment period depending on the rule. Because this rule is implementing a law that has been in effect since June 2000, FCIC made the decision not to extend the comment period.

Section 400.451 General

Comment: A commenter stated that ''waste'' and ''abuse'' are neither offenses defined by statute or regulation and that FCIC never has defined in a regulation, contract, policy, or procedure, the conduct or actions that constitute ''waste'' and ''abuse.'' The commenter asked that FCIC define ''waste'' and ''abuse.''

Response: Combating fraud, waste and abuse are the obligation of all Government agencies. The imposition of these sanctions is one means to combat fraud, waste and abuse. However, there are numerous other actions taken by FCIC to combat fraud, waste and abuse. However, in the context of this rule, fraud, waste and abuse are not grounds for the imposition of sanctions. Sanctions are imposed for violations of section 515(h) of the Act and other relevant statutory provisions. The terms fraud, waste and abuse are not used except in the context of a policy statement. Therefore, inclusion of separate definitions may confuse persons into believing that sanctions can be imposed for allegations of fraud, waste and abuse. This is supported by many of the following comments which suggest that fraud must be proven before a sanction under section 515(h) of the Act can be imposed. No change has been made.

Comment: A commenter stated that a person may abuse the crop insurance program without providing false information or violating FCIC procedures.

Response: The crop insurance program may still be abused by a person without providing false information or violating FCIC procedures. Abuse can occur in any number of ways and FCIC continuously reviews the program to tighten program requirements to prevent other types of abuse. However, this rule is intended to preclude the specific abuses associated with the providing of false or inaccurate information and failure to comply with a requirement of FCIC.

Comment: A commenter stated § 400.451(b) is overbroad as it expands the rule to persons outside of the crop insurance program. For example, an accountant knowingly falsifies an insured's Schedule F and an insurance provider overpays on an Adjusted Gross Revenue claim based on that Schedule F, the commenter asked whether the accountant is subject to the sanctions of § 400.454. The commenter asked that FCIC precisely identify the persons to be covered by subpart R.

Response: Section 515(h) of the Act specifically refers to a producer, agent, loss adjuster, insurance provider or ''other person'' that intentionally provides false or inaccurate information to FCIC or to an approved insurance provider with respect to a policy. In the example given, an accountant who knowingly provides false information on a Schedule F may be subject to sanction under § 400.454. However, unless the accountant is otherwise participating in the crop insurance program, disqualification would not be applicable. However, the accountant could be subject to civil fines. Section 515(h) of the Act was intended to sanction anyone who willfully and intentionally provides false or inaccurate information, not just direct participants. Therefore, its scope could encompass any person. For example, an elevator operator who provides false weight receipts or the seed dealer who falsifies a sales receipt would also be subject to sanctions under section 515(h) of the Act.

Comment: A commenter stated that by making the proposed rule applicable to ''any other persons who may provide information to a program participant,'' the FCIC was improperly expanding the scope of persons subject to administrative sanctions beyond what is authorized in the Act. In addition, the phrase, ''any other persons who may provide information'' was imprecise and, therefore, subject to ambiguous construction.

Response: As stated above, section 515(h) of the Act authorizes the scope of the sanction to apply to other than just producers, agents, loss adjusters or insurance providers. Congress expressly refers to ''other persons.'' Therefore, the scope of this rule is authorized and can apply to virtually anyone who may provide information that is false or inaccurate. Therefore, there is no ambiguity. However, as stated above, persons who may not be participating in the crop insurance program or other United States Department of Agriculture (USDA) programs would likely be subject to civil fines instead of disqualification.

Comment: A commenter is concerned that the proposed rule exposes too many innocent persons to the threat of civil fines and sanctions without focusing on the real wrong-doers. The rule proposes to cover a vast number of ''participants in the federal crop insurance program'' as well as any other persons who may provide information to a program participant. In addition, the definitions of affiliate, participant, person, and principal are broad and far reaching and may subject innocent persons to the threat of civil fines and sanctions. The commenter recommends these

definitions exclude those not actively involved in the submission, purchase or receipt of benefits of crop insurance policies.

Response: In order to be subject to the sanctions under section 515(h) of the Act, FCIC must be able to prove that the person willfully and intentionally provided false or inaccurate information or willfully and intentionally failed to comply with a requirement of FCIC. Therefore, it is not possible for the sanctions to be imposed on innocent persons. Further, the standards for the imputing of improper conduct are the same as that applied in debarments and ensures that only those persons responsible for the violation are sanctioned. As an additional check and balance, persons have the right to contest any sanction before it is imposed before an Administrative Law Judge. This will ensure that the burden of proof has been met.

Comment: Several commenters stated that the proposed rule made the rule retroactive in effect. In the preamble, FCIC states, ''the provisions of this rule will not have a retroactive effect.'' However, the proposed rule at § 400.451(d) states that the ''failure to comply with a requirement'' is applicable as of the date the proposed rule become effective. But, the rule with respect to a false or inaccurate statement is applicable to any act or omission occurring after June 20, 2000. The rule and FCIC's explanation of it are inconsistent as to its retroactivity. Because Congress did not grant FCIC the authority to promulgate retroactive rules, they can only be applied prospectively. To impose penalties for past conduct is improper and unlawful. Because it is unclear as to its retroactivity, the rule violates Executive Order 12988. The proposed rule should be changed so that the regulation clearly has no retroactive effect. The commenters asked that the rule become effective on the date rule becomes final.

Response: FCIC has clarified when the provisions of this rule become effective. There is confusion because section 515(h) of the Act, which contains the sanction provisions applicable to false or inaccurate information that are the subject of this rule, have been in effect since June 2000. Further, since that date, those statutory provisions have been used to impose sanctions against persons that have provided false or inaccurate information after June 2000 because the statutory provisions were not in conflict with the regulation sanction provisions that existed during that time. Therefore, false or inaccurate information provided between June 20, 2000, and the date this rule becomes effective will continue to be processed under section 515(h) of the Act and the regulations in effect prior to the date this rule becomes effective. For false or inaccurate information provided after the date this rule is effective will be processed under this rule.

Section 400.452 Definitions

A. In General

Comment: A commenter stated that the proposed rule expanded the definition of ''person'' and added 17 more definitions which apply only to this subpart. FCIC does not describe the sources of many of the definitions.

Response: FCIC expanded § 400.452 to include terms used in the proposed rule. Most of the definitions will refer to terms and definitions contained in other regulations, such as the Common Crop Insurance Policy Basic Provisions to ensure consistency. With respect to the other definitions, FCIC has defined the terms in such a manner as to achieve the purpose of this rule. The rulemaking procedures do not require that administrative agencies document the source of all of its information.

Comment: Several commenters make statements regarding removing (1) vague and ambiguous language, and (2) defining terms FCIC normally or routinely uses but has failed to define, such as ''benefit,'' ''fraud,'' ''waste and abuse,'' ''wrongdoing,'' and ''knows or has reason to know.'' A commenter stated that the word ''benefit'' is used in the regulation but not defined. The proposed rule suggests benefit is not limited to monetary gains. The commenters also stated that if FCIC intends to impose sanctions for persons engaged in ''waste and abuse,'' the terms must be adequately defined to provide notice of the prohibited conduct. One commenter also stated that FCIC should add the definition of ''knows or has reason to know'' contained in 7 CFR 1.302(o) to the proposed rule and make conforming changes to the balance of the proposed rule consistent with the text of this added definition.

Response: FCIC has revised the rule to add definitions of ''benefit,'' and ''knows or has reason to know.'' ''Benefit'' is defined as any advantage, preference, privilege or favorable consideration a person receives from another person in exchange for certain acts or considerations. A benefit may be monetary or non-monetary. The definition of ''knows or should have known'' will be the same as that contained in 7 CFR 1.302(o). Further, this rule does not sanction persons for ''fraud, waste or abuse.'' This rule imposes sanctions for violations of section 515(h) of the Act and other statutory provisions. To the extent that such statutory provision includes some elements of fraud, waste and abuse, the prohibited conduct will be specified therein.

B. Revisions to Specific Definitions

1. Affiliate

Comment: A commenter stated that FCIC's definition of ''affiliate'' is inconsistent with the Standard Reinsurance Agreement's (SRA) definition of ''affiliate.'' The commenter stated that the definition should be amended to mirror the SRA's focus on the control of management of the book of business.

Response: While the narrower definition is appropriate for the SRA, such a narrow definition is not appropriate for this rule, which is intended to determine who a person is for the purposes of this rule. Under the definition of ''person'' affiliates are also considered as part of the person if the requirements are met. The main reason for defining the term ''affiliate'' in this rule is to put everyone on notice that the term may be used differently in this rule than it is in other rules or agreements. No change has been made.

Comment: A commenter stated that the definition of ''affiliate'' is broad and ambiguous because it uses the term ''same or similar management'' when describing a presumably affiliated business entity. The commenter suggested that the ambiguity can be cured by using either the accepted definition under federal banking and securities law or alternatively by substituting the term ''identical or substantially identical management'' for ''same or similar management.''

Response: The definition was obtained from the definition of ''affiliate'' in USDA's suspension and debarment regulations published at 7 CFR part 3017. Since a disqualification has a similar effect to a debarment, it was determined that the treatment of affiliates and the definition should be the same for both remedial sanctions. No change has been made.

2. Participant

Comment: A commenter stated that the definition of ''participant'' was unduly broad in that it contained no materiality or other threshold test for determining the extent of benefit that makes a person a participant. As written, someone who does not have a substantial beneficial interest for purposes of the crop insurance policy could be subject to a sanction.

Response: Any person, regardless of his interest for purposes of the crop

insurance policy, who willfully and intentionally makes a false statement or fails to comply with a requirement of FCIC, may be subject to sanction. As stated above, such person may have no connection to the crop insurance program other than to provide certain information that is then provided to FCIC or the insurance provider. If such person willfully and intentionally provides false or inaccurate information, such person can be subject to the sanctions provided in this rule even if they derive no benefit from the crop insurance program. Materiality does not require monetary damages. The false information can be material if it adversely affects program integrity, including damage to the program's reputation. Since the gravity must be considered in determining whether to impose a sanction, FCIC has revised the provision to include a materiality requirement and added a definition of ''material.''

Comment: A commenter suggested that a materiality test, percent interest or monetary level of benefit be used as a threshold for defining ''participant.''

Response: As stated above, materiality does not require monetary damages or benefits. The false information can be material if it adversely affects program integrity, including damage to its reputation. Further, FCIC has revised the provisions to include a materiality requirement when the gravity of the violation is taken into consideration and defined the term ''material.''

3. Preponderance of the Evidence

Comment: A commenter stated that intentional, willful conduct and fraud are subject to special rules regarding proof in civil litigation. Fraud requires ''clear and convincing proof to establish liability.'' This is a higher standard than that required under the proposed rule by a preponderance of the evidence. Because fraud connotes intentional misconduct the party charging that conduct is required to prove it to a greater certainty. The commenter stated further that it is improper to reduce the burden of proof by the government when alleging fraud. No justification has been given that alters longstanding rules applicable to civil litigation. Furthermore, intentional and willful acts should be defined to make clear that the person knew the falsity of the statement when made and intended that FCIC act on the basis of the intentional and willful misstatements. Intent and willfulness also must be established by clear and convincing evidence.

Response: Section 515(h) of the Act does not require a showing of fraud. The standard is whether a person willfully and intentionally provided false or inaccurate information. The standard of proof was derived from USDA's suspension and debarment regulations because of the similarity of the effects of disqualification and debarment. Further, debarment must also show evidence of willfulness and knowingly, which is similar to the standards contained in section 515(h) of the Act. The causes for debarment need only be established by a preponderance of the evidence. In addition, this is not a civil litigation. This is an administrative action taken to protect the integrity of the program and misuse of taxpayer dollars. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. Section 515(h) of the Act does not contain any requirement that the person who provides the false information intended for FCIC to rely on such information. FCIC does not have to prove fraud. FCIC only needs to prove that a person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

Comment: A commenter stated that the definition of ''preponderance of the evidence'' needs to be revised or clarified to clearly state that FCIC has the burden of proof to produce evidence to meet its preponderance of the evidence.

Response: FCIC has revised § 400.454(a) to clarify that FCIC bears the burden of proving that the person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

4. Principal

Comment: A commenter stated that the definition of ''principal'' was broad, and includes persons whom the law does not recognize as a principal. In addition, while the concept of ''control'' is defined by case law, the concept of ''critical influence'' is not. Theoretically, a data processor has ''critical influence'' because the incorrect entry of data may have a significant impact on liability. The commenter asked whether FCIC contends that such persons are ''principals'' under the rule. The commenter also questioned who is a ''key employee'' and what are the indicia of a ''key employee.'' The commenter asked who will determine whether an employee is a ''key employee''—the insurance provider or FCIC?

Response: The definition of principal has been broadened in this rule because insurance providers have routinely delegated many of their obligations and responsibilities to persons who would not normally have the ability to direct the activities of the business. The definition of ''principal'' is intended to encompass such persons who may not have the title, but who have functional influence or control over some activities of the insurance provider. This delegation is not unique to the insurance providers. Insureds may also delegate their obligations to other persons, such as farm managers. The use of the term ''key employee'' is intended to be a catch-all term for employees that have primary management or supervisory responsibilities or have the ability to direct activities or make decisions regarding the crop insurance program. FCIC would initially decide whether an employee is a key employee based upon the person's responsibilities in the entity when determining whether to file a complaint. However, it would be an Administrative Law Judge that will ultimately decide whether the employee is subject to sanction under this rule.

Comment: A commenter said that the definition of ''principal'' was broad and ambiguous. This problem is magnified by the use of ''key employee'' (an undefined term with no commonly accepted legal understanding) and ''critical influence on or substantive control over the activities of the entity'' (also undefined and not susceptible to common legal interpretations from other bodies of law). The commenter suggested that FCIC could cure the ambiguity to defining ''principal'' by citing position names commonly used in business and limiting the scope of the definition to only certain functions with the organization. The commenter suggested the following definition for ''principal'': ''A person who is an officer, director, owner or partner within an entity with primary management or supervisory responsibilities over the entity's Federal crop insurance activities.''

Response: FCIC is attempting to avoid being locked into titles because they do not fit all the business entities that can be involved directly or indirectly with the crop insurance program. This is why the term ''key employee'' has been added. This definition is trying to identify those persons who perform or exert some type of management or control or decision making over at least some activities related to the crop insurance program. Those are the persons who will be treated as principals. Given the practice of delegation that occurs in the insurance and farming industries, the definition would be too limiting to name the specific titles.

5. Requirement of FCIC

Comment: Several commenters stated that the definition of ''requirement of FCIC'' is overly board, ambiguous, and vague. As written, the rule could include informal communications, such as e-mails, from RMA personnel writing without actual approval by supervisory or managerial personnel with the agency. The definition does not define the form in which the written communication must take. Thus, a requirement of FCIC could take the form of any writing, including an e-mail. The commenter asked what types of communications are included in ''other written communications.''

Response: FCIC has revised the definition to specify that requirements will be contained in formal communications such as regulations, procedures, policy provisions, reinsurance agreements, memorandums, bulletins, handbooks, manuals, findings, directives or letters signed or issued by persons who have been provided the authority to issue such communications on behalf of FCIC. The definition is also revised to clarify that e-mails are not formal communications although they can be used to transmit formal communications.

Comment: Several commenters stated that the definition of ''Requirement of FCIC'' does not specify from whom within the FCIC the written communication may come. The written communication could come from any FCIC employee, regardless of status or level, to anyone associated with the insurance provider.

Response: As stated above, the provision as been revised to specify that written communications that will qualify as a ''requirement of FCIC'' will be originated by a FCIC employee that has been delegated the authority to issue such communications on behalf of FCIC. The current delegations are found at *http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–1.pdf, http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–2.pdf, http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–3.pdf*, and these delegations include documents that would qualify as ''requirements of FCIC.'' To the extent that other persons may also receive delegated authority, other bulletins containing such delegation will be issued.

Comment: A commenter stated that no ''other written communication from FCIC'' should qualify as a ''Requirement of FCIC'' unless FCIC has sent the communication to the insurance provider's designated recipients. The commenter pointed out that the SRA, in Appendix II, paragraph 6, requires each insurance provider to designate persons with authority to receive written communications from FCIC.

Response: To the extent that the ''requirement of FCIC'' is in the form of letters and other individual communications, such documents will be provided to the designated recipients of the insurance providers. However, documents such as regulations, procedures, bulletins, reinsurance agreements, etc. may also be considered requirements of FCIC under certain circumstances. Such documents will continue to be released in the customary manner.

Comment: A commenter suggested the phrase ''other written communications from FCIC'' be removed or at least restricted to require that the FCIC official sending the ''other written communication'' have express authority to send the communication and require that the communication be sent to the insurance provider's designee for the specifically stated type of communication.

Response: As stated above, FCIC has previously delegated persons to provide written communication on behalf of FCIC. FCIC will issue other bulletins if other persons will be delegated this authority. Further, as stated above, to the extent that such communication is a letter or other such individual communication, such communication will be sent to the insurance provider's designee. However, all other communications will be released in the customary manner.

Comment: One commenter questioned whether the Common Crop Insurance Policy falls within the definition of requirement of FCIC. The commenter asked if the Common Crop Insurance Policy is a requirement of FCIC only for agents, adjusters, and producers because the SRA's remedy applies only to insurance providers. This same conundrum exists for various handbooks and manuals.

Response: As stated in the rule, documents such as the Common Crop Insurance Policy are considered a requirement of FCIC unless such documents contain their own sanctions for violations. Further, even if such documents contain sanctions, they may still be considered a requirement of FCIC if there are multiple violations of the same provision or multiple violations of different provisions. FCIC has clarified that the remedial sanction is in addition to any other remedy contained in such document. The requirement of FCIC will only apply the persons to whom the document applies. For example, all regulations, including the Common Crop Insurance Policy, are applicable to insurance providers, agents, loss adjusters, and producers. However, the SRA is only applicable to insurance providers. The question will be whether the person is legally obligated to comply with the document through the force of law or contract.

Comment: One commenter asked: (1) Who is the arbiter of whether the ''breach rises to the level where remedial action is appropriate;'' (2) what standard is used to make a determination that a breach occurred under ''requirement of FCIC;'' and (3) whether materiality of the breach or injury to FCIC is a consideration for ''requirement of FCIC.''

Response: FCIC will initially determine whether a breach rises to the level where remedial action should be taken when it issues the complaint. However, persons have the ability to contest any proposed sanction before an Administrative Law Judge, who will be the ultimate arbiter. Further, as stated above, the rule states the standards applicable. For a document that has its own remedy for a violation, such document will only be considered a requirement of FCIC when there are multiple violations of the same or different provisions. If the document is directed to a specific person or group of persons, or does not contain a remedy for a violation, and requires such person or persons to take or cease from taking a specific action, the document is considered a requirement of FCIC. As stated above, FCIC has revised the provisions to include materiality, which applies to both false or inaccurate statements and failing to comply with a requirement of FCIC. However, as stated above materiality does not require monetary damages. The false information or the failure to comply can be material if it adversely affects program integrity, including damage to the crop insurance program's reputation.

Comment: One commenter stated that definition of ''requirement of FCIC'' states that a breach will not be considered a requirement of FCIC unless the breach rises to the level where remedial action is appropriate. The proposed rule imposes a subjective standard of reviewing conduct. The commenter asked at what level does conduct rise to ''the level where remedial action is appropriate.''

Response: The rule makes it clear that when the communication has its own remedy there must be multiple violations before the conduct arises to the level where remedial action, in addition to the remedy contained in the

communication, is necessary. With respect to other communications, there is a subjective element. However, as stated above, the gravity of the violation must be taken into consideration when determining whether to impose a sanction, which would include whether conduct arises to the level where remedial action is appropriate. In addition, the ultimate decision maker regarding whether the conduct arises to the level where remedial action is necessary will be the Administrative Law Judge. For the purpose of clarity, FCIC has used the term ''violation'' in place of ''breach'' because breach may mistakenly imply that the definition only applies to contracts or agreements when the definition clearly refers to other types of documents.

Comment: A few commenters stated that the definition of ''requirement of FCIC'' includes not only regulations and policy provision, but also procedures and other written communications from FCIC. The proposed rule does not address the potential conflicting nature of these requirements. It also imposes the same sanctions for violating non-binding informal procedures and communications as for violating binding rules and regulations. Neither the law nor the Administrative Procedures Act gives the same type of formality, equality or deference to these types of agency decisions.

Response: To the extent that there is a conflict between the regulations, policy provisions, and procedures, the regulations resolve such conflict in the order of priority. To the extent that other written communications may be in conflict, any provision that has the force of law, such as statutory or regulatory provisions, would take precedence. Further, neither the Act nor the Administrative Procedures Act precludes the use of any particular form of communication to impose requirements on a person. If FCIC has the authority to require that certain action be done or ceased, the Act provides the authority to provide sanctions for non-compliance. The nature of the crop insurance program makes it impractical to put all requirements in regulations or reinsurance agreements. Circumstances may arise during the year that requires immediate action and FCIC must have the means to ensure such action is taken. In determining whether to impose a sanction, FCIC must look at the nature of the violation. If the person fails to take a specific action required by FCIC or FCIC mandates that it cease a specific action, it does not matter the form of the communication. The person is required to comply and failure to comply can result in the imposition of sanctions.

Comment: One commenter is concerned that a person without access to FCIC's regulations, policies, procedures or other written communications and those who may have misinterpreted those regulations, policies and procedures, may be subject to sanctions. The commenter stated that the definition should include regulations, policies, procedures or other written communications the person knew or should have known or had received a specific notice of alleged violation.

Response: As stated above, sanctions can only be imposed for a violation of requirement of FCIC if such requirement is applicable to the person. If applicable, the person should have notice of the requirement. For example, bulletins are not applicable to producers unless such bulletin is provided to the producer or directs the agent or insurance provider to provide such bulletin to the producer. In addition, the gravity of the violation will be taken into consideration before imposing any sanction. No change has been made.

Comment: One commenter stated that, as proposed, the FCIC has virtually unlimited discretion in determining what constitutes a ''requirement.'' Insurance providers are often forced to make on the spot interpretations of ambiguous regulations without any guidance from FCIC, only to have FCIC later determine that the insurance provider's interpretation was incorrect. Allowing FCIC to go one step further and disqualify an insurance provider because it disagrees with the insurance provider's interpretation of an ambiguous ''requirement,'' is unreasonable, unworkable, and unfair.

Response: FCIC does not disqualify an insurance provider because it disagrees with the FCIC. If FCIC determines that an insurance provider has made an incorrect interpretation, it would notify the insurance provider of its misinterpretation and request that any actions taken based on the misinterpretation be corrected. Sanction would only be considered if the insurance provider does not comply with FCIC's request. Further, if the insurance provider believes that FCIC's interpretation is incorrect or that it does not have the authority to require the specific action, it can always appeal FCIC's action to the Civilian Board of Contract Appeals. No sanction could be imposed during this appeal process.

6. Violation

Comment: One commenter stated that the definition of ''violation'' leaves far too much room for interpretation as to what constitutes a single violation and what results in multiple violations. For example, assume that a farmer submits a single claim under his policy, but that the claim involves three separate units of insurance. The farmer submits three false production worksheets in connection with the one claim. The commenter asked whether the farmer committed one violation or three violations.

Response: To be subject to a sanction, the person must have willfully and intentionally provided false or inaccurate information. Each false or inaccurate piece of information would constitute a violation. Therefore, if in the acreage report the producer falsely reports the number of acres in the unit and the share, this would be two violations. In the example given, the farmer has committed four violations. The proposed rule defines violation as ''each act or omission'' made by a person that satisfies all required elements for a sanction is a violation. The farmer signed his name on three separate production worksheets and one claim, four times he ''certified'' the information provided, to the best of his knowledge to be true and complete; when in fact, he knew the information was false.

7. Willful and Intentional

Comment: One commenter stated that ''willful and intentional'' acts should be defined to make clear that the person knew the falsity of the statement when made and intended that FCIC act on that misstatement.

Response: A ''willful and intentional'' act is providing information by a person who had ''knowledge that the statement was false or inaccurate at the time.'' The requirement that the person ''intended that FCIC act on that misstatement'' is an element of fraud. However, under section 515(h) of the Act, to impose a sanction, the person only needs to have willfully and intentionally provided false or inaccurate information. The term ''fraud'' is not found in section 515(h) of the Act and if Congress wanted to require reliance by FCIC as an element, it could have so required. No change has been made.

Comment: One commenter stated that the definition ''Willful and intentional'' is incomplete and inaccurate as a standard of proof for the conduct under the proposed rule. Intent and willfulness must be established by clear and convincing evidence.

Response: The general standard of proof in administrative cases is preponderance of the evidence. This is consistent with USDA's suspension and

debarment regulations, which serve a similar purpose. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

Comment: One commenter stated that FCIC should clearly require that scienter must be proven with respect to willful and intentional statements prosecuted under the rule to ensure that prosecutions are confined to fraudulent statements or acts or omissions, rather than non-malicious acts or omissions.

Response: In the definition of ''willful and intentional,'' FCIC has included the requirement that the person know that the statement was false or inaccurate at the time the statement was made or the person know that the act or omission was not in compliance with a requirement of FCIC at the time the act or omission occurred. Therefore, sanctions will not be imposed for innocent mistakes. However, maliciousness is not a standard required by the Act. FCIC has structured these provisions to fully comply with the requirements imposed in the Act. No change has been made.

Comment: One commenter stated that the definition of ''willful and intentional'' deviates from the common law meaning of those terms, and specifically nullifies a showing of malicious intent, an element of common law fraud. The commenter further states that fraud is the very target of 7 U.S.C. 1515(h) and that FCIC may lack the authority to expand the definition of willful and intentional to include conduct outside the common understanding of fraud and to impute knowledge from one individual to another.

Response: Section 515(h) only requires that the person willfully and intentionally provide a false or inaccurate statement or fail to comply with a requirement of FCIC before a sanction can be imposed. Section 515(h) does not use the term ''fraud'' and that term's other connotations. FCIC has studiously attempted to stay within the requirements of the Act. To that end, FCIC has used the common definitions and common law to determine the meaning of ''willful and intentional.'' This rule contained the same meaning as has been given the term since FCIC began doing disqualifications after the enactment of the Federal Crop Insurance Reform Act of 1994. With respect to the imputation of knowledge, FCIC has used the Department's debarment regulations as guidance because the burdens and consequences are similar.

Comment: One commenter stated that for the definition of ''willful and intentional'' FCIC does not specifically define the words separately, and FCIC does not state the source of this definition. FCIC also excludes the showing of malicious intent as unnecessary. FCIC includes ''the failure to correct the false or inaccurate statement when its nature becomes known to the person who made it'' and includes acts of omission. These additions force agents and agencies to review information for past years, or they may be subject to sanctions.

Response: Defining the words separately would not change the meaning or bring more clarity. The terms will be given their common meaning. The dictionary defines ''willful'' as ''intentional, or knowing, or voluntary.'' ''Intentional'' is defined as ''done purposely.'' FCIC has also looked to the body of established law regarding the meaning of the terms for the purposes of this rule. There is no requirement in the Act for maliciousness intent. The Act only requires that a person willfully or intentionally provide false or inaccurate information. Therefore, requiring a person to know the information was false or misleading and electing to provide it anyways satisfies the common meaning of the terms. Further, agents are not required to review information for past years. Agents will only be subject to sanctions if they knew the information was false or inaccurate at the time it was provided or if they discover it later and they fail to do anything about it. No change has been made.

Comment: One commenter stated that the definition of ''Willful and intentional'' should be defined to make clear that the actor knew the falsity of the statement when made and intended that FCIC act on the basis of the intentional misstatements.

Response: As stated above, there is no requirement that the person intended FCIC to act on the false information in section 515(h) of the Act. To be subject to sanctions, the person only needs to have willfully and intentionally provided false or inaccurate information to FCIC or an approved insurance provider. Reliance of the misstatement is an element of fraud, which as stated above, is a term that is not found in section 515(h) of the Act.

Comment: One commenter stated that FCIC must establish a clear indication of how intent will be established with respect to demonstrating whether a statement, act or omission is willful and intentional. A false or inaccurate statement or a noncompliant act or omission alone does not rise to willful and intentional and additional evidence that clearly establishes that a person had sufficient knowledge is necessary before imposing sanctions.

Response: The definition of ''willful and intentional'' makes it clear that the person must have knowledge of the falseness or inaccuracy of the information. Unless FCIC can establish the person has such knowledge no sanction under section 515(h) of the Act can be imposed. Further, FCIC is not alone in making these decisions. Any person subject to a proposed sanction has a right to contest the sanction before an Administrative Law Judge. The Administrative Law Judge will determine whether FCIC has met its burden before any sanction is imposed.

Comment: One commenter stated that with no showing of intent coupled with the provision that sanctions may be imposed regardless of whether FCIC or the insurance provider sustained monetary losses places all parties in jeopardy of severe punishment for seemingly innocuous mistakes that may have caused little to no harm.

Response: Sanctions cannot be imposed for innocuous mistakes. There must be evidence of willfulness and intent. Further, the fact that no monetary losses may occur does not excuse the improper conduct. All false or inaccurate statements have the capacity to adversely affect program integrity.

Comment: One commenter stated that while the definition may be clear in regards to willful, it is not clear from the definition that there is actually a requirement of intention at all. The commenter suggested that the definition should include knowledge of the inaccuracy and that an intent, malicious or otherwise be associated with the inaccuracy. The definition should be confined to ''material'' misrepresentations or omissions.

Response: ''Intentional'' is defined as ''done purposely.'' FCIC's definition of ''willful and intentional'' is consistent with that definition in that it requires the person to have provided the information to FCIC or an approved insurance provider even though the person had knowledge that the information was false or inaccurate at the time that the statement was made and still elected to provide the information to FCIC or the approved insurance provider. However, as stated above materiality has been added to the rule but it does not require monetary damages.

Section 400.454 Disqualification and Civil Fines

A. In General

Comment: One commenter stated that ARPA required that each policy or plan of insurance to provide notice of the sanctions that could be imposed under ARPA for willfully and intentionally providing false or inaccurate information to FCIC or failing to comply with a requirement of FCIC. FCIC has failed to comply with 1515(h)(5).

Response: Section 27 of the Common Crop Insurance Policy Basic Provisions (Basic Provisions) (7 CFR 457.8) states that if the producer, or someone assisting the producer, has intentionally concealed or misrepresented a material fact, the producer could be subject to the remedial sanctions in 7 CFR part 400, subpart R, which includes disqualification and civil fines. However, FCIC has revised this rule to include more specific language in section 27 of the Basic Provisions and added a new section 22 to the Group Risk Plan Common Policy (7 CFR 407.9) (GRP policy).

B. Section 400.454(a)

Comment: One commenter has concerns that FCIC is not providing producers with the appropriate notice of sanctions as stated under section 515(h)(5). The commenter stated that section 454(a) lacks the required notice to policyholders. Specifically, the commenter stated that the proposed language in section 454(a) does not appear to provide producers the required notice of the sanctions available under 7 U.S.C. 1515(h)(3) as required by 7 U.S.C. 1515(h)(5). That in its present form section 454(a) does not notify producers that they can be disqualified for up to five years from specific programs or that the potential fine could be greater than $10,000.

Response: It is not the specific intent of § 400.454(a) to provide producers notice of sanctions available under section 515(h)(3) of the Act. It is intended to provide all persons of the possible consequences of willfully and intentionally provided false or inaccurate information or willfully and intentionally failing to comply with a requirement of FCIC. As stated above, FCIC has revised the Basic Provisions and the GRP policy to ensure that producers receive the required notice.

Comment: Several commenters stated that the decision to initiate administrative sanctions should not rest solely with the FCIC Manager, but that it should require a determination by the FCIC Board of Directors.

Response: Section 515(h) of the Act confers the authority to impose sanctions on the Secretary, who has subsequently authorized the Manager of FCIC to initiate the process when the rule was originally promulgated in 1993 (58 FR 53110). Since this process has been in place since 1993 and there have not been any allegations that the Manager has abused this authority, the Secretary has elected to allow the authority to initiate sanctions to remain with the Manager of FCIC. In addition, although the Manager initiates the process, it is the Administrative Law Judge that ultimately decides whether there is sufficient evidence to impose a sanction under section 515(h) of the Act.

Comment: Several commenters stated that FCIC uses an inappropriate standard of proof, preponderance of the evidence, for the imposition of any penalty. One commenter stated that the standard of guilt should rest with the party alleging such violation. Instead of requiring a mere 'preponderance of evidence' the standard of proof should be clear and convincing evidence. There is no justification for holding the crop insurance industry to a lower standard of guilt.

Response: As stated above, this is the same standard applied by the Department for debarments. Because the effects are similar and both can require willful and intentional conduct, it is appropriate to apply that standard to sanctions under this rule. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

Comment: Several commenters stated that the proposed rule imposes a low evidentiary threshold for the imposition of sanctions. The burden of proof should be clear and convincing evidence as opposed to a preponderance of the evidence. The rule only authorizes sanctions for willful and intentional conduct. Such a standard connotes the elements of fraud. In almost every instance, liability for fraud cannot be predicated on a mere preponderance of the evidence; rather, a finding based on at least clear and convincing evidence is required. Therefore, the draft regulations should be amended to reflect a burden of proof of clear and convincing evidence. Commenters stated that FCIC may lack the authority to adopt a burden of proof lower than the clear and convincing standard of proof in fraud cases. One commenter stated that to establish a prima facie claim of fraud, the party alleging it must prove by clear and convincing evidence that there was a false representation or concealment of a material fact, calculated with the intent to deceive. One commenter stated that the rule potentially expands the liability of actions to a degree not enforceable in civil litigation.

Response: Section 515(h) of the Act does not require a finding of fraud. Sanctions can be imposed for willfully and intentionally providing false or inaccurate information. Further, as stated above, this is the same standard applied by the Department for debarments. Because the effects are similar and both can require willful and intentional conduct, it is appropriate to apply that standard to sanctions under this rule. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

C. Section 400.454(b)

Comment: One commenter stated FCIC needs to provide a clear indication of how intent will be established as to whether a statement, act or omission is willful and intentional. Further, scienter must also be established to a statement, act or omission that is willful and intentional.

Response: As stated above, FCIC has defined ''willful and intentional'' to be consistent with the common definition of these terms and case law. Scienter is not a specific requirement. No change has been made.

Comment: Several commenters stated that the proposed rule must be confined to material misrepresentation or omissions that cause financial loss. One commenter stated that it was the intent of Congress. A commenter stated that FCIC should confine the proposed rule to statements, acts or omissions that cause injury or damages, consistent with general principles of law relative to fraud.

Response: FCIC has revised the provisions to require consideration of materiality when considering whether to impose a sanction and defined the term ''material.'' However, as stated above materiality does not require monetary damages. The false information can be material if it adversely affects program integrity, including damage to the crop insurance program's reputation or providing or potentially providing benefits that would otherwise not be available. Further, as stated above, fraud is not required to be proven before a sanction can be imposed. There only needs to be a finding that a person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

D. Section 400.454(c)

Comment: One commenter stated that ''gravity'' is subjective and vague. It did not tell the public the standard to be applied by FCIC when measuring the severity of a violation. The commenter suggested that FCIC adopt the list of factors under 7 CFR 1.335(b) or develop its own list of mitigating factors to be applied when considering the gravity of a violation.

Response: FCIC has reviewed the list of factors used in the assessment of sanctions in 7 CFR 1.335(b), and has modified the list to be more applicable to the crop insurance program and included it in § 400.454(c).

Comment: One commenter has concerns that cumulative penalties could exceed the gravity of the violation. The commenter urged FCIC to establish appropriate penalties to violations that are always commensurate to the gravity of such violations.

Response: As stated above, FCIC has adopted factors, with modification, used by Department in assessing sanctions. However, Congress specifically revised section 515(h) of the Act to allow the imposition of a separate sanction for each violation. The gravity of each violation will be taken into consideration when imposing a sanction.

Comment: A commenter stated that increased penalties demand an equally elevated system of judgment process and identification of degree. The rule's definition of degree of offense and penalty extends to others who may be oblivious to the error of intention to submit false information. For example, the agent who forwards an actual production history (APH) which was completed and signed by an insured can be totally unaware of erroneous information provided by that insured, unless the submission is blatantly different from other producers in the area. Cumulative penalties could result in disproportionate fines in relation to the offense. Therefore, a minor infraction could have a major impact.

Response: An agent that transmits an APH that is false can only be sanctioned if the agent knew or should have known the information was false and transmitted it anyway. If the agent had no way to know the information was false, no sanction can be applied. However, the producer that provided the false APH may be sanctioned for providing the false information to the agent. In such case, the gravity of the violation will be considered based on the factors FCIC has added to the rule to ensure the sanction is commensurate with the violation. Further, FCIC will consider each person's conduct as it pertains to the provision of false or inaccurate information. Therefore, there should not be the possibility of disproportionate sanctions.

Comment: A few commenters stated that the rule should exclude penalties and suspensions for conduct that is already addressed in the SRA.

Response: There is nothing in the SRA or other contracts that specifically involves willfully and intentionally providing false or inaccurate information or failing to comply with a requirement of FCIC. Further, there may be circumstances where the improper conduct under the SRA is so egregious that the imposition of sanctions may be appropriate. The rule explains those situations. In such cases, the liquidated damage provisions may be inadequate given the gravity of the violation. Further, suspension or termination may not be viable options and the imposition of a civil fine may be more appropriate. However, with respect to any breach of the SRA, FCIC first will look to the remedies in the SRA. Because remedies are available under the SRA, sanctions can only be imposed if there are multiple violations of the same or different provisions.

Comment: Several commenters state that the proposed rule's cumulative penalties violate the excessive fines provision of the Eighth Amendment of the U.S. Constitution. Since its penalties would be cumulative, the proposed rule could result in disproportionate fines. Cumulative penalties are not allowed under the Act, in addition to those found in 7 U.S.C. 1515(h)(3). The commenters stated that the rule should also be clarified to make it clear that the penalties and fines are not cumulative and that if the FCIC chooses to enforce any existing contract-based or regulatory remedies, the rule should be expressly inapplicable. A commenter stated that while the sanctions in 7 U.S.C. 1515(h)(3) potentially are cumulative, there is no statutory basis for punishing the same conduct under other regulations or agreements. Accordingly, any fair reading of the FCIA precludes cumulative penalties in addition to those found at 7 U.S.C. 1515(h)(3). A commenter stated that FCIC should not treat the sanctions as cumulative relative to other sanctions, as this is not anywhere provided for in the plain language or legislative history of the statute.

Response: Section 515(h) of the Act expressly authorizes a separate civil fine for each violation. Therefore, this rule does not contain cumulative civil fines for the same conduct. It would not make sense to impose the same civil fine on a person who committed one violation compared to one who committed two or more violations. When determining the civil fine to apply for each violation, FCIC is to take into consideration the gravity of that violation. Therefore, this allows the sanctions to be proportional to the conduct. However, there is nothing in the Act that would preclude FCIC from enforcing section 515(h) of the Act along with any contractual remedies. When section 515(h) of the Act was enacted, Congress was aware that many contracts and agreements had remedies for a breach. If it wanted the sanctions under section 515(h) of the Act to be the sole remedy for the conduct it could have so required, but it did not do so. The application of any other remedy will be taken into consideration when assessing the sanction to be imposed under this rule so that the result is not disproportionate. Further, this is most likely to arise with respect to the willful and intentional failure to follow a requirement of FCIC, because there is no mention of willfully and intentionally providing false or inaccurate information in the contract or agreement. As stated above, there are situations when the conduct is so egregious, such as with multiple violations, that the imposition of sanctions is appropriate under this rule in addition to the remedies available in the contract or agreement. No change has been made in response to this comment.

Comment: One commenter states that the rule states that it is remedial in nature. However, the rule also states that fines and disqualifications are in addition to any other actions taken by FCIC or others under the terms of the crop insurance policies, other statutes and regulations. Recently the U.S. Supreme Court disregarded its own long-standing position on the remedial nature of the federal False Claims Act and labeled its treble damage provision as ''punitive.'' Adding additional sanctions on top of those recoverable under the False Claims Act, and other statutes will undoubtedly be punitive, and subject the rule to interpretation and construction consistent with its punitive aims.

Response: The provisions stating that the imposition of sanctions under this rule is in addition to any other sanctions provided in the agreement or contract is not new. It was included in § 400.451(c). Further, it is not FCIC's decision regarding whether other sanctions are imposed. FCIC can only enforce the sanctions available under the contract or agreement and section 515(h) of the Act.

FCIC will take into consideration any other sanctions that may have been previously imposed for the conduct to ensure that the sanctions are not disproportionate to the conduct. To the extent that FCIC imposes sanctions under section 515(h) of the Act, in addition to the remedies available under the contract or agreement, the person is able to challenge such imposition before the Administrative Law Judge.

Comment: One commenter stated that because the definition of willful and intentional is broad and sanctions can be applied without resulting monetary damages, it appears that cumulative penalties could easily result from simple mistakes that resulted in little to no damages. Thus, cumulative penalties could be unconstitutional as it may constitute excessive fines under the Eighth Amendment.

Response: Cumulative penalties cannot be applied for simple mistakes. Sanctions under section 515(h) of the Act can only be applied for willfully and intentionally providing false or inaccurate information or failing to comply with a requirement of FCIC. Further, materiality will be considered when determining whether to impose a sanction and a consideration of the gravity will also be done to determine the amount of sanction to apply. This should preclude the imposition of sanctions that is disproportionate to the conduct.

Comment: Two commenters stated that the $100,000 threshold in § 400.454(c)(2) may be appropriate for producers, agents, adjusters, or other program participants, but it is too low to impose on insurance providers. A $100,000 indemnity could represent only a few hundred thousandths of the total indemnities paid by insurance provider. A commenter stated that the proposed penalty is too harsh. Absent any intention on the part of Congress to impose such draconian penalties, the proposed regulations cannot stand. A commenter suggested that $500,000 may be a more appropriate benchmark for insurance providers.

Response: The $100,000 threshold in the aggregate may be low given the amount of indemnities each insurance provider pays out each year. However, on an individual basis, a $100,000 indemnity is a significant amount and the consequences are appropriate, especially given that insurance providers are required to review all claims in excess of $100,000 and annually report the results. The commenter is correct that in the case of multiple violations, a $500,000 threshold is more appropriate.

Comment: One commenter stated that the threshold amount for the imposition of maximum penalties is low and has no rational basis, especially when applied to an insurance provider. Without raising the threshold for imposing the maximum disqualification term or fine, the FCIC could run two serious risks. First, it easily could be imposing civil fines in amounts disproportionate to actual losses and will thus be excessive under the Eighth Amendment of the Constitution. Second, program disqualification for an insurance provider which overpays losses based on such a low threshold is disproportionate that this remedy, too, would violate the Eighth Amendment.

Response: The civil fine is no more than the amount of any pecuniary gain resulting from the improper conduct for which such sanction is sought or $10,000. The $10,000 civil fine is reasonably related to the amount of time and resources required to investigate whether false or inaccurate information was provided to FCIC or the insurance provider and whether such information was provided willfully and intentionally. The Supreme Court has held that civil fines reasonably related to the cost of investigation do not violate the Eighth Amendment. FCIC is unsure of the argument that ''program disqualification for an insurance provider which overpays losses based on such a low threshold is disproportionate that this remedy, too, would violate the Eighth Amendment.'' The Supreme Court has held that occupational debarments, even permanent ones, are traditionally not viewed as punishments. Therefore, it is difficult to see how an occupational disqualification for a limited term would be ''cruel and usual.'' Further, while FCIC has added a materiality requirement, it is not dependent on monetary damages. Further, these thresholds are related to the maximum sanctions that can be imposed. Based on the gravity of the violation, amounts smaller than the maximum may be appropriate. No change is made in response to this comment.

Comment: One commenter stated the monetary threshold in § 400.454(c)(2)(ii) (redesignated as 400.454(c)(3)(ii)) is less defensible when one recognizes that it is not tied to a single crop year's overpayments. Hypothetically, disqualification could occur based on more than $100,000 in errors over multiple crop years. An insurance provider could be barred from the program for errors amounting to less than 0.009 percent of indemnities paid. FCIC's approach violates the Eighth Amendment as applied to insurance providers.

Response: As stated above, FCIC has left the single violation at $100,000 but increased the threshold for multiple violations to $500,000 for the imposition of the maximum sanction against insurance providers. The commenter is correct that since insurance providers deal with much larger amounts of claims, the threshold should be higher for the imposition of the maximum sanction. However, as stated above, monetary damages are not required as a condition of imposing a sanction under this rule. Sanctions can be imposed for any willful and intentional providing of false or inaccurate information or willful and intentional failure to comply with a requirement of FCIC. This means that under the Act, a single willful and intentional providing of false or inaccurate information by an insurance provider can subject it to disqualification of a period up to one year. Although not required, FCIC has added a materiality requirement but it is still not conditioned on whether there is a monetary loss.

Comment: One commenter stated that the proposed rule states a single 'violation' can be the basis for the imposition of the maximum penalty if the violation results in an overpayment of more than $100,000. This $100,000 threshold is immaterial and statistically insignificant with regard to insurance providers.

Response: A single violation of $100,000 is not statistically insignificant. The average claim paid over the last three crop years is less than $5,300. Further, approved insurance providers have an obligation to verify all claims in excess of $100,000. Therefore, there is a heightened duty with respect to these policies. As a result, FCIC has not increased the single violation threshold. However, as stated above, FCIC has increased the multiple violation threshold for insurance providers to $500,000.

Comment: Several commenters stated that the parameters proposed for the maximum penalties under § 400.454(c)(2) (redesignated as 400.454(c)(3)) were too broadly worded. The commenter asked what constitutes ''multiple'' violations. If a single claim involves the submission of five fraudulent claims for indemnity, a commenter asked whether the participant has committed multiple violations.

Response: Multiple violations are the number of each willful and intentional false or inaccurate statement and each incident of failing to comply with a

requirement of FCIC. One false or inaccurate statement or one incidence of failing to comply with a requirement of FCIC is a single violation. More than one false or inaccurate statement, even if there is only one claim involved, or more than one incidence of failing to comply with a requirement of FCIC constitutes multiple violations. In the example given, each fraudulent claim for indemnity counts as a separate violation so that five fraudulent claims would constitute multiple violations.

Comment: One commenter asked if the multiple violations all have to be of the same nature, or whether they can be completely unrelated violations.

Response: Multiple violations do not all have to be of the same nature. Multiple violations may be completely unrelated. An example of multiple violations of the same nature may be an insured who falsely certified three separate production worksheets that the production was less than the guarantee. An example of multiple unrelated violations may be when a producer falsely reports acreage on an acreage report and then later falsely reports production for the unit and claims a loss.

Comment: One commenter asked how many years does ''several crop years'' entail.

Response: ''Several crop years'' is commonly defined as a number of more than two or three, but not many. ''Many'' is commonly defined as a large number to infinity. Use of the term ''several'' means that if the improper conduct occurred in more than three crop years, the maximum sanction can be imposed.

Comment: One commenter asked under § 400.454(c)(2) (redesignated as 400.454(c)(3)), how many years back can FCIC look to violations ''over several crop years.''

Response: The Act does not limit the number of years RMA can look at to discover fraud, waste or abuse.

Comment: One commenter stated that under the proposed rule one error, immaterial or not, which does not arise to negligence much less fraud, can be mistakenly repeated numerous times. The maximum penalty would appear to apply in the case of multiple violations without materiality or damages.

Response: Sanctions can only be imposed for proven willful and intentional acts that monetarily or non-monetarily harm the program. If the person knows that he or she is committing an error and continues to do so, then this would be willful and intentional conduct that could lead to the imposition of sanctions. In addition, as stated above, FCIC has added a provision regarding materiality although it does not require monetary damages.

Comment: One commenter asked whether there must have been an actual adjudication by FCIC or some other authority of a previous violation.

Response: There is no requirement for an adjudication of a previous violation. However, to be a factor in determining the appropriate length of disqualification or amount of civil fine there must be sufficient evidence to prove that there was a violation and that it was willful and intentional. The Administrative Law Judge will consider whether there is sufficient evidence to support that a previous violation occurred.

Comment: One commenter asked for examples of multiple acts of wrongdoing.

Response: FCIC has reconsidered this provision in light of the other provisions and comments received and realized that only conduct that is willful and intentional can be subject to sanctions and such improper conduct constitutes a violation. Since redesignated § 400.454(c)(3) already covers multiple violations, FCIC has removed the provisions relating to multiple acts of wrongdoing to avoid any ambiguity.

Comment: One commenter asked what is a wrongdoing. Wrongdoing is not a defined term in the proposed regulations. The commenter asked if wrongdoings equate to a violation.

Response: As stated above, this provision has been removed because multiple violations are already covered under redesignated § 400.454(c)(3)(i).

Comment: One commenter asked if multiple acts of wrongdoing span more than one crop year, and if so, how many crop years.

Response: As stated above, the provisions regarding wrongdoings have been removed. Redesignated § 400.454(c)(3) already covers multiple violations.

Comment: One commenter asked what would constitute ''multiple'' acts of wrongdoing. The commenter stated that ''wrongdoing'' should be a defined term. The commenter states that a similar problem of ''individual'' or ''multiple'' violations arises under § 400.454(f)(1).

Response: As stated above, the provisions regarding wrongdoings have been removed. The term ''individual'' and ''multiple'' are given their common usage meaning and, therefore, a definition is not necessary. Individual means one and multiple means more than one.

Comment: Several commenters stated that the phrase ''of so serious a nature'' provides no objective guidance as to what conduct rises to this level. The commenters suggested that FCIC clearly define precisely what conduct will result in the maximum penalties.

Response: Conduct ''of so serious a nature'' is one of the standards used in suspension and debarment proceedings and FCIC intends to use the history of the imposition of suspensions and debarments under this standard as guidance under this rule. Further, this standard still requires that the conditions of willful and intentional be met. However, it is not possible to define the actual conduct meeting this standard because each case is based on its own factual situation. No change has been made in response to this comment.

E. Section 400.454(d)

Comment: Several commenters objected to imputation of conduct between individuals and corporations. They claim that section 515(h) does not authorize the imputation of conduct between individuals and corporations. In addition, FCIC's proposed rule provides no evidence that its board of directors has authorized the Manager to impute liability as part of conducting the 'business' of FCIC. One commenter stated that the provisions for imputations of conduct of one person to another are unauthorized by the FCIA, inappropriate, legally improper, and both overly broad and vague. One commenter stated that the most troubling is the potential to impute conduct from an individual to an organization. This provision puts insurance providers at risk for unjustified sanctions. However, if RMA proceeds with its inclusion, the scope of potentially imputable conduct must be narrowed.

Response: The Act does not preclude the imputation of improper conduct. The purpose of section 515(h) is to protect the Government from doing business with persons who have willfully and intentionally made misrepresentations. Persons can include entities or individuals. However, all entities are operated by individuals who are responsible for the actions of the entity. Therefore, those individuals should be held responsible for those actions just as much as the entity itself. Conversely, entities that benefit from the improper conduct by its associates should similarly be held responsible. Without the ability to impute improper conduct too many people could find means to shield themselves from their conduct. Further, the factors that must be satisfied before the imputation of conduct should ensure that the truly innocent are not sanctioned. There must be knowledge, approval or acquiescence

before knowledge can be imputed. Further, as stated more fully below, FCIC has added provisions to clarify when improper conduct may be imputed and that the factors applicable to determining the gravity of the violation must also be considered with respect to the person upon whom improper conduct is imputed. No change has been made in response to this comment.

Comment: One commenter stated that FCIC cannot rely on 7 CFR part 3017 for the imputation of liability. FCIC cannot rely on 3017 because 3017 provides for imputation of liability by FCIC only for 'fraudulent, criminal, or other improper conduct.' The first problem with this concept is that part 3017 was not issued under the authority of FCIA. The second problem with relying on part 3017 is that FCIC has not cited the statutory authority for that set of regulations as authority for the proposed rule. Finally, the rule calls for the imputation of liability for any violation of § 400.454(b), which includes providing false or inaccurate statements and failing to adhere to a 'Requirement of FCIC.' A false statement would not be fraudulent unless made with the requisite intent. An inaccurate statement or failure to adhere to a requirement of FCIC could result simply from negligence. Thus, the severity of the conduct embraced by 3017.630 is significantly greater than the conduct covered by proposed § 400.454(b).

Response: Section 515(h) of the Act describes the conduct that is subject to sanctions under this rule, not 7 CFR 3017. The purpose of the imputation of conduct provisions is to preclude individuals from escaping responsibility for their actions by hiding behind entity structures. It is not intended to enlarge the scope of the sanctions or to apply to conduct that is otherwise not sanctionable under section 515(h). However, FCIC must employ all reasonable measures to protect the program from any person who has committed a violation subject to the sanctions in section 515(h). No change has been made in response to this comment.

Comment: One commenter stated that the proposed rule improperly expands, without providing a basis for doing so, the scope of the allowed imputation under 7 CFR 3017.630 to include omissions and failures to act as well as culpable acts performed with intent.

Response: Section 515(h) of the Act describes the conduct that is subject to sanctions under this rule. Section 400.454(d) only seeks to ensure that those persons involved in the conduct described in section 515(h) are held accountable. One way to do this is to preclude individuals from shielding themselves through the use of entities or from entities shielding themselves by claiming the conduct was caused by an individual associated with the entity even though the entity benefited from the conduct. No change has been made in response to this comment.

Comment: One commenter stated imputing conduct would be improved by two fundamental changes. First, conduct only should be imputed when the person to whom the conduct is imputed 'knows or has reason to know' of the conduct under the definition contained in 7 CFR 1.302(o). The standards contained in that definition should work for the Federal crop insurance program. Second, the imputation scheme could be improved by revising 400.454(f) to conform to 7 CFR 1.335(b). Providing a non-exhaustive list of aggravating and mitigating factors would create appropriate flexibility for dealing with situations where conduct is imputed.

Response: As stated above, FCIC has already included the definition of ''knows or has reason to know'' and used that term with respect to the imputation of conduct. Further, FCIC has added a provision that will require the review of the factors added to § 400.454(c)(2) when imposing a sanction on a person to whom conduct was imputed.

Comment: One commenter stated that to impute the improper conduct of a person to another person, such person must know or should have known of the improper conduct. This statement indicates that the government will assess what the knowledge level of an individual should be and prosecute them according to their supposed knowledge. There are many factors that can influence the knowledge level of an agent or insurance provider representative. Not every insured and agent has the same level of knowledge or access to every element of information.

Response: As stated above, imputation of improper conduct provides a means to ensure that those responsible for the improper conduct are held accountable. It is to prevent persons from using entities or other persons as shields against responsibility. Persons should not be permitted to turn a blind eye to what is occurring, while at the same time they are benefiting from the conduct. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change has been made in response to this comment.

Comment: One commenter stated that holding an organization responsible for the acts of an individual is only reasonable if that individual is a principal of that organization, and even then there are perimeters to be established.

Response: The commenter's view is too restrictive. There may be cases where an entity will allow a subordinate to commit violations or turn a blind eye to such conduct in order to obtain the benefits. For example, an agency may knowingly allow agents to falsify records in order to increase premiums and their commissions. The agents may not be a principal of the agency, but the agency by allowing the improper conduct, would be complicit and should be held accountable. There are sufficient parameters in the rule to ensure that persons who have no way of knowing of the improper conduct and have no involvement are not held accountable for the actions of others. No change has been made in response to this comment.

Comment: Two commenters stated it would appear that the rule would hold a person responsible for the acts of another even where such statements, acts or omissions are not fraudulent. The commenter feels that other persons could be held to a higher standard than the person making the statement or committing the act or omission. If there is to be any imputation of liability, it must pertain strictly to fraudulent statements, acts or omissions and require actual knowledge or a reason to know.

Response: Persons to whom conduct may be imputed are not held to a higher standard. The rule requires knowledge, approval or acquiescence before the conduct can be imputed from an individual to the organization. Further, knowledge of or a reason to know is required before conduct can be imputed from an entity to an individual. As stated above, FCIC has added a definition of ''knows or has reason to know'' obtained from 7 CFR 1.302. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the improper conduct, there may be no basis to impute the improper conduct. However, as stated above, fraudulent conduct is not required before a sanction may be imposed. Section

515(h) refers to willfully and intentionally providing false or inaccurate information or willfully and intentionally failing to comply with a requirement of FCIC. If such conduct occurs and the requirements for the imputation of such conduct have been met, these persons will be subject to the sanctions contained in the rule. No change has been made in response to this comment.

Comment: One commenter stated that FCIC is proposing to revise § 400.454(d) to allow FCIC to impute the improper conduct of a person to another person if the other person has the power to direct, manage, control or influence the activities of the person that is being cited for improper conduct. Since an insurance provider employs agents to sell policies, it follows the entire organization could potentially be cited for improper conduct of an agent. Both could be disqualified from selling crop insurance.

Response: An insurance provider could only be at risk of sanction if it is proven that the insurance provider had knowledge, approved of or acquiesced to the conduct of the agent that is the subject of the sanction. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, there have been instances in the past where insurance providers have allowed false information, such as backdated documents, to be provided by agents. In such cases, the insurance provider should be held accountable. No change has been made in response to this comment.

Comment: One commenter stated that the proposed rule seems to indicate that suspension and/or debarment may happen without the parties being fully aware of the reasoning behind the penalty. The commenter recommends that this provision be eliminated for 'participants' and FCIC fully explain the process.

Response: FCIC is unsure of the basis for the comment. FCIC must prove that a person willfully and intentionally provided false or inaccurate information or willfully and intentionally failed to comply with a requirement of FCIC. Such conduct cannot be imputed to another unless there was knowledge, approval or acquiescence. Further, the process of imposing disqualifications and civil fines has been in place since 1993 and, before any sanction is imposed, the person will have an opportunity to hear the evidence against them and provide evidence in their defense. An Administrative Law Judge will determine whether a sanction under this rule can be imposed. Therefore, there should never be a situation where a person would not be aware of the basis for the sanction. In addition, by statute, sanctions apply to participants. Therefore, there is no basis to remove them from this rule. No change has been made in response to this comment.

Comment: One commenter stated that at a minimum, the scope of potentially imputable conduct must be narrowed to only impute conduct of officers, directors and conduct of employees that is specifically ratified or endorsed by the entity. Moreover, the entity must be given 'credit' for having practices that attempt to prevent rule violations and encourage 'whistleblower complaints' of suspected violations. Thus, if an entity addresses the allegedly 'bad' conduct by its employee or independent contractor after its officers have been made aware of the situation, it should not be subject to any of the penalties under the rule.

Response: The rule requires the knowledge, approval or acquiescence of the entity before improper conduct can be imputed. Unless these standards are met, no conduct can be imputed to the entity. However, it is not practical to limit the imputation of conduct to when such conduct is ''ratified'' or ''endorsed'' by the entity. Such actions suggest the need for an affirmative action on the part of the entity. However, in most cases, there is a failure of the entity to act when it knew or should have known of the improper conduct. If the safeguards put in place by the entity are working there should be no risk of the imputation of conduct to it. Further, one of the factors to be considered in determining the gravity is the internal controls in place. However, FCIC does not know what the commenter meant by ''addressing'' the alleged bad improper conduct. Once the entity becomes aware of the improper conduct that is subject to sanction, it must be reported to FCIC so it can take the appropriate action against the wrongdoer. Failure to report such improper conduct can make the entity at least appear complicit in the conduct. If the person rejects the improper conduct and any benefit derived therefrom, such as refusal to accept documents that are backdated, etc., then there may not be a basis for the imputation of conduct.

Comment: One commenter stated that clarification concerning imputation of liability to other persons is needed. It must be proven that the third party had actual knowledge or at least a reason to know of the fraudulent statement, act or omission of another.

Response: As stated above, this rule does require knowledge or at least a reason to know before conduct can be imputed. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, fraudulent is not the standard. If a person willfully and intentionally provides a false or inaccurate statement, the person is subject to the sanctions contained in this rule.

Comment: One commenter stated that FCIC has the authority to sanction, even debar an insurance provider as a result of the violation of a low level employee.

Response: An insurance provider cannot be disqualified or assessed a civil fine unless it is proven that it had knowledge of or reason to know of the willful and intentional violation by the low level employee. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, there have been instances in the past where the insurance provider has turned a blind eye to misconduct it knew about, such as backdated documents, and in such cases the insurance provider should be held accountable.

Comment: One commenter objects to imputing the conduct of an 'individual associated with an organization,' as FCIC has not defined what it means to be 'associated with an organization.' The commenter asks whether a contractor is 'associated with' an insurance provider or whether that contractor's subcontractor is associated with an insurance provider.

Response: Any person that performs work on behalf of the organization can be found to be associated with the organization. However, that does not necessarily mean that conduct will be imputed to the organization. The organization must know or have reason to know of the improper conduct. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be

no basis to impute the conduct. No change has been made in response to this comment.

Comment: One commenter stated that a corporation's receipt of a benefit from an individual's violation does not 'evidence knowledge, approval or acquiescence' unless the corporation knows or should know of either the violation or that the benefit resulted from the violation.

Response: While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct.

Comment: One commenter stated (1) the imputation appears to be automatic if the 'conduct occurred in connection with the individual's performance of duties for or on behalf of that organization.' The commenter stated a reasonable approach would be to make conduct by a 'principal,' no presumed imputation should exist with respect to any person who is not a principal. (2) While receipt of a benefit can be 'evidence of knowledge, approval or acquiescence,' it only should be rebuttable evidence. (3) The proposed rule gives no recognition of the extent to which the organization's practices attempted to preclude such conduct. USDA elsewhere has recognized the relevance of this factor. See for example, 7 CFR 1.335(b)(11). (4) Imputing knowledge in the severe fashion proposed could chill internal investigative efforts by insurance providers and ultimately cooperation with FCIC in identifying and punishing misconduct. FCIC should not adopt a rule that might chill such efforts.

Response: (1) The commenter's view is too restrictive. There may be cases where an entity will allow a subordinate to commit violations or turn a blind eye to such conduct in order to obtain the benefits. For example, an agency may knowingly allow agents to falsify records in order to increase premiums and their commissions. The agents would not be a principal of the agency, but the agency by allowing the improper conduct would be complicit and should be held accountable. (2) While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. (3) As stated above, having internal controls in place is one of the factors to be considered when determining the gravity of the violation. (4) This rule should not chill the investigative efforts of the entity. If the entity discovers improper conduct subject to sanction under this rule, the entity can shield itself from any imputation of such conduct by not accepting the benefits from the conduct and promptly reporting the improper conduct to FCIC. No change has been made as a result of the comment.

Comment: One commenter stated that an insurance provider can be sanctioned based simply upon the fact that the conduct occurred in connection with the individual's performance of duties for or on behalf of that organization. If an insurance provider did not actively participate in the agent's or adjuster's violation, the agent's or adjuster's conduct should not be imputed to the insurance provider and the insurance provider should not be sanctioned under this rule.

Response: An insurance provider that did not actively participate in an agent's or adjuster's violation and it is proven that the insurance provider did not know or have reason to know of the violation, the insurance provider should not be sanctioned. As stated above, the entity can shield itself from any imputation of such conduct by not accepting the benefits from the improper conduct and promptly reporting the conduct to FCIC. No change has been made as a result of this comment.

Comment: One commenter stated that whether a person had reason to know of a particular course of conduct is a very subjective analysis. The commenter asked how FCIC plans to determine whether one person had a reason to know of the conduct of another.

Response: Acceptance of the benefits of the conduct subject to the sanction is evidence of knowledge. However, as stated above, that evidence is rebuttable. There are other ways to establish a reason to know, such as an obligation to review documents that contain the false statements, etc. In all cases, the person will have the opportunity to provide evidence in defense and the issue will be decided by an independent Administrative Law Judge.

Comment: Two commenters, citing 41 AM JUR 2d, Independent Contractors section 2 (2007), stated that liability of an independent contractor may not be imputed to a corporation, but it imposes a virtually impossible standard on large insurance providers. Under the proposed regulations, a corporation with thousands of lower-level employees and independent contractors can be held liable and subject to disqualification for the rogue actions of a single independent contractor [or any other individual 'associated' with the insurance provider], even if that individual acts in violation of insurance provider policy unbeknownst to the insurance provider.

Response: As stated above, the corporation can only be subject to sanctions under this rule if it knew of or could reasonably have known of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the improper conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. Therefore, the corporation is not liable for the rogue acts of a single independent contractor that is unknown or could not have been known by the corporation. No change has been made in response to this comment.

Comment: One commenter citing Federal law stated that absent evidence that Congress intended to impose such harsh strict liability standards on corporations, of which there is none, the proposed rule cannot stand.

Response: This rule is not imposing strict liability on corporations. Conduct can only be imputed if the corporation knew or reasonably should have known of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change is made in response to this comment.

Comment: One commenter stated that whether an individual had 'reason to know' a specific fact is not equivalent to whether an individual 'should have known' of the fact and FCIC should amend the rule to clarify the applicable standard. USDA's civil fraud regulations, under 7 CFR 1.302(o), already define the phrase 'knows or has reason to know' in the context of fraud and false statements. Another commenter stated that the language 'reason to know' should be defined to make clear that this does not create a 'should have known' standard. The commenter stated that the 'reason to know' requires that a person draw reasonable inferences from information already 'known to him' and does not give rise to the duty of inquiry that is

created by a 'should have known' standard.

Response: As stated above, FCIC has added a definition ''knows or has reason to know'' for clarity and used the definition contained in 7 CFR 1.302(o). However, also as stated above, fraud is not a prerequisite to the imposition of sanctions under this rule. Section 515(h) of the Act only requires that a person willfully and intentionally provide a false or inaccurate statement or willfully or intentionally fail to follow a requirement of FCIC.

Comment: The commenter, citing federal law, stated that imputation from an organization to another organization is contrary to existing law. The mere existence of a partnership, joint venture, joint application, association, or similar arrangement does not automatically give rise to shared liability. The commenter stated that the proposed rule must be clarified to include additional prerequisites for imputed liability such as actual knowledge or reason to know of the culpable acts.

Response: The issue is not shared liability. The question is whether a person can be held accountable for the actions on another. As stated above, the rule requires that there be knowledge or reason to know of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change has been made in response to this comment.

F. Section 400.454(e)

Comment: One commenter stated that the Agricultural Market Transition Act cited in § 400.454(e)(1)(i)(B) was replaced by the Farm Security and Rural Investment Act of 2002.

Response: The reference to the Agricultural Market Transition Act in § 400.454(e)(1)(i)(B) will be deleted and replaced with the Farm Security and Rural Investment Act of 2002 or a successor statute.

Comment: One commenter stated that the prohibition contained in § 400.454(e)(1)(ii) is neither discussed in nor implied by section 515(h), therefore it is an impermissible expansion of the penalties authorized by ARPA.

Response: FCIC does not understand this comment. Section 515(h)(1) of the Act refers to ''producer, agent, loss adjuster, approved insurance provider, or any other person.'' This means that the sanctions in section 515(h) can apply to any person who willfully and intentionally provides false or inaccurate information or willfully and intentionally fails to comply with a requirement of FCIC. However, section 515(h) provides for different consequences depending on whether the person is a producer or other person. This distinction is carried over into § 400.454(e)(1)(ii). That fact that § 400.454(e)(1)(ii) refers to participant is not an expansion of the available sanction since a participant, as defined in the rule, just delineates a group of persons already included under section 515(h). No change is made in response to this comment.

Comment: One commenter asked if § 400.454(e)(1)(i)(I) (redesignated § 400.454(e)(1)(i)(H)) applied only to federal assistance laws and if so, the rule should be worded to reflect that fact.

Response: Section 515(h) of the Act refers to ''any law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.'' It does not make any distinction between federal or any other laws but as a practical matter, disqualification can only apply to programs under the auspices of the Federal Government. Therefore, redesignated § 400.454(e)(1)(i)(H) will be revised to read: ''Any federal law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.''

Comment: One commenter stated that the requirements were far too broad and overreaching to be fair and enforceable and that an insurance provider could be subject to sanctions even if it strictly complied with the rule to periodically check the Ineligible Tracking System (ITS) and Excluded Parties List System (EPLS). An insurance provider could be required to check the ITS and EPLS daily for not only prospective business partners, but also for its current employees, adjusters, and agents. In an example given, insurance provider A contracts with an adjuster. Insurance provider A checks ITS and EPLS and the adjuster is cleared. The same adjuster later contracts with insurance provider B. The adjuster is then disqualified for conduct associated with his work for insurance provider B. However, prior to insurance provider A's next periodic check of ITS and EPLS, the adjuster works several claims for insurance provider A.

Response: The burden imposed by this rule is no different than the burden that exists with respect to suspended or debarred persons. The Government wants to preclude such persons from circumventing their disqualification by hiding under the auspices of another person. Participants in the program have the responsibility to periodically review EPLS and ITS to determine whether the persons it does business with are included on such lists. FCIC will examine the reasonableness of the reviews to determine whether it is appropriate to disqualify the participant who does business with a disqualified person. Such disqualification is not automatic. No change is made in response to this comment.

Comment: One commenter stated that the rule's requirement to periodically review the ITS and EPLS to determine persons who are disqualified from participation in the Federal crop insurance program directly contravenes the statutory requirement that the relevant sanctions under the proposed rule be confined to 'willful and intentional' acts.

Response: There is no contravention of the statute by imposing disqualification on persons who elect to do business with a person that has been disqualified. Without this requirement, disqualified persons will be able to hide their participation by hiding under another person. FCIC has the authority to prevent such circumvention and has elected to adopt the same remedies as is applicable to persons who do business with suspended and debarred persons. Disqualification is not automatic and FCIC will consider the circumstances on a case-by-case basis. No change is made in response to this comment.

Comment: Two commenters stated that insurance providers have greater access than individual agencies to monitor ITS and that agencies don't have the system to do an effective job. Although the insurance providers monitor ITS, the agency may not receive notification of ineligibility until several months have passed or until after an initial application was accepted and was detected only when a loss was submitted.

Response: Persons who are disqualified are also reported to the General Services Administration for inclusion on the EPLS. EPLS is available to everyone. Therefore, all participants have the ability to timely determine whether the persons with whom they are doing business have been disqualified. No change is made in response to this comment.

Comment: One commenter asked if entity ABC is ineligible, and new entity DEF is set up, how will agents discover the new entity, without some elaborate system. It would appear that FCIC could have a system which would automatically detect, in a timely manner

before insurance attaches, by cross referencing social security number.

Response: There is no foolproof method to prevent disqualified persons from trying to hide their involvement. The participants' responsibility is to review ITS and EPLS to determine whether it is doing business with a person listed. If a person is not listed because it has changed its name, participants cannot be held accountable for the knowledge. However, if the person is required to provide its social security number or other identification number in connection with its participation in the program or affiliation with the participant, such persons should be identifiable on ITS or EPLS. No change is made in response to this comment.

Comment: One commenter stated that spousal tracking would be tedious to track as there may be multiple entries for a given last name. The commenter asked whether this means that it will have to go through all insureds with that last name. What if a person retains their maiden name and their spouse is ineligible? The commenter asks how this will be tracked.

Response: If the spouse is disqualified under this rule, the spouse should be separately listed in ITS and EPLS. Therefore, there should be no difficulty in tracking such persons.

Comment: One commenter was concerned that an agency could become a victim if an insured were to testify that he knowingly took a false report when, in fact he didn't; it would be the agent's word against the insured's word. The commenter asks where the burden of proof lies.

Response: The burden of proof lies with FCIC, who must establish that the agent willfully and intentionally provided a false or inaccurate statement. Testimony can provide evidence, but the agent will have the opportunity to provide a defense, which will all be considered by a neutral Administrative Law Judge.

Comment: One commenter stated that agents should not be involved in any aspect of production fact finding as it could be interpreted as a conflict of interest. The commenter suggested that this could be remedied by FCIC making production fact finding by agents a conflict of interest.

Response: Agents are precluded from participating in any aspect of the loss adjustment process under the conflict of interest provisions in the SRA. It is the loss adjuster that would be determining production. Further, it is the loss adjuster that should be providing the production information to the insurance provider, not the agent. However, if the agent knows that false information has been provided and does nothing, the agent can be held responsible. No change is made in response to this comment.

Comment: One commenter is concerned that a mistake could be turned into a ''willful and intentional'' act due to a person's misinterpretation.

Response: It is difficult to see how this could happen. FCIC bears the burden of proving willful and intentional conduct and the person will be provided an opportunity to provide a defense. The evidence will be considered by a neutral Administrative Law Judge, who will determine whether FCIC has met its burden. This due process should protect against misinterpretations. No change is made in response to this comment.

Comment: One commenter is concerned about the imposition of multiple penalties of $100,000 per occurrence for multiple events. The commenter recommends that participants should not be punished for simple errors or misinterpretation of a rule, but participants should be punished for willful and intentional abuses.

Response: Simple errors or misinterpretation of a rule are not the basis for sanctions. There must be willful and intentional conduct, which is defined in the rule. Further, the civil fine is $10,000 per violation, not $100,000. No change is made in response to this comment.

Comment: One commenter suggests if an agent submits an acreage report with false information it appears to be shifting the responsibility of acreage reporting from the insured to the agent. The agent should not be expected to act as a law enforcement official. Agents are not authorized to require hard copy records from the insured unless the records are specifically requested by the insurance provider.

Response: The proposed rule is not shifting the responsibility of acreage reporting from the insured to the agent. The insured is responsible for the accuracy of the provided information. However, agents should not provide any documentation with information it knows or has reason to know is false. At a minimum the agent should ask the insured if the information provided is correct. If an agent does not know nor has no reason to know that the information is false, there is no basis to sanction the agent. No change is made in response to this comment.

Comment: One commenter is concerned about the rule's reference to proving willful and intentional error versus unintentional error. Unintentional errors can occur; the most experienced operator, agent or adjuster with years of training or coverage, can make a mistake on a report. Months or years after the unintentional error, these mistakes may be construed as intentional omissions. Specific and defined consideration of the values and variables used to determine guilt or innocence is needed.

Response: Unintentional errors are not the basis for sanctions. FCIC bears the burden of proving that the error was willful and intentional at the time it was made and the person will have the opportunity to provide evidence in the defense. An independent Administrative Law Judge will decide whether FCIC has met its burden. No change is made in response to this comment.

Comment: One commenter stated that the prohibition contained in § 400.454(e)(3)(ii) is neither discussed in nor implied by section 515(h) and therefore, is an impermissible expansion of the penalties authorized by ARPA.

Response: Section 400.454(e)(3)(ii) precludes participants from conducting business directly related to crop insurance with disqualified persons or conducting any other business if such business would permit the disqualified person from receiving a benefit under a program administered under the Act. Under section 515(h) of the Act, FCIC is expressly authorized to exclude persons from participating in the crop insurance program. Ancillary to this express authority is the authority to take such actions as are necessary to ensure that disqualified persons do not continue to participate in, or receive benefits from, the crop insurance program. FCIC exercised this authority in § 400.454(e)(3)(ii). Without this provision, persons could avoid their disqualification by affiliating with other persons. Further, as learned in the suspension and debarment process, the only meaningful way to prevent persons from doing business with disqualified persons is to make them also subject to disqualification. No change is made in response to this comment.

Comment: One commenter stated that the penalty imposed under § 400.454(e)(3)(iii) is inequitable and overly broad. For example, if a disqualified agent also is a chemical supplier, it is unreasonable for FCIC to prohibit insureds from purchasing chemicals from that individual.

Response: Doing business with a disqualified person does not automatically subject the participant to disqualification. The purpose of § 400.454(e)(3)(iii) is to preclude persons from circumventing their

disqualification. FCIC will have to evaluate whether the business is related to the crop insurance program, the disqualified person will be able to receive benefits under the crop insurance program as a result of the business relationship, or the disqualified person is using the business relationship to obtain benefits not otherwise entitled to because of the disqualification. No change is made in response to this comment.

Comment: One commenter asked what occurs in a situation in which a participant is unaware that the person with whom he or she is doing business was disqualified. The commenter asks whether a participant has an obligation to inquire of a prospective business partner as to its status in the crop insurance program.

Response: A participant has an obligation to review ITS and EPLS to discover whether a person with whom they are doing business is disqualified. Therefore, unless there is some subterfuge on the part of the disqualified person, such as using different names, social security numbers, etc., there should not be any situation where the participant is unaware they are doing business with a disqualified person.

Comment: One commenter stated that the phrase in § 400.454(e)(3)(iii), 'may be subject to disqualification' seems selective. The commenter asks what criteria FCIC will apply in determining whether to disqualify a participant for doing business with a disqualified person.

Response: The purpose of the provision is to prevent disqualified persons from circumventing their disqualification. There may be situations where the participant does not know and has no reason to know that a person has been disqualified, such as using a slightly different name or social security number. Under these circumstances, it is unlikely disqualification could be imposed on the participant. There may also be situations where the business conducted is in no way related to the crop insurance program. However, there may also be situations where the participant knows the person is disqualified and elects to do business with them anyway. Under such circumstances, disqualification of the participant may be appropriate. Each case will have to be considered on its own merits. This may seem selective, but all cases will ultimately be determined by a neutral Administrative Law Judge who will determine whether FCIC has met its burden.

Comment: One commenter stated that § 400.454 refers to a person as an insurance provider and the disqualification of an insurance provider is also broad and ambiguous. The commenter asks if the entire insurance provider, the individual, or both are penalized if a qualifying error occurs. Clarification is needed to explain the process used when an insurance provider is disqualified because of an error.

Response: Insurance providers cannot be disqualified because of an error unless such error was committed willfully and intentionally. If the person named in the disqualification is the insurance provider, then the insurance provider as a business entity is disqualified. If an individual affiliated with the insurance provider is disqualified, the disqualification applies to the individual, not the insurance provider unless specifically named. The process used for disqualification is the same for all persons, including individuals and insurance providers. A complaint is filed seeking disqualification and the person can mount a defense before a neutral Administrative Law Judge.

Comment: One commenter stated that § 400.454(e)(3)(ii) states that 'no participant may conduct business with a disqualified participant or other person * * * if, through the business relationship, the disqualified participant or other person will derive any monetary or non-monetary benefit from a program administered under the Act.' It is not clear what 'program administered under the Act' means.

Response: ''Program administered under the Act'' means any program authorized under the Federal Crop Insurance Act. This would include all crop insurance programs, education programs, research and development programs, expert reviews, etc. It would not include any program not authorized under the Act, such as private hail insurance or other lines of business.

Comment: One commenter stated that the rule is overbroad in that it could be interpreted to apply to contractual, statutory, or other pre-existing legal rights and obligations that an insurance provider might have with 'other persons,' i.e., its employees subject to future disqualification. For example, if an employee is disqualified for violating 'FCIC requirements' and is terminated for cause, under federal law the insurance provider must continue to honor its existing ERISA obligations to its former employee. As the rule is written, allowing the disqualified participant to continue to derive these monetary benefits, as mandated by ERISA, could subject the insurance provider to disqualification. Another commenter stated that contractual and statutory rights that precede disqualification should not be affected. If an employee is disqualified, the employer is still obligated to honor these pre-existing obligations. The rule should clarify that honoring contractual and statutory obligations that precede the date of disqualification does not subject an entity to potential disqualification because of indirectly providing a 'monetary or non-monetary benefit from a program administered under the FCIA.'

Response: As stated above, the purpose of this provision is to prevent disqualified persons from circumventing their disqualification by affiliating with other participants. In the scenario presented, once the participant severs the relationship with the disqualified person, FCIC recognizes that there may be legal obligations that the participant must continue to fulfill, such as ERISA. However, such arrangements may be subject to scrutiny to ensure that they are not a subterfuge to continue to channel benefits to a disqualified person. FCIC has added provisions to clarify that simply fulfilling a previous contractual or statutory obligation after termination of the relationship with a disqualified person is not doing business with such person unless the arrangement is determined to provide a means of circumventing the disqualification, for example, a severance agreement executed at the time of termination that provides payments or benefits similar to what the person was previously receiving.

Comment: One commenter stated that the rule has no limitation with respect to the type of business relationship that a participant or other person has with a 'disqualified participant or other person.' Thus, the business activity could be completely unrelated to any business transaction subject to the FCIA or to the receipt of any benefit from the USDA under another Federal program. Second, such a proposed provision creates a serious risk of blacklisting individuals.

Response: There is no limitation with respect to the type of business because FCIC does not want to create loopholes for disqualified persons to be able to create business opportunities to circumvent their disqualification. However, § 400.454(e)(3) expressly states that the business must directly relate to the Federal crop insurance program or allow the person to receive a benefit from a program administered under the Act. As stated above, such

programs would include the contracts, cooperative agreements and partnerships for research and development, educations, etc. Therefore, there is no possibility of ''blacklisting'' individuals. FCIC has the right to elect not to permit disqualified persons to circumvent their disqualification by preventing their ability to obtain benefits related to crop insurance or another program administered under the Act. No change is made in response to this comment.

Comment: One commenter stated that the proposed rule proposes routine review of the ITS and EPLS to ensure FCIC is not doing business with a disqualified person. Each insurance provider handles the flow of information from RMA systems in a different manner. This commenter does not use ITS or EPLS. Agents are notified if an insured is ineligible, however the manner and timing of the notification varies with each insurance provider. The proposed rule would hold agents accountable for review of systems of which they have little or no knowledge. The commenter recommends that RMA systems not accept data for ineligible producers.

Response: The commenter's suggestion presupposes that the disqualified person is an agent or a producer and this may not be the case. Therefore, FCIC would have no means to identify when participants are doing business with disqualified persons. Further, all participants are already under an obligation to check the ITS and ELPS with respect to persons who may be suspended or debarred. That would include agents, loss adjusters, producers, and any other persons. Therefore, this rule does not add a new obligation; it simply reaffirms the existing obligation and places participants on notice to also check for disqualified persons. No change is made in response to this comment.

Comment: One commenter stated that, as the rule is written, an agent and agency could be disqualified from selling crop insurance for an error that was not willful or intentional on their part.

Response: It is difficult to see how continuing to do business with a disqualified person is not willful or intentional unless there is some deceit on the part of the disqualified person. The participant has a duty to check the ITS and ELPS to identify disqualified persons. The participant knows that it is precluded from doing business with such persons. Therefore, the participant's continuance of business with a disqualified person under the circumstances can be considered willful and intentional.

G. Section 400.454(f)

Comment: One commenter stated that the civil fines were too miniscule and suggested that the minimum fine should be $50,000, civil fines should be imposed against all individuals who participated in the entire scheme, and jail time of five years minimum for all offenders involved in the loan process.

Response: FCIC cannot impose a civil fine in any amount greater than that authorized in section 515(h) of the Act. Further, nothing in the Act authorizes the imposition of incarceration. However, to the extent that the conduct that subjects a person to disqualification may violate any criminal statutes, there is no impediment to the prosecution of such persons. Further, any individual who participated in the conduct that is subject to disqualification is also subject to disqualification provided their conduct meets the standards contained in this rule.

Comment: One commenter stated that although § 400.454(c) requires FCIC to consider the ''gravity'' of an offense when imposing a civil fine, FCIC should amend subsection (f) to recognize the concept of materiality.

Response: As stated above, FCIC has amended the provisions in § 400.454(c) regarding whether to impose a civil fine and the amount to include materiality.

Comment: One commenter stated that the rule improperly fails to recognize any concept of materiality. The absence of a materiality test is contrary to FCIA, which only authorizes sanctions for material violations. Because the proposed rule applies to reinsurance agreements, it clearly sets up a situation where immaterial conduct is punished beyond the levels contemplated in the SRA. The commenter suggested that this section could be improved by including the non-exhaustive list of aggravating and mitigating factors found under 7 CFR 1.335(b).

Response: As stated above, FCIC has amended the provisions in § 400.454(c) regarding whether to impose a civil fine and the amount to include materiality. Further, FCIC has also added the list of aggravating and mitigating factors found in 7 CFR 1.335(b) to § 400.454(c).

Comment: Two commenters stated that § 400.454(f)(1) imposes a separate civil fine for each individual action. It was suggested that FCIC should fully explain what constitutes an 'individual action'.

Response: FCIC has revised the provision to refer to ''each violation.'' FCIC has also revised the definition of ''violation'' in § 400.452 to specifically refer to the elements for disqualification or civil fines contained in § 400.454.

Comment: One commenter asked what would constitute an individual or multiple violations.

Response: As stated above, each willful and intentional false or inaccurate statement or each act that would be considered a willful and intentional failure to comply with a requirement of FCIC would be considered an individual violation. For example, each document that contains a back-dated date would be an individual violation. If there is more than one such document or there are different false statements on more than one document, there would be multiple violations.

Comment: One commenter stated that FCIC proposes to eliminate current § 400.454(f), which requires the hearings to be governed by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary. Without this section, it is unclear what rules apply to the hearings. The commenter suggested that FCIC state what rules of practice apply to these proceedings.

Response: The provisions from current § 400.454(f) that provide for the rules of practice have not been eliminated. They were moved to § 400.454(a).

Comment: One commenter suggested that the last sentence of 400.454(f)(3)(i) should end with the period inside the end parenthesis and the preceding sentence should end with a period of its own; '* * * the specified due date. (If * * * signed by FCIC.)' instead of '* * * the specified due date (if * * * signed by FCIC).'

Response: Given that these are independent sentences, FCIC has removed the parenthesis and added periods at the end of each sentence.

H. Section 400.454(g)

Comment: Two commenters stated that the language about insurance providers' assumption of the book of business introduces ambiguity and is absolutely unnecessary. As a matter of both fact and law, policies written by an agent or an agency on behalf of an insurance provider are already the direct liability of the insurance provider, so no assumption would be required. Adding this provision simply introduces confusion to an otherwise clear situation. On the other hand, it is appropriate for this provision to require the insurance provider to assign policies written by a disqualified agent or agency to a different agent or agency.

Response: The commenter is correct that when an agent writes a policy for a particular insurance provider, that

insurance provider has already assumed the liability for such policy. Therefore, this provision is removed. The requirement that the insurance provider assign the policies to a different agent or agency will be retained. However, ultimately it is the producer that has the right of selection of which agent will service their business and may move their policy to any agent of their choice that is not disqualified. Therefore, the provision is revised to allow for this election.

Comment: One commenter stated that the proposed rule appears to suggest that an agent rightfully found in violation can have his entire business confiscated, in addition to disqualification and other pecuniary fines. This could lead to constitutional problems.

Response: The agent is precluded from selling or servicing any policies or receiving any benefits from the sale or service of such policies during the period of disqualification. However, as the insurer, the insurance provider has an obligation to ensure that the policies are sold and serviced in accordance with the approved policies and procedures of FCIC. As stated above, it is the producer that has the right to elect which agent will sell and service his or her policy. If the producer fails to make this election, under the rule, the insurance provider must assign the policy to another agent but the assignment of any policy will only last for as long as the period of disqualification. After the disqualification period, subject to the election of the producer, the agent is entitled to get the book of business back. The provision has been revised to clarify that after the period of disqualification, policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated that it appears if an agent is disqualified, the agency employing the agent would be subject to disqualification as well. The rule also states that the insurance provider would be required to assign the book to another agent or agency. The commenter suggests the inclusion of language that, in the case of one agent in an agency being sanctioned, would leave the book of business within the same agency if that is the agency's choice or if one agency within an organization is sanctioned, would leave the business within the same organization if that is the organization's choice, unless the agency also committed a willful and intentional violation of FCIC requirement.

Response: If an agent is disqualified, the agency employing the agent may only be disqualified if the agency has been named in a disqualification, it continues to do business with the agent or provides any benefits to the agent under the crop insurance program or any other program authorized under the Act during the period of disqualification. As stated above, it is the producer that has the first right to determine who will sell and service his or her policy. If no such election is made, it is the responsibility of the insurance provider to ensure that the policies are properly serviced. There is nothing in this rule that would preclude the insurance provider from electing to keep the policies in the same agency. However, there is nothing in the Act that provides an agency with the right to take over policies sold and serviced by one of its agents. The transfer of policies under such circumstances should be a contractual matter between the agent, agency and insurance provider. No change is made in response to this comment.

Comment: One commenter had great concern that an insurance provider could somehow assign a violating agent's book of business to someone else. The commenter suggested that it may be legally impossible for an insurance provider to seize an agent's book of business.

Response: Once the agent is disqualified, that agent can no longer sell or service the policies in its book of business or receive any benefits from the same or service of such policies. As stated above, the provision has been revised to provide the producer with the right to elect a different agent. However, if no such election is made, as the insurer of these policies, the insurance provider has an obligation to sell and service the policies under the SRA. FCIC is leaving it to the insurance provider and agent to determine how the book of business will be serviced during the period of disqualification. However, FCIC has added a provision clarifying that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated the requirement that the insurance provider assign them to a different agent or agency to service during the period of ineligibility is unfair and is a threat to the rights of the agent and agency. Agents and agencies own their books of business; it is an asset of the agent and the agency just like any other asset. The reassignment of that book of business would be the transferring of an agent's physical assets to another party.

Response: While agents and agencies may consider the book of business to be an asset, it is the producer that controls who sells and services the policy. Therefore, as stated above, the provision was revised to give the producer the election to cancel and rewrite the policy with another agent or agency. If the producer does not transfer the policy, it is the insurance provider that has a contractual obligation to ensure that the policies are serviced. As stated above, FCIC is leaving it to the agent, agency and insurance provider to determine to whom policies are moved once the agent is disqualified. This rule simply reiterates that such an assignment of the policies must occur. Further, as stated above, FCIC has added provisions clarifying that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated that if a disqualification for an insurance provider results in a 'time out of new sales and renewals, but the ability for continued service of existing policies,' they believe that the same standard should be held to agents and agencies, and not simply a confiscation of an agent's or agency's book of business.

Response: Given the large number of policies in an insurance provider's book of business, it may not be feasible for them to be disqualified in the middle of a crop year without great disruption to the crop insurance program. All of the policies must be cancelled and rewritten with another insurance provider and for some insurance providers it could amount to hundreds of thousands of policies. At the end of the crop year, policies must be cancelled and rewritten with another insurance provider. Therefore, this rule does not allow the insurance provider to continue doing business, it simply provides for the orderly transition of the business. There is not such a large disruption to the program when an agent's or an agency's book of business must be moved. Policies do not have to be cancelled and rewritten because they will remain insured with the same insurance provider. However, as stated above, the agent's or agent's book of business is not confiscated. During the period of disqualification, the producer can elect to move to another agent and only if such election is not made will the insurance providers assign policies to fulfill its contractual obligation under the SRA. The contract between the agent and insurance provider can determine

how the business is sold and serviced if the agent is disqualified and such arrangements will not be disturbed by FCIC unless they violate the provisions of this rule by permitting the agent to continue to benefit from the crop insurance program during the period of disqualification. The provisions have also been revised to clarify that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

I. Section 400.454(h)

Comment: One commenter stated that 400.454(h) contains the risk of improperly cumulative and excessive penalties.

Response: There is nothing in section 515(h) of the Act that states that the administrative remedies contained therein are the only remedies for the proscribed conduct. There are other civil, criminal and possibly administrative remedies available. If multiple remedies are applied to a person, that person has the right to challenge the application of those remedies as unconstitutional.

Section 400.457 Program Fraud Civil Remedies Act

Comment: One commenter stated that although the rule does not revise § 400.457(a), the proposed rule renders this section inaccurate. This section is not in accordance with the Program Fraud Civil Remedies Act of 1986, because the standards set forth in 400.454 differ from those set forth in 7 CFR 1.302 and 1.335.

Response: As stated above, FCIC has revised this rule to make it consistent with 7 CFR 1.302 and 1.335 to the maximum extent practicable. In any case, before sanctions can be imposed under both sections 515(h) of the Act and the Program Fraud Civil Remedies Act, all the requirements for the imposition of sanctions under each must be met.

Comment: Several commenters stated that the rule must be clear so that ordinary people can understand what conduct is prohibited and provides sufficient guidance to those who may be subject to the penalties. Several commenters expressed concern with the broad and ambiguous language of the rule. Unintentional errors can occur. Specific and defined consideration of the factors used to determine guilt or innocence is needed to be fair to alleged offenders. One commenter stated that FCIC must clear up any and all ambiguities under the proposed rule so all covered persons receive proper notice of their legal responsibilities. One commenter stated that the rule does not adequately define certain key terms that will provide adequate notice of prohibited conduct in the future. For example, the rule provides sanctions against persons who 'submit' or 'provide' false information related to the Federal crop insurance program. These terms do not provide adequate notice of prohibited conduct to agents or others who merely forward information or forms supplied or completed by others, but who submit the information and forms to insurance provider.

Response: In response to these and other comments, FCIC has added definitions and revised provisions to increase the clarity of the rule. Responses to these comments will also provide guidance. With respect to the terms ''submit'' and ''provide,'' the term submit is not used in the rule. The rule only refers to willfully and intentionally providing false or inaccurate information, consistent with section 515(h) of the Act, which uses the term ''provides.'' However, FCIC has revised the rule to add a definition of ''provides'' but without other specific examples, FCIC is unsure of what ambiguities the commenters are referring to.

List of Subjects in 7 CFR Parts 400, 407, and 457

Administrative practice and procedures; Administrative remedies for non-compliance.

Final Rule

■ Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR parts 400, 407 and 457, as follows:

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

■ 1. The authority citation for 7 CFR 400, subpart R is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o), and 7 U.S.C. 1515(h)

Subpart R—Administrative Remedies for Non-Compliance

■ 2. Revise the heading for subpart R to read as set forth above.

■ 3. Revise § 400.451 to read as follows:

§ 400.451 General.

(a) FCIC has implemented a system of administrative remedies in its efforts to ensure program compliance and prevent fraud, waste, and abuse within the Federal crop insurance program. Such remedies include civil fines and disqualifications under the authority of section 515(h) of the Act (7 U.S.C. 1515(h)); government-wide suspension and debarment under the authority of 48 CFR part 9, 48 CFR part 409, and 7 CFR part 3017; and civil fines and assessments under the authority of the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812).

(b) The provisions of this subpart apply to all participants in the Federal crop insurance program, including but not limited to producers, agents, loss adjusters, approved insurance providers and their employees or contractors, as well as any other persons who may provide information to a program participant and meet the elements for imposition of one or more administrative remedies contained in this subpart.

(c) Any remedial action taken pursuant to this subpart is in addition to any other actions specifically provided in applicable crop insurance policies, contracts, reinsurance agreements, or other applicable statutes and regulations.

(d) This rule is applicable to any violation occurring on and after January 20, 2009.

(e) The purpose of the remedial actions authorized in this subpart are for the protection of the public interest from potential harm from persons who have abused the Federal crop insurance program, maintaining program integrity, and fostering public confidence in the program.

■ 4. Revise § 400.452 to read as follows:

§ 400.452 Definitions.

For purposes of this subpart:

Act. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the disqualification, suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the disqualified, suspended, debarred, ineligible, or voluntarily excluded person.

Agency. The person authorized by an approved insurance provider, or its designee, to sell and service a crop

insurance policy under the Federal crop insurance program.

Agent. Has the same meaning as the term in 7 CFR 400.701.

Agricultural commodity. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Approved insurance provider. Has the same meaning as the term in 7 CFR 400.701.

Benefit. Any advantage, preference, privilege, or favorable consideration a person receives from another person in exchange for certain acts or considerations. A benefit may be monetary or non-monetary.

FCIC. Has the same meaning as the term in 7 CFR 400.701.

Key employee. Any person with primary management or supervisory responsibilities or who has the ability to direct activities or make decisions regarding the crop insurance program.

Knows or has reason to know. When a person, with respect to a claim or statement:

(1)(i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(iii) Acts in reckless disregard of the truth or falsity of the claim or statement; and

(2) No proof of specific intent is required.

Managing General Agent. Has the same meaning as the term in 7 CFR 400.701.

Material. A violation that causes or has the potential to cause a monetary loss to the crop insurance program or it adversely affects program integrity, including but not limited to potential harm to the program's reputation or allowing persons to be eligible for benefits they would not otherwise be entitled.

Participant. Any person who obtains any benefit that is derived in whole or in part from funds paid by FCIC to the approved insurance provider or premium paid by the producer. Participants include but are not limited to producers, agents, loss adjusters, agencies, managing general agencies, approved insurance providers, and any person associated with the approved insurance provider through employment, contract, or agreement.

Person. An individual, partnership, association, corporation, estate, trust or other legal entity, any affiliate or principal thereof, and whenever applicable, a State or political subdivision or agency of a State. ''Person'' does not include the United States Government or any of its agencies.

Policy. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Preponderance of the evidence. Proof by information that, when compared with the opposing evidence, leads to the conclusion that the fact at issue is probably more true than not.

Principal. A person who is an officer, director, owner, partner, key employee, or other person within an entity with primary management or supervisory responsibilities over the entity's federal crop insurance activities; or a person who has a critical influence on or substantive control over the federal crop insurance activities of the entity.

Producer. A person engaged in producing an agricultural commodity for a share of the insured crop, or the proceeds thereof.

Provides. Means to make available, supply or furnish with. The term includes any transmission of the information from one person to another person. For example, a producer writes information on forms and gives it to the agent and the agent transmits that information to the insurance provider. In both instances, the information is ''provided'' for the purpose of this rule.

Reinsurance agreement. Has the same meaning as the term in 7 CFR 400.161, except that such agreement is only between FCIC and the approved insurance provider.

Requirement of FCIC. Includes, but is not limited to, formal communications, such as a regulation, procedure, policy provision, reinsurance agreement, memorandum, bulletin, handbook, manual, finding, directive, or letter, signed or issued by a person authorized by FCIC to provide such communication on behalf of FCIC, that requires a particular participant or group of participants to take a specific action or to cease and desist from a taking a specific action (e-mails will not be considered formal communications although they may be used to transmit a formal communication). Formal communications that contain a remedy in such communication in the event of a violation of its terms and conditions will not be considered a requirement of FCIC unless such violation arises to the level where remedial action is appropriate. (For example, multiple violations of the same provision in separate policies or procedures or multiple violations of different provisions in the same policy or procedure.)

Violation. Each act or omission by a person that satisfies all required elements for the imposition of a disqualification or a civil fine contained in § 400.454.

Willful and intentional. To provide false or inaccurate information with the knowledge that the information is false or inaccurate at the time the information is provided; the failure to correct the false or inaccurate information when its nature becomes known to the person who made it; or to commit an act or omission with the knowledge that the act or omission is not in compliance with a ''requirement of FCIC'' at the time the act or omission occurred. No showing of malicious intent is necessary.

■ 5. Revise § 400.454 to read as follows:

§ 400.454 Disqualification and civil fines.

(a) Before any disqualification or civil fine is imposed, FCIC will provide the affected participants and other persons with notice and an opportunity for a hearing on the record in accordance with 7 CFR part 1, subpart H.

(1) Proceedings will be initiated when the Manager of FCIC files a complaint with the Hearing Clerk, United States Department of Agriculture.

(2) Disqualifications become effective:

(i) On the date specified in the order issued by the Administrative Law Judge or Judicial Officer, as applicable, or if no date is specified in the order, the date that the order was issued.

(ii) With respect to a settlement agreement with FCIC, the date contained in the settlement agreement or, if no date is specified, the date that such agreement is executed by FCIC.

(3) Disqualification and civil fines may only be imposed if a preponderance of the evidence shows that the participant or other person has met the standards contained in § 400.454(b). FCIC has the burden of proving that the standards in § 400.454(b) have been met.

(4) Disqualification and civil fines may be imposed regardless of whether FCIC or the approved insurance provider has suffered any monetary losses. However, if there is no monetary loss, disqualification will only be imposed if the violation is material in accordance with § 400.454(c).

(b) Disqualification and civil fines may be imposed on any participant or person who willfully and intentionally:

(1) Provides any false or inaccurate information to FCIC or to any approved insurance provider with respect to a policy or plan of insurance authorized under the Act either through action or omission to act when there is knowledge that false or inaccurate information is or will be provided; or

(2) Fails to comply with a requirement of FCIC.

(c) When imposing any disqualification or civil fine:

(1) The gravity of the violation must be considered when determining:

(i) Whether to disqualify a participant or other person;

(ii) The amount of time that a participant or other person should be disqualified;

(iii) Whether to impose a civil fine; and

(iv) The amount of a civil fine that should be imposed.

(2) The gravity of the violation includes consideration of whether the violation was material and if it was material:

(i) The number or frequency of incidents or duration of the violation;

(ii) Whether there is a pattern or prior history of violation;

(iii) Whether and to what extent the person planned, initiated, or carried out the violation;

(iv) Whether the person has accepted responsibility for the violation and recognizes the seriousness of the misconduct that led to the cause for disqualification or civil fine;

(v) Whether the person has paid all civil and administrative liabilities for the violation;

(vi) Whether the person has cooperated fully with FCIC (In determining the extent of cooperation, FCIC may consider when the cooperation began and whether the person disclosed all pertinent information known to that person at the time);

(vii) Whether the violation was pervasive within the organization;

(viii) The kind of positions held by the persons involved in the violation;

(ix) Whether the organization took prompt, appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence;

(x) Whether the principals of the organization tolerated the offense;

(xi) Whether the person brought the violation to the attention of FCIC in a timely manner;

(xii) Whether the organization had effective standards of conduct and internal control systems in place at the time the violation occurred;

(xiii) Whether the organization has taken appropriate disciplinary action against the persons responsible for the violation;

(xiv) Whether the organization had adequate time to eliminate the violation that led to the cause for disqualification or civil fine;

(xv) Other factors that are appropriate to the circumstances of a particular case.

(3) The maximum term of disqualification and civil fines will be imposed against:

(i) Participants and other persons, except insurance providers who:

(A) Commit multiple violations in the same crop year or over several crop years; or

(B) Commit a single violation but such violation results in an overpayment of more than $100,000;

(ii) Approved insurance providers who:

(A) Commit a single violation resulting in an overpayment in excess of $100,000; and

(B) Commit multiple acts of violations resulting in an overpayment in excess of $500,000; and

(iii) Any participant or person who commits such other action or omission of so serious a nature that imposition of the maximum is appropriate.

(d) With respect to the imputing of conduct:

(1) The conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, in violation of § 400.454(b) may be imputed to that organization when such conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the violation is evidence of knowledge, approval or acquiescence.

(2) The conduct of any organization in violation of § 400.454(b) may be imputed to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, knows, or had reason to know of such conduct.

(3) The conduct of one organization in violation of § 400.454(b) may be imputed to another organization when such conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(4) If such conduct is imputed, the person to whom the conduct is imputed to may be subject to the same disqualification and civil fines as the person from whom the conduct is imputed. The factors contained in § 400.454(c)(2) will be taken into consideration with respect to the person to whom the conduct is being imputed.

(e) With respect to disqualifications:

(1) If a person is disqualified and that person is a:

(i) Producer, the producer will be precluded from receiving any monetary or non-monetary benefit provided under all of the following authorities, or their successors:

(A) The Act;

(B) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*) or any successor statute;

(C) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*) or any successor statute;

(D) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*) or any successor statute;

(E) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*) or any successor statute;

(F) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*) or any successor statute;

(G) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921, *et seq.*) or any successor statute; and

(H) Any federal law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.

(ii) Participant or other person, other than a producer, such participant or person will be precluded from participating in any way in the Federal crop insurance program and receiving any monetary or non-monetary benefit under the Act.

(2) With respect to the term of disqualification:

(i) The minimum term will be not less than one year from the effective date determined in § 400.454(a)(2);

(ii) The maximum term will be not more than five years from the effective date determined in § 400.454(a)(2); and

(iii) Disqualification is to be imposed only in one-year increments, up to the maximum five years.

(3) Once a disqualification becomes final, the name, address, and other identifying information of the participant or other person shall be entered into the Ineligible Tracking System (ITS) maintained by FCIC in accordance with 7 CFR part 400, subpart U, and this information along with a list of the programs that the person is disqualified from shall be promptly reported to the General Services Administration for listing in the Excluded Parties List System (EPLS) in accordance with 7 CFR part 3017, subpart E.

(i) It is a participant's responsibility to periodically review the ITS and EPLS to

determine those participants and other persons who have been disqualified.

(ii) No participant may conduct business with a disqualified participant or other person if such business directly relates to the Federal crop insurance program, or if, through the business relationship, the disqualified participant or other person will derive any monetary or non-monetary benefit from a program administered under the Act.

(iii) If a participant or other person does business with a disqualified participant or other person, such participant may be subject to disqualification under this section.

(iv) Continuing to make payments to a disqualified person to fulfill pre-existing contractual or statutory obligations after the business relationship is terminated will not be considered as doing business with a disqualified person unless such payment is used as a means to circumvent the disqualification process.

(f) With respect to civil fines:

(1) A civil fine may be imposed for each violation.

(2) The amount of such civil fine shall not exceed the greater of:

(i) The amount of monetary gain, or value of the benefit, obtained as a result of the false or inaccurate information provided, or the amount obtained as a result of noncompliance with a requirement of FCIC; or

(ii) $10,000.

(3) Civil fines are debts owed to FCIC.

(i) A civil fine that is either imposed under with this subpart, or agreed to through an executed settlement agreement with FCIC, must be paid by the specified due date. If the due date is not specified in the order issued by the Administrative Law Judge or Judicial Officer, as applicable, or the settlement agreement, it shall be 30 days after the date the order was issued or the settlement agreement signed by FCIC.

(ii) Any civil fine imposed under this section is in addition to any debt that may be owed to FCIC or to any approved insurance provider, such an overpaid indemnity, underpaid premium, or other amounts owed.

(iii) FCIC, in its sole discretion, may reduce or otherwise settle any civil fine imposed under this section whenever it considers it appropriate or in the best interest of the USDA.

(4) The ineligibility procedures established in 7 CFR part 400, subpart U are not applicable to ineligibility determinations made under this section for nonpayment of civil fines.

(5) If a civil fine has been imposed and the person has not made timely payment for the total amount due, the person is ineligible to participate in the Federal crop insurance program until the amount due is paid in full.

(g) With respect to any person that has been disqualified or is otherwise ineligible due to non-payment of civil fines in accordance with § 400.454(f):

(1) With respect to producers:

(i) All existing insurance policies will automatically terminate as of the next termination date that occurs during the period of disqualification and while the civil fine remains unpaid;

(ii) No new policies can be purchased, and no current policies can be renewed, between the date that the producer is disqualified and the date that the disqualification ends; and

(iii) New application for insurance cannot be made for any agricultural commodity until the next sales closing date after the period of disqualification has ended and the civil fine is paid in full.

(2) With respect to all other persons:

(i) Such person may not be involved in any function related to the Federal crop insurance program during the disqualification or ineligibility period (including the sale, service, adjustment, data transmission or storage, reinsurance, etc. of any crop insurance policy) or receive any monetary or non-monetary benefit from a program administered under the Act.

(ii) If the person is an agent or insurance agency, the producers may cancel their policies sold and serviced by the disqualified agent and rewrite the policy with another agent. If the producer does not cancel and rewrite the policy with another agent, the approved insurance provider must assign the policies to a different agent or agency to service during the period of disqualification or ineligibility. Policies that have been assigned to another agent or agency by the insurance provider will revert back to the disqualified agent or agency after the period of disqualification has ended provided all civil fines are paid in full and the producer does not cancel and rewrite the policy with a different agent or agency;

(iii) If the person is an approved insurance provider, the approved insurance provider shall not sell, or authorize to be sold, any new policies or may not renew, or authorize the renewal of, existing policies, as determined by FCIC, during the period of disqualification or ineligibility. Nothing in this provision affects the approved insurance provider's responsibilities with respect to the service of existing policies.

(h) Imposition of disqualification or a civil fine under this section is in addition to any other administrative or legal remedies available under this section or other applicable law including, but not limited to, debarment and suspension.

■ 6. Revise § 400.455 to read as follows:

§ 400.455 Governmentwide debarment and suspension (procurement).

(a) For all transactions undertaken pursuant to the Federal Acquisition Regulations, FCIC will proceed under 48 CFR part 9, subpart 9.4 or 48 CFR part 409 when taking action to suspend or debar persons involved in such transactions, except that the authority to suspend or debar under these provisions will be reserved to the Manager of FCIC, or the Manager's designee.

(b) Any person suspended or debarred under the provisions of 48 CFR part 9, subpart 9.4 or 48 CFR part 409 will not be eligible to contract with FCIC or the Risk Management Agency and will not be eligible to participate in or receive any benefit from any program under the Act during the period of ineligibility. This includes, but is not limited to, being employed by or contracting with any approved insurance provider that sells, services, or adjusts policies offered under the authority of the Act. FCIC may waive this provision if it is satisfied that the person who employs the suspended or debarred person has taken sufficient action to ensure that the suspended or debarred person will not be involved, in any way, with FCIC or receive any benefit from any program under the Act.

■ 7. Revise § 400.456 to read as follows:

§ 400.456 Governmentwide debarment and suspension (nonprocurement).

(a) FCIC will proceed under 7 CFR part 3017 when taking action to suspend or debar persons involved in non-procurement transactions.

(b) Any person suspended or debarred under the provisions of 7 CFR part 3017, will not be eligible to contract with FCIC or the Risk Management Agency and will not be eligible to participate in or receive any benefit from any program under the Act during the period of ineligibility. This includes, but is not limited to, being employed by or contracting with any approved insurance provider, or its contractors, that sell, service, or adjust policies either insured or reinsured by FCIC. FCIC may waive this provision if it is satisfied that the approved insurance provider or contractors have taken sufficient action to ensure that the suspended or debarred person will not be involved in any way with the Federal crop insurance program or receive any benefit from any program under the Act.

(c) The Manager, FCIC, shall be the debarring and suspending official for all debarment or suspension proceedings undertaken by FCIC under the provisions of 7 CFR part 3017.

■ 8. Amend § 400.457 by adding a new paragraph (d) to read as follows:

§ 400.457 Program Fraud Civil Remedies Act.

* * * * *

(d) Civil penalties and assessments imposed pursuant to this section are in addition to any other remedies that may be prescribed by law or imposed under this subpart.

§ 400.458 [Amended]

■ 9. Amend § 400.458 by removing paragraph (b)(2), adding an ''or'' at the end of paragraph (b)(1) and redesignating paragraph (b)(3) as paragraph (b)(2).

§ 400.459 [Removed]

■ 10. Remove § 400.459.

PART 407—GROUP RISK PLAN OF INSURANCE REGULATIONS

■ 11. The authority citation for 7 CFR part 407 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 12. Amend § 407.9, Group Risk Plan Common Policy, by adding a new section 22 at the end to read as follows:

§ 407.9 Group risk plan common policy.

* * * * *

22. Remedial Sanctions

If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(a) A civil fine for each violation in an amount not to exceed the greater of:

(1) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(2) $10,000; and

(b) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(1) Any crop insurance policy offered under the Act;

(2) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(3) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(4) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(5) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(6) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(7) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(8) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 13. The authority citation for 7 CFR part 457 is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 14. Amend § 457.8, Common Crop Insurance Policy Basic Provisions, by adding a new paragraph (e) at the end of section 27 to read as follows:

§ 457.8 The application and policy.

* * * * *

27. Concealment, Misrepresentation or Fraud.

* * * * *

(e) If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(1) A civil fine for each violation in an amount not to exceed the greater of:

(i) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(ii) $10,000; and

(2) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(i) Any crop insurance policy offered under the Act;

(ii) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(viii) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

* * * * *

Signed in Washington, DC on December 12, 2008.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

[FR Doc. E8–30073 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 274a

[Docket No. USCIS–2007–0055; CIS No. 2428–07]

RIN 1615–AB65

Changes to Requirements Affecting H–2A Nonimmigrants

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This final rule amends Department of Homeland Security regulations regarding temporary and seasonal agricultural workers, and their U.S. employers, within the H–2A nonimmigrant classification. The final rule removes certain limitations on H–2A employers and adopts streamlining measures in order to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. The final rule also addresses concerns regarding the integrity of the H–2A program and sets forth several conditions to prevent fraud and to protect laborers' rights. The purpose of the final rule is to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers.

The rule revises the current limitations on agricultural workers' length of stay including lengthening the amount of time an agricultural worker may remain in the United States after his or her employment has ended and shortening the time period that an agricultural worker whose H–2A nonimmigrant status has expired must wait before he or she is eligible to obtain H–2A nonimmigrant status again. This rule also provides for temporary employment authorization to agricultural workers seeking an extension of their H–2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user in good standing with the E-Verify employment eligibility verification program. In addition, DHS modifies the current notification and

payment requirements for employers when an alien fails to show up at the start of the employment period, an H–2A employee's employment is terminated, or an H–2A employee absconds from the worksite. To better ensure the integrity of the H–2A program, this rule also requires certain employer attestations and precludes the imposition of fees by employers or recruiters on prospective beneficiaries. Under this final rule, DHS also will revoke an H–2A petition if the Department of Labor revokes the petitioner's underlying labor certification. Also, this rule provides that DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2A program. These changes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

Finally, this rule establishes criteria for a pilot program under which aliens admitted on certain temporary worker visas at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographical information upon departure. U.S. Customs and Border Protection (CBP) will publish a Notice in the **Federal Register** designating which temporary workers must participate in the program, which ports of entry are participating in the program, and the types of information that CBP will collect from the departing workers.

DATES: This rule is effective January 17, 2009.

FOR FURTHER INFORMATION CONTACT: Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, telephone (202) 272–8410.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

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I. Background

A. Proposed Rule

The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States. Immigration and Nationality Act (Act or INA) section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H–2A classification). Despite the availability of the H–2A nonimmigrant classification, a high percentage of the agricultural workforce is comprised of aliens who have no immigration status and are unauthorized to work. In response to members of the public citing what they consider to be unnecessarily burdensome regulatory restrictions placed on the H–2A nonimmigrant classification and resulting limits on the utility of this nonimmigrant category to U.S. agricultural employers, the Department of Homeland Security (DHS) published a notice of proposed rulemaking on February 13, 2008, proposing to amend its regulations regarding the H–2A nonimmigrant classification. 73 FR 8230. On the same date, the Department of Labor (DOL) published a notice of proposed rulemaking to amend its regulations regarding the certification of H–2A employment and the enforcement of the contractual obligations applicable to H–2A employers. 73 FR 8538.

DHS, among other changes, proposed to:

- Relax the limitations on naming beneficiaries on the H–2A petition who are outside of the United States.
- Permit H–2A employers to file only one petition when petitioning for multiple H–2A beneficiaries from multiple countries.
- Deny or revoke any H–2A petition if the alien-beneficiary paid or agreed to pay any prohibited fee or other form of compensation to the petitioner, or, with the petitioner's knowledge, to a facilitator, recruiter, or similar employment service, in connection with the H–2A employment.
- Require H–2A petitioners: (a) To attest that they will not materially change the information provided on the Form I–129 and the temporary labor certification; (b) to attest that they have not received and do not intend to receive, any fee, compensation, or other form of remuneration from prospective H–2A workers; and (c) to identify any facilitator, recruiter, or similar employment service that they used to locate foreign workers.
- Require H–2A petitioners to provide written notification to DHS, or be subject to an imposition of $500 in liquidated damages, within forty-eight hours if: (a) An H–2A worker fails to report to work within five days of the date of the employment start date; (b) the employment terminates more than five days early; or (c) the H–2A worker has not reported for work for a period of five days without the consent of the employer.
- Clarify that DHS will not accord H–2A status to any alien who has violated any condition of H–2A nonimmigrant status within the previous five years.
- Immediately and automatically revoke an H–2A petition upon the revocation of the underlying labor certification by DOL.
- Refuse to approve H–2A petitions filed on behalf of beneficiaries from or to grant admission to aliens from countries determined by DHS to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal.
- Extend the H–2A admission period following the expiration of the H–2A petition from not more than 10 days to 30 days.
- Reduce from 3 months to 45 days the minimum period spent outside the United States that would interrupt the accrual of time toward the 3-year maximum period of stay where the accumulated stay is 18 months or less, and to reduce such minimum period from 1/6 of the period of accumulated stay to 2 months if the accumulated stay is longer than 18 months.
- Reduce from 6 months to 3 months the period that an individual who has held H–2A status for a total of 3 years must remain outside of the United States before he or she may be granted H–2A nonimmigrant status again.
- Extend H–2A workers' employment authorization for up to 120 days while they are awaiting an extension of H–2A status based on a petition filed by a new employer, provided that the new employer is a registered user in good standing in DHS's E-Verify program.
- Impose on sheepherders the departure requirement applicable to all H–2A workers.
- Establish a temporary worker exit program on a pilot basis that would require certain H–2A workers to register at the time of departure from the United States.

DHS initially provided a 45-day comment period in the proposed rule, which ended on March 31, 2008. DHS provided an additional 15-day comment

period from April 1, 2008 through April 14, 2008. During this 60-day comment period, DHS received 163 comments. DHS received comments from a broad spectrum of individuals and organizations, including various agricultural producers, agricultural trade associations, farm workers' labor unions, civil and human rights advocacy organizations, agricultural producers' financial cooperatives, farm management services companies, voluntary public policy organizations, private attorneys, state government agencies, a Member of Congress, and other interested organizations and individuals. During the public comment period, DHS officials, together with those from DOL, also met with stakeholders to discuss the proposed rule. Meeting participants were encouraged to submit written comments on the rule.

DHS considered the comments received and all other materials contained in the docket in preparing this final rule. The final rule does not address comments seeking changes in United States statutes, changes in regulations or petitions outside the scope of the proposed rule, or changes to the procedures of other DHS components or agencies.

All comments and other docket materials may be viewed at the Federal Docket Management System (FDMS) at *http://www.regulations.gov,* docket number USCIS–2007–0055.

B. Discussion of the Final Rule

The final rule adopts many of the regulatory amendments set forth in the proposed rule. The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid with respect to these regulatory amendments, and DHS adopts such reasoning in support of the promulgation of this final rule. Based on the public comments received in response to the proposed rule, however, DHS has modified some of the proposed changes for the final rule as follows.

1. Notification and Liquidated Damages Requirements

The final rule requires petitioners to notify DHS, within two workdays, beginning on a date and in a manner specified in a notice published in the **Federal Register**, of the following circumstances: (a) An H–2A worker's failure to report to work within five workdays of the employment start date on the H–2A petition or within five workdays of the start date established by his or her employer, whichever is later; (b) an H–2A worker's completion of agricultural labor or services 30 days or more before the date specified by the petitioner in its H–2A petition; or (c) an H–2A worker's absconding from the worksite or termination prior to the completion of the agricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(5)(vi)(B)(*1*). By ''workday,'' DHS means the period between the time on any particular day when such employee commences his or her principal activity and the time on that day at which he or she ceases such principal activity or activities.

a. Liquidated Damages

DHS has revisited the proposed increase in liquidated damages from $10 to $500 for an employer's failure to comply with the notification requirement. For the time being, DHS will retain the liquidated damages provision under 8 CFR 214.2(h)(5)(vi)(B)(*3*), and require an employer who fails to comply with the notification requirements, as revised under this final rule, to pay liquidated damages in the amount of $10.

b. Timeframes Triggering Notification Requirement

To minimize the impacts on petitioners, the final rule relaxes the notification requirement in response to commenters' concerns that the proposed timeframes were not workable within current business realities. The final rule allows an employer, in certain circumstances, to use a start date newly established by the employer as the notification trigger date. The final rule also clarifies that the H–2A worker must report to work within five ''workdays'' of the employment start date, rather than the proposed five days. If the H–2A worker does not timely report to the worksite, the H–2A employer must report this violation to DHS within two workdays, rather than the proposed 48 hours. The final rule adopts the term ''workdays'' to ensure that H–2A employers are clear on the reporting deadlines. The final rule also requires DHS notification where the work is completed 30 days early rather than the proposed five days. The rule relieves the employer of its obligation to notify DHS when the worker's employment terminates upon completion of the work (unless the work is completed more than 30 days early). The final rule also provides that, if the petitioner demonstrates in the notification itself that good cause exists for an untimely notification to DHS, then DHS, in its discretion, may waive the liquidated damages amount.

c. Remedy for Petitioners

While the notification provision furthers DHS's enforcement goals of locating aliens who have not met the terms of their nonimmigrant status, DHS recognizes that the current regulations do not provide a sufficient remedy to petitioners that ''lose'' H–2A workers before the completion of work in the instances covered in the notification provision. Under the current regulations, petitioners may replace H–2A workers whose employment was terminated before the work has been completed. 8 CFR 214.2(h)(5)(ix). Such petitioners must file a new H–2A petition using a copy of the previously approved temporary labor certification to request replacement workers. However, the current regulations do not cover situations where H–2A workers fail to show up at the worksite or abscond.

To minimize the adverse impact on petitioners who lose workers for these reasons, DHS has determined that petitioners should be permitted to seek substitute H–2A workers in these instances, as well, provided that petitioners comply with the notification requirements in 8 CFR 214.2(h)(5)(vi). Thus, the final rule allows a petitioner to file an H–2A petition using a copy of the previously-approved temporary labor certification to replace an H–2A worker where: (a) An H–2A worker's employment was terminated early (i.e., before the completion of work); (b) a prospective H–2A worker fails to report to work within five workdays of the employment start date on the previous H–2A petition or within five workdays of the date established by his or her employer, whichever is later; or (c) an H–2A worker absconds from the worksite. New 8 CFR 214.2(h)(5)(ix). These three instances parallel the instances that trigger the notification requirement in new 8 CFR 214.2(h)(5)(vi)(B)(1) (except where the work for which the petitioner needed H–2A workers has been completed).

d. Retention of Evidence of a Change in Employment Start Date

The final rule also adds to the provision requiring the petitioner to retain evidence of its notification to DHS a requirement that the petitioner also retain evidence of a different employment start date for one year if the start date has changed from that stated on the H–2A petition. New 8 CFR 214.2(h)(5)(vi)(B)(*2*). Since the notification provision allows for the petitioner to use a new start date that the petitioner has established rather than the start date stated in the H–2A

petition, DHS believes that it must require the employer to retain evidence of the change in the start date to protect against misrepresentations by the petitioner regarding the employment start date.

e. Response Period Upon Receipt of a Notice of Noncompliance With the Notification Requirement

The final rule extends from 10 days to 30 days the time period within which a petitioner must reply to a DHS notice of noncompliance with the notification requirement. New 8 CFR 214.2(h)(5)(vi)(C). Based upon comments received, DHS recognizes that small businesses may have difficulty in responding to a DHS notice within 10 days. Many do not have a human resources department to handle administrative tasks and may find it difficult to respond to a notice within 10 days, especially if the notice arrives during the petitioner's busiest season. DHS believes that a 30-day time period for responding to a notice is reasonable.

2. Payment of Fees by Aliens To Obtain H–2A Employment

To address some commenters' concerns about the proposed provisions addressing job placement-related fees paid by beneficiaries to obtain H–2A employment, the final rule makes several clarifications and changes.

First, the final rule specifies that the fees prohibited by the rule do not include the lower of the fair market value or the actual costs of transportation to the United States and any payment of government-specified fees required of persons seeking to travel to the United States (*e.g.*, fees required by a foreign government for issuance of passports, fees imposed by the U.S. Department of State for issuance of visas, inspection fees), except where the passing of such costs to the worker is prohibited by statute or the Department of Labor's regulations. See 20 CFR 655.104(h). Prospective H–2A workers may be required to pay such costs, unless the prospective employer has agreed with the alien to pay such fees and/or transportation costs. New 8 CFR 214.2(h)(5)(xi)(A). DHS determined that payment of these costs by the H–2A worker should not be prohibited since they are personal costs related to the alien's travel to the United States, rather than fees charged by a recruiter or employer for finding employment.

Second, to clarify the standard for the petitioner's knowledge of fees being paid by the alien, the final rule modifies the standard to include both knowledge by the petitioner and circumstances in which the petitioner should reasonably know that that worker has paid or has entered an agreement to pay the prohibited fees.

Third, the final rule offers petitioners a means by which to avoid denial or revocation (following notice to the petitioner) of the H–2A petition in cases where USCIS determines that the petitioner knows or reasonably should know that the worker has agreed to pay the prohibited fees as a condition of obtaining H–2A employment. In cases where prohibited fees were collected prior to petition filing, and in cases where prohibited fees were collected by the labor recruiter or agent after petition filing, USCIS will not deny or revoke the petition if the petitioner demonstrates that the beneficiary has been reimbursed in full for fees paid or, if the fees have not yet been paid, that the agreement to pay such fees has been terminated. Additionally, as an alternative to reimbursement in the case where the prohibition is violated by the recruiter or agent after the filing of the petition, the petitioner may avoid denial or revocation of the petition by notifying DHS of the improper payments, or agreement to make such payments, within two workdays of finding out about such payments or agreements. If the H–2A petition is denied or revoked on these grounds, then, as a condition of approval of future H–2A petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. New 8 CFR 214.2(h)(5)(xi)(C).

Fourth, the final rule does not include the requirement that the petitioner submit a separate document attesting to: The scope of the H–2A employment and the use of recruiters to locate H–2A workers, and the absence of any payment of prohibited recruitment fees by the beneficiary. Although petitioners will be required to attest to these factors, DHS is instead amending the Form I–129 to include those attestation provisions rather than requiring petitioners to submit a separate attestation document. DHS has determined that a separate attestation would increase petitioners' administrative burdens as well as duplicate much of the same information that petitioner must provide on the H–2A petition to establish eligibility.

3. Revocation of Labor Certification

The final rule addresses the effect of the revocation of temporary labor certifications by DOL on H–2A petitioners and their beneficiaries. This rule provides for the immediate and automatic revocation of the H–2A petition if the underlying temporary labor certification is revoked by DOL. New 8 CFR 214.2(h)(5)(xii). DHS believes that immediate and automatic revocation of the petition is a necessary consequence of a revocation of the temporary labor certification. The temporary labor certification is the basis for the petition, and DHS does not have the expertise to second-guess DOL's decision to revoke the temporary labor certification.

Because the denial or revocation of a petition based on the revocation of temporary labor certification will have a direct effect on an H–2A worker's status, DHS will authorize the alien beneficiary's period of stay for an additional 30-day period for the purpose of departure or extension of stay based upon a new offer of employment. *Id.* During this 30-day period, such alien will not be deemed to be unlawfully present in the United States. *Id.; see also* INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B) (description of unlawful presence). Although DHS also proposed to require a petitioner to pay for the alien's reasonable transportation costs of return to his or her last place of foreign residence abroad after DHS revokes a petition for improper payment of fees, DHS has removed that requirement from this final rule.

4. Violations of H–2A Status

The final rule clarifies that DHS will deny H–2A nonimmigrant status based on a finding that the alien violated any condition of H–2A status within the past 5 years, unless the violation occurred through no fault of the alien. DHS has added this clarification to ensure that this provision will not adversely affect the aliens whose previous violations of status were caused by illegal or inappropriate conduct by their employers. New 8 CFR 214.2(h)(5)(viii)(A).

5. Permitting H–2A Petitions for Nationals of Participating Countries

The final rule modifies the proposal that would have precluded DHS from approving an H–2A petition filed on behalf of aliens from countries that consistently deny or unreasonable delay the prompt return of their citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. DHS will now publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2A program. In designating countries to

allow the participation of their nationals in the H–2A program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. Initially, the list will be composed of countries that are important for the operation of the H–2A program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H–2A program during the last three fiscal years. Additional details on how this list will be administered are included in the discussion in response to comments received on this proposed provision below.

6. Conforming Amendments and Non-Substantive Changes

The final rule makes conforming amendments to 8 CFR 214.2(h)(2)(B) and (C) by providing that the form instructions will contain information regarding appropriate filing locations for the H–1B, H–2A, H–2B, and H–3 classifications. The final rule also makes conforming amendments to 8 CFR 214.2(h)(5)(v)(B) and 8 CFR 214.2(h)(5)(v)(C) to clarify job qualification documentation requirements and the timing for such documents to be filed for named and unnamed beneficiaries. Finally, the final rule includes non-substantive structure or wording changes from the proposed rule for purposes of clarity and readability.

II. Public Comments on the Proposed Rule

A. Summary of Comments

Out of the 163 comments USCIS received on the proposed rule, several comments supported the proposals in the rule as a whole and welcomed DHS's recognition of the need for H–2A workers and for modifications to the current H–2A regulations. Agricultural employers submitted 115 of the total comments received.

Most commenters generally supported the streamlining measures in the proposed rule, such as: Removing the requirement to name the sole beneficiary and beneficiaries who are outside of the United States if the beneficiaries are named in the labor certification; permitting an employer to file only one petition for multiple beneficiaries from multiple countries; extending the admission period to 30 days after the conclusion of the H–2A employment; and reducing the required time abroad once an H–2A worker has reached the maximum period of stay before being able to seek H–2A nonimmigrant status again. However, many commenters were opposed to several changes that they believe will impose additional burdens and costs on farm businesses. They suggested that some of the proposed changes could lead to a decrease in usage of the H–2A program, such as the following proposals: Precluding the current practice of approving H–2A petitions that are filed with denied temporary labor certifications; authorizing USCIS to deny or revoke upon notice any H–2A petition if it determines that the beneficiary paid a fee in connection with or as a condition of obtaining the H–2A employment; modifying the current notification and liquidated damages requirements; providing for the immediate and automatic revocation of the petition upon the revocation of the labor certification; and imposing on sheepherders the same departure requirement applicable to all H–2A workers. Many commenters also were concerned about the proposals to authorize employment of H–2A workers while they are changing employers (if the new employer is a participant in good standing in E-Verify) and to institute a land-border exit system for certain H–2A workers on a pilot basis.

The concerns of the commenters summarized above and additional, more specific comments are organized by subject area and addressed below.

B. General Comments

1. Comments From the Dairy Industry

Comment: Several commenters expressed disappointment about what was described as the continued exclusion of the dairy industry from the H–2A program.

Response: DHS notes that most dairy farmer's needs are year-round and, therefore, may not be able to meet the requirements of the H–2A program. Dairy farmers that can demonstrate a temporary need for H–2A workers, however, are able to utilize the program. The applicable statute precludes DHS from extending the program to work that is considered permanent. *See* INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).

2. U.S. and Foreign Worker Protections

Comment: DHS received some comments that urged the withdrawal of the proposed rule entirely on the basis that the rule fails to reflect the critical balance between the nonimmigrant labor force and the U.S. workforce and undermines critical labor protections that serve as the foundation of the H–2A program. Some commenters also opined that the proposed rule would result in the exploitation of temporary foreign workers and the undermining of wages and working conditions of U.S. workers.

Response: DHS is aware of its responsibility to help maintain the careful balance between preserving jobs for U.S. workers and administering nonimmigrant programs designed to invite foreign workers to the United States. The final rule contains two major revisions to the regulations designed to protect U.S. workers: (1) Removal of DHS's authority to approve H–2A petitions filed with temporary labor certifications that have been denied by DOL (revised 8 CFR 214.2(h)(5)(i)(A)); and (2) the addition of a provision to provide for the immediate and automatic revocation of an H–2A petition upon the revocation of the temporary labor certification by DOL (new 8 CFR 214.2(h)(5)(xii)). DHS believes that a temporary labor certification process is required to protect U.S. workers.

In order to protect foreign workers from exploitation, the final rule requires petitioners to return any recruiter or finders' fees paid by alien beneficiaries as a condition of the H–2A employment if paid with the knowledge of the petitioner (or if the petitioner reasonably should have known about the payment). *See* new 8 CFR 214.2(h)(5)(xi)(A). Failure to return the prohibited fees to the beneficiaries will result in the denial or revocation of the H–2A petition.

3. Lack of Enforcement Against the Employment of Unauthorized Aliens

Comment: A few commenters criticized the lack of a sound method for strong enforcement against employers that obtain and maintain a workforce of unauthorized aliens while the rule proposed to impose stiffer fines, revocations, and increase in costs to those employers who are trying to obtain and maintain a legal workforce through the H–2A program.

Response: U.S. Immigration and Customs Enforcement (ICE) is charged with enforcing the laws against the

employment of unauthorized aliens, including the applicable provisions at section 274A of the INA, 8 U.S.C. 1324a. Enforcement of these provisions is outside the scope of this rulemaking. The purpose of this rule is to strengthen the integrity of the H–2A program so that employers will be encouraged to obtain workers through the H–2A program rather than through unlawful means. The added authority to deny or revoke petitions, and any increase in costs to employers included in this rule reflect necessary anti-fraud and worker protection measures. Employers that follow the rules of the program will not be unreasonably affected by these measures.

C. Specific Comments

1. Consideration of Denied Temporary Agricultural Labor Certifications

Comment: Seventeen out of 24 commenters who discussed this issue objected to the removal of regulatory language permitting, in limited circumstances, the approval of H–2A petitions filed with temporary labor certifications that have been denied by DOL.

Response: After considering the commenters' objections, DHS nevertheless retains this proposal in this final rule as discussed in the comments and responses below. *See* new 8 CFR 214.2(h)(5)(i)(A).

Comment: Some commenters among those who objected to this proposal suggested that the INA vests the authority for making decisions on the H–2A workers' admission solely with DHS, not DOL.

Response: DHS's statutory authority is to determine whether or not to approve a petition for H–2A workers after consultation with DOL. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). By no longer permitting the approval of H–2A petitions in instances where DOL has denied the temporary labor certification, DHS does not believe that it is abrogating its statutory responsibility in adjudicating H–2A petitions. Rather, DHS is recognizing that it does not have the expertise in evaluating the current U.S. labor market to make a determination independent from DOL's determination on the temporary labor certification. It is therefore in the best interests of U.S. workers and the public in general that DHS relinquish its ability to approve H–2A petitions in the absence of the grant of such labor certification by DOL.

Comment: A few commenters pointed out that the language of the INA requires an employer only to apply for, not obtain, a temporary labor certification from the Secretary of Labor. *See* INA section 218(a)(1), 8 U.S.C. 1188(a)(1).

Response: DHS disagrees with the commenters' interpretation of the statute. While the statutory language only refers to a petitioner's application for a temporary labor certification, DHS believes that its interpretation of this language requiring petitioners also to obtain a temporary labor certification as a condition of H–2A employment is reasonable. A temporary labor certification certifies that there are insufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. INA section 218(a)(1), 8 U.S.C. 1188(a)(1). The statute includes the temporary labor certification requirement as a means to protect U.S. workers from losing jobs to foreign laborers. INA section 218(c)(3)(A), 8 U.S.C. 1188(c)(3)(A). Without requiring that the temporary labor certification actually be obtained by the petitioner, the temporary labor certification requirement would fail to offer such protection. Moreover, it is clear that the determinations as to the availability of U.S. workers and the effect on their wages and working conditions are within the expertise of DOL, not DHS. Without certification by the Secretary of Labor, DHS would not be well equipped to make a determination on the petition for an employer to import foreign workers. Additionally, section 214(a)(1) of the INA grants the Secretary of Homeland Security authority to establish by regulation the conditions for nonimmigrant admissions. 8 U.S.C. 1184(a)(1). This rule is establishing a requirement that employers obtain a temporary labor certification as a condition for an alien to be admitted as an H–2A nonimmigrant.

Comment: Many commenters who objected to this proposal suggested that this proposal and the lack of an expeditious process to make a new determination on the denied temporary labor certification will leave employers without recourse if U.S. workers do not report to work on the date of their need. They asserted that filing a petition without a temporary labor certification should be allowed in any circumstance where DOL denies certification or fails to act in a timely manner.

Response: In its final H–2A rule, DOL establishes a process for an employer to request re-determination of need if U.S. workers fail to report on the date of need. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS abrogates the process for approving H–2A petitions, in limited circumstances, that are filed with denied temporary labor certifications.

2. Unnamed Beneficiaries in the Petition

Comment: Ten commenters addressed and supported the proposal to allow H–2A petitions to include unnamed beneficiaries for those who are outside the United States regardless of the number of beneficiaries on the petition or whether the temporary labor certification named beneficiaries. They agreed that it would provide agricultural employers with more flexibility to recruit foreign workers months ahead of the actual date of stated need.

Response: Based on the support from the commenters, the final rule adopts this proposal with minor changes. The changes discussed below concern beneficiaries from countries that have not been designated as participating countries under the H–2A program as well as minor, nonsubstantive changes to improve the clarity of the text. The final rule revises 8 CFR 214.2(h)(2)(iii) and removes 8 CFR 214.2(h)(5)(i)(C). Also, as noted earlier, the final rule makes conforming amendments to 8 CFR 214.2(h)(5)(v)(B) and 8 CFR 214.2(h)(5)(v)(C) to clarify job qualification documentation requirements and the timing for such documents for named and unnamed beneficiaries. The final rule also maintains the requirement that the petition include the names of those beneficiaries who are present in the United States. It should be noted that, in the case of an alien who is already in the United States, an H–2A petition encompasses both an employer's request to classify its worker as H–2A nonimmigrant and the alien worker's request to change from a different nonimmigrant status to H–2A or to extend his or her H–2A status. If eligible, the approval of the H–2A petition and the related request for extension of stay or change of status will serve either to confer a new immigration status or to extend the status of a particular alien immediately upon approval. Since such an approval, unlike a nonimmigrant admission from outside the country, does not afford the U.S. Government the opportunity to first inspect and/or interview the H–2A beneficiary at a consular office abroad or at a U.S. port of entry, it is essential that DHS have the names of beneficiaries in the country.

3. Multiple Beneficiaries

Comment: Eleven out of 12 commenters supported the proposal to permit petitioners to file only one petition with DHS when petitioning for multiple H–2A beneficiaries from multiple countries. They stated that this change to the regulations would benefit the employer not only in terms of convenience but also financially.

Response: Based on the positive responses from commenters, the final rule retains the proposal. New 8 CFR 214.2(h)(5)(i)(B).

Comment: One commenter suggested that this change would unnecessarily complicate the visa issuance process.

Response: DHS disagrees with this commenter's concern. DHS proposed the change as a result of the implementation of the Petition Information Management System (PIMS) by the Department of State in 2007. PIMS effectively tracks visa issuance for specific petitions approved for multiple beneficiaries in real time regardless of the consulate location where a beneficiary may apply for a visa. Therefore, DHS does not believe that this proposed change would complicate the visa issuance process. A consular officer would have full and timely access to information regarding the exact number of beneficiaries who have been issued visas based on the approved H–2A petition at the time an alien applies for his or her H–2A visa based on that petition. The Department of State website provides more information about PIMS at *http://travel.state.gov/visa/laws/telegrams/telegrams_4201.html.*

Comment: The same commenter also stated that the proposal would result in an employer recruiting and hiring workers from different geographical regions of a country and/or from different nations. The commenter further suggested that such hiring process would increase the likelihood of problems for workers who feel isolated, decreasing the workers' ability to unite and communicate among themselves.

Response: DHS does not intend to change employers' recruiting processes as a result of this proposal. Under the current regulations, an employer may bring in H–2A workers from many different countries rather than from a single country or from one region within a country. The change made by this final rule merely would permit petitioners to file only one petition with DHS when petitioning for multiple H–2A beneficiaries from multiple countries instead of requiring multiple petitions.

4. Payment of Fees by Beneficiaries To Obtain H–2A Employment

a. Grounds for Denial or Revocation on Notice.

Comment: Eleven out of 83 commenters supported the proposal to authorize the denial or revocation of an H–2A petition if DHS determines that the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner or that the petitioner is aware or reasonably should be aware that such payment was made to the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with or as a condition of obtaining the H–2A employment. Seventy-one commenters responded negatively to this proposal and one comment was neutral.

Response: After carefully considering the commenters' support and objections, for the reasons stated in the paragraphs below, the final rule provides DHS with the authority to deny or to revoke (following notice and an opportunity to respond) an H–2A petition if DHS determines that the petitioner has collected, or entered into an agreement to collect a fee or compensation as a condition of obtaining the H–2A employment, or that the petitioner knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition of H–2A employment. See new 8 CFR 214(h)(5)(xi)(A). DHS has determined that a prohibition on any payment made by a foreign worker in connection with the H–2A employment is more restrictive than necessary to address the problem of worker exploitation by unscrupulous employers, recruiters, or facilitators imposing costs on workers as a condition of selection for H–2A employment. Accordingly, DHS has not included in the final rule the prohibition on payments made in connection with the H–2A employment, but retains the prohibition on payments made to an employer, recruiter, facilitator, or other employment service by the foreign worker that are a condition of obtaining the H–2A employment.

DHS will not deny or revoke the petition if the petitioner demonstrates that (1) prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited fees paid; (2) where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or (3) where the prohibition on collecting or agreeing to collect a fee is violated by a recruiter or agent after the filing of the petition, the petitioner notifies DHS about the prohibited payments, or agreement to make such payments, within 2 workdays of finding out about such payments or agreements.

Comment: The commenters who supported this proposal welcomed this addition to the regulations as a positive change to recognize worker abuses, such as human trafficking and effective indenture. They suggested that DHS should take further measures to deter future violations by implementing procedures to debar a violator from the program.

Response: DHS does not have the statutory authority to implement procedures to debar petitioners from the H–2A program. The statute provides DHS with the authority to deny petitions filed with respect to an offending employer under section 204 or 214(c)(1) of the INA (8 U.S.C. 1154 or 1184(c)(1)) for 1 to 5 years if it finds a significant failure to meet any of the conditions of an H–2B petition or a willful misrepresentation of a material fact in an H–2B petition. INA section 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii). However, there is no similar provision applicable to the H–2A nonimmigrant classification that provides such authority.

Comment: Most of the commenters supporting worker protections also suggested that DHS should take further measures to provide appropriate remedies to help the foreign workers receive the funds to which they were entitled.

Response: DHS agrees that the proposed rule, while offering some safeguards against the indenture of H–2A workers by providing a direct disincentive to employers and/or their recruiters to collect recruiting and similar fees from prospective and current H–2A workers, does not address fully the basic problem such workers face: They remain ''indentured'' until such time as they are relieved of this debt burden. While the proposed rule addresses this concern by providing an alien worker who has incurred such debt in connection with obtaining H–2A employment with the opportunity to change employers or return to his or her home country, it does not relieve the alien of his or her improperly imposed H–2A placement-related debt burden. DHS agrees with the commenters' concern in this regard and believes that it is in the interests of both the alien and legitimate H–2A employers to ensure the fair and even-handed administration of the H–2A program by providing a means to make such alien workers whole. Consistent with the expressed intent of the proposed rule to afford

adequate protections for alien agricultural workers seeking H–2A nonimmigrant classification and to remove unnecessary administrative burdens on legitimate employers seeking to hire such workers, the final rule, therefore, provides that an H–2A petitioner can avoid denial or revocation of the H–2A petition if the petitioner demonstrates that the petitioner or the employment service reimbursed the alien worker in full for the prohibited fees paid or that any agreement for future payment is terminated. New 8 CFR 214.2(h)(5)(xi)(A)(*1*), (*2*), and (*4*). However, the remedy of reimbursement would not apply if the petitioner collected the fees after the filing of the petition. New 8 CFR 214.2(h)(5)(xi)(A)(*3*). For a petitioner who discovers after the filing of the petition that the alien worker paid or agreed to pay an employment service the prohibited fees, the petitioner can avoid denial or revocation by notifying DHS within 2 workdays of obtaining this knowledge instead of reimbursing the worker or effecting termination of the agreement. New 8 CFR 214.2(h)(5)(xi)(A)(*4*). DHS will publish a notice in the **Federal Register** to describe the manner in which the notification must be provided.

DHS does not believe it appropriate to impose on petitioners who discover a post-filing violation by a labor recruiter the same adverse consequence—denial or revocation of the petition—that is imposed on more culpable petitioners who themselves violate the prohibition on collection of fees from H–2A workers after petition filing, nor should petitioners discovering such post-filing violations by a labor recruiter be put in a situation where the only way to avert denial or revocation of the petition might be for the petitioner to pay for the recruiter's violation by reimbursing the alien itself. Petitioners should be encouraged to come forward with information about post-filing wrongdoing by labor recruiters, even if reimbursement is not possible. In this way, DHS can help provide further protections to H–2A workers against unscrupulous recruiter practices.

Further, where the petitioner does not reimburse the beneficiary and USCIS denies or revokes the H–2A petition, the final rule provides that a condition of approval of subsequent H–2A petitions filed within one year of the denial or revocation is reimbursement of the beneficiary of the denied or revoked petition or a demonstration that the petitioner could not locate the beneficiary. New 8 CFR 214.2(h)(5)(xi)(C)(*1*). This requirement is intended to balance the commenters' concerns that an H–2A alien worker not be required to pay fees as a condition of obtaining his or her H–2A employment with the legitimate concern that petitioners who run afoul of 8 CFR 214.2(h)(5)(xi)(A) but who have reimbursed the alien worker in full or who, despite their reasonable efforts, are unable to locate such workers, continue to have access to participation in the H–2A program. Whether the petitioner will be able to demonstrate to the satisfaction of DHS that it has exercised reasonable efforts to locate the alien worker will depend on the specific facts and circumstances presented. In this regard, DHS would take into consideration the amount of time and effort the petitioner expended in attempting to locate the beneficiary, and would require, at a minimum, that the petitioner has attempted to locate the worker at every known address(es). The final rule also clarifies that the 1-year condition on petition approval will apply anew each time an H–2A petition is denied or revoked on the basis of new 8 CFR 214.2(h)(5)(xi)(A)(1)–(4). New 8 CFR 214.2(h)(5)(xi)(C)(*2*).

Comment: Many commenters further suggested that employers should be obligated to pay for aliens' subsistence costs while the workers are not permitted to work.

Response: DHS agrees that the revocation of a petition based on the payment of prohibited fees should not penalize H–2A workers. Accordingly, to minimize the adverse impact on workers, DHS will authorize the alien beneficiary's period of stay for an additional 30-day period for the purpose of departure or extension of stay based upon a new offer of employment. *Id.* During this 30-day period, such alien will not be deemed to be unlawfully present in the United States. *Id.; see also* INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B) (description of unlawful presence).

DHS, however, will not be requiring employers to provide financial assistance to aliens adversely affected by the revocation of a petition. While we understand that certain H–2A workers will be adversely affected when DHS revoked H–2A petitions due to actions by the employer, we do not believe that DHS can require employers to cover expenses for workers without further notice and comment. This determination, however, does not impact any other legal remedy or claim that an affected worker may have against his or her employer.

Further, although DHS proposed to also require a petitioner to pay for the alien's reasonable transportation costs of return to his or her last place of foreign residence abroad after DHS revokes a petition for improper payment of fees, DHS has removed that requirement from this final rule. While section 214(c)(5)(A) of the INA (8 U.S.C. 1184(c)(5)(A)), requires petitioners to pay the workers' reasonable transportation expenses to return to their last place of foreign residence following revocation of a petition, that provision pertains solely to H–1B and H–2B nonimmigrant workers. 8 U.S.C. 1184(c)(5)(A). As there is no similar statutory requirement for employers of H–2A temporary workers to cover expenses for beneficiaries even when the petitioner's actions result in the revocation of the petition and thus require the alien to leave the United States, DHS does not believe that it may impose such costs onto the H–2A employer.

Comment: Several commenters suggested that employers should be required to ensure that workers' passports are not confiscated.

Response: Existing laws satisfactorily meet these commenters' concerns and they are not addressed by this final rule. For example, it is unlawful to conceal, remove or confiscate an immigration document in furtherance of peonage or involuntary servitude. *See* 18 U.S.C. 1592.

Comment: Some commenters suggested that the U.S. government should require H–2A employers to comply with Article 28 of Mexico's Federal Labor Law, which requires that employers recruiting Mexican citizens in Mexico for employment abroad comply with such requirements as registering with the applicable Board of Conciliation and Arbitration, submitting the employment contract to the Board, and posting a bond to ensure a fund to compensate workers for illegal employment practices. They further stated that the North American Agreement on Labor Cooperation (NAALC), which requires each signatory nation to cooperate to ensure compliance with all labor laws and improve conditions for workers, is a treaty that binds the United States.

Response: DHS does not enforce the labor law of a foreign country. As it is DOL's function to administer the U.S. government's responsibilities under the NAALC and to enforce federal labor laws, DHS is not in a position to reply to these comments and no changes were made to the final rule to respond to them.

Comment: One commenter suggested that the proposed rule contains no plan for dealing with unscrupulous, fraudulent recruiters in foreign

countries and that this change may result in DHS penalizing the victims rather than the perpetrators as workers lose jobs and employers lose workers. Some commenters made a variety of recommendations to enforce the methods to protect H–2A workers from abuses, such as requiring an H–2A employer to reach written agreements with labor contractors, recruiters, or facilitators to prohibit the imposition of job placement-related fees on prospective workers or limiting the use of recruiters and facilitators for H–2A purposes to those that maintain an office in the United States and are duly licensed to do business in the United States according to Federal and State laws.

Response: While DHS agrees that these precautions would further protect H–2A workers from abuses, including such precautions in this final rule would be outside DHS' authority. DHS cannot specifically regulate the business practices of recruiters in foreign countries or the agreements between private entities under existing authorities.

Comment: Some commenters who objected to this proposal suggested that this proposal would lead to a decrease in the usage of the H–2A program as it will make the program more costly.

Response: While DHS understands that this rule has the effect of requiring employers rather than H–2A workers to bear these costs, the H–2A program was never intended to encourage the importation of indebted workers. The intention of the final rule is to ensure that the actual wages paid to H–2A workers reflect those set forth in the labor certification; passing recruitment-related costs on to the alien worker would have the effect of reducing the alien worker's actual wages. Further, DHS does not believe that this rule would have a chilling effect on the recruitment of H–2A workers; demand for such workers is based on a prospective employer's need for workers. So too, the choice whether to use recruiters and/or facilitators is that of the employer and is presumably based on a determination that it makes economic sense to use such persons to assist in finding alien workers. Assuming that making the employer bear such recruitment costs would make the program more cost prohibitive, the solution is not to pass those costs on to economically disadvantaged alien workers but to leave to the free market the amount an employer is willing to agree to pay the recruiter, facilitator, or employment service.

Comment: A number of commenters who objected to this proposal asserted that there is no statutory authority in the INA for DHS to prohibit prospective workers from paying a recruiter or a facilitator for the services they receive in order to secure employment in the United States. They stated that it is a longstanding practice that foreign agents collect fees from those who wish to find work in the United States and need assistance with their visa applications and/or the admission process and, in fact, such services have become essential with constant changes in the visa application procedure at U.S. consulates abroad.

Response: DHS believes that these comments misinterpret the proposed change. The proposal would neither prohibit the use of such recruiters or facilitators during the recruitment or visa application process nor the collection of fees itself. Instead, the proposal would prohibit imposition of fees on prospective workers as a condition of selection for such employment. It would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker. Under section 214(a) of the INA, 8 U.S.C. 1184(a), DHS has plenary authority to determine the conditions of admission of all nonimmigrants to the United States, including H–2A workers. It is within the authority of DHS to bar the payment by prospective workers of recruitment-related fees as a condition of an alien worker's admission to this country in H–2A classification.

DHS notes that this final rule is consistent with the Department of Labor's bar on the employer passing to prospective alien agricultural workers fees the employer incurs in recruiting U.S. workers in conjunction with obtaining a temporary agricultural worker labor certification. *See* new 20 CFR 655.105(o).

Comment: Many commenters asked DHS to specify what types of fees are prohibited by the rule. Several commenters argued that obtaining a passport and a visa for arriving H–2A workers should not be the employer's responsibility.

Response: DHS agrees that passport and visa fees should not be included in the types of fees prohibited by the rule, except where the passing of such costs to the worker is prohibited by statute or the Department of Labor's regulations. Generally, the types of fees that would be prohibited include recruitment fees, attorneys' fees, and fees for preparation of visa applications. So that the prohibition against impermissible fees remains general, covering any money paid by the beneficiary to a third party as a condition of the H–2A employment, the final rule does not provide a list of prohibited fees. However, as discussed earlier, the final rule provides that prohibited fees do not include the lesser of the fair market value or actual costs of transportation to the United States, or payment of any government-specified fees required of persons seeking to travel to the United States, such as, fees required by a foreign government for issuance of passports and by the U.S. Department of State for issuance of visas. As these costs would have to be assumed by any alien intending to travel to the United States, DHS believes that each alien should be responsible for them. New 8 CFR 214.2(h)(5)(i)(C)(*5*) and (h)(5)(xi)(A) and (C).

Comment: Many commenters expressed concerns about petition revocation based on an employer's knowledge of the payment of job placement-related fees by prospective workers. Many commenters requested that DHS clarify the standard by which an employer will be deemed to lack knowledge of the prohibited payment by the prospective worker.

Response: The final rule clarifies that an H–2A petition will be subject to denial or revocation only if DHS determines that the H–2A petitioner knew, or reasonably should have known, that the H–2A worker paid or agreed to pay a prohibited fee. New 8 CFR 214.2(h)(5)(xi)(A). For example, if a recruiter advertises to prospective H–2A petitioners that it can place temporary alien workers with such employers at no or minimal cost to the employers, it is reasonable for prospective petitioners to view these claims as suspect and question whether the recruiter has passed its recruitment costs to the prospective H–2A workers. A determination by DHS that the petitioner failed to make reasonable inquiries to ensure that prospective H–2A workers did not pay the recruiter any fees will subject the petition to denial or revocation. Similarly, if an H–2A petitioner learns, directly or indirectly, that a prospective H–2A worker has been asked to pay a fee or other thing of value as a condition of his or her employment with the U.S. employer, the H–2A petitioner will be deemed to be on notice that the prospective worker has paid a prohibited fee and reasonably can be expected to ascertain whether this is in fact true before petitioning for the worker.

Comment: Another comment stated that this proposal would make petitioners subject to liability by opening additional avenues for lawsuits

against the petitioners who may be held responsible for a third party's action.

Response: This provision is not intended to provide any party with the authority to engage in legal proceedings based on this decision by DHS.

Comment: Some commenters suggested that DHS should recognize that some assistance in recruiting and/or in the visa application and admission process could be conducted informally by friends or family members, not as a for-profit activity, and requested DHS to specify facilitators and recruiters that fall under these provisions.

Response: Since assistance in recruiting and in the visa application or admission process that is provided without charge is not precluded by this rule, DHS determined that it is not necessary for the final rule to reference such assistance.

Comment: There were additional suggestions to prevent fraud and to protect laborers' rights, as well as administrative recommendations.

Response: Because these comments exceeded the scope of the proposed rule, they are not addressed in this final rule.

b. Employer Attestation

Comment: One out of 8 commenters supported the proposed addition to require H–2A petitioners to attest that they will not materially change the information provided on the Form I–129 and the temporary labor certification; that they have not received, nor intend to receive, any fee, compensation, or other form of remuneration from prospective H–2A workers; and whether they used a facilitator, recruiter, or any other similar employment service, to locate foreign workers, and if so, to name such facilitators, recruiters, or placement services. Seven commenters wrote that the employer attestation would not reduce the amount of paperwork required by an employer nor streamline the process.

Response: DHS has carefully considered the attestation requirement, and has determined that a separate attestation requirement would be a duplicative addition to the regulations. However, an attestation relates to eligibility requirements that the petitioner must demonstrate on the H–2A petition which the petitioner must sign as being true and correct. DHS is instead amending the Form I–129 to include the attestation requirements.

Comment: Many commenters pointed out that there are some minor activities in the overall scope of work on an agricultural operation and the workers' secondary duties change from season to season. They suggested that the narrow and restrictive view of unchanging duties in the proposed rule could result in good-faith employers violating this portion of the rule.

Response: While the final rule does not contain a separate attestation requirement, these comments relate to the requirement that the petitioner notify DHS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. 8 CFR 214.2(h)(11)(i)(A). DHS does not agree with these commenters' interpretations and understands that farm laborers generally perform several duties and their secondary duties may vary from season to season. For example, while a worker's main duty may be to harvest the crop, there may be a time when he or she is required to drive a tractor, to transport the crop to a processor, or to repair farm equipment. Incidental duties that are associated with the worker's main duty and are part of routine farm maintenance are not considered material changes and do not require the filing of a new petition. *See* 8 CFR 214.2(h)(2)(i)(E).

DOL also provides a clarification in its final rule to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H–2A labor certification was approved may be performed by an H–2A worker. DHS is in agreement with DOL's clarification, which will ensure that H–2A workers can engage in minor amounts of other incidental farm work activity during periods when they are not performing the agricultural labor of services that is the subject of their application.

Comment: Commenters suggested that the listing of facilitators, recruiters, or placement services should only be required where workers were actually recruited, and not in the instances where workers were assisted with the visa application process.

Response: While the final rule does not include a separate attestation requirement where the listing of facilitators, recruiters, or placement services would be required, the revised H–2A petition will request the petitioner to include this information. DHS agrees with the commenters' concerns. DHS recognizes that listing all services used potentially may be overly burdensome and of limited utility to DHS. The revised H–2A petition instead will request the petitioner to provide the names of the facilitators, recruiters, or placement services that actually located the H–2A beneficiaries on the petition.

Comment: One commenter suggested that the attestation provision include an agreement by the employer agreeing to unhindered and unannounced inspections by U.S. Immigration and Customs Enforcement (ICE) and DOL.

Response: The final rule does not include the suggested addition. DHS has determined that it is not necessary to include such a provision because such inspections are separately authorized by law. *See* 8 CFR 214.2(h)(5)(vi)(A). Additionally, DOL authorities are within the jurisdiction of DOL, rather than DHS. As such, it is not necessary that an employer agree to inspections.

5. Petition Notification Requirements and Liquidated Damages

Comment: Seventy-three out of 74 commenters objected to the modified notification and liquidated damages provisions in the proposed rule.

Response: After careful consideration, and in response to the commenters' objections, DHS has modified the proposed notification requirements. DHS also has removed the increase in liquidated damages and, instead, will return to the current liquidated damages provision under 8 CFR 214.2(h)(5)(vi)(A).

Comment: Many commenters objected to the proposed requirements to notify DHS if an H–2A worker fails to report for work within 5 days after the employment start date stated on the petition or the worker's employment is terminated more than 5 days before the employment end date stated on the petition. For example, the commenters stated that the majority of late arrivals of H–2A workers to the worksite are caused by slow processing at U.S. government agencies or emergencies beyond the employer's control. In some cases, employers stagger workers' arrival at the consulate and at the worksite to accommodate logistical arrangements, such as transportation. Further, many commenters suggested that, given that work in agriculture is dependent upon weather, it is rare that an employer can accurately predict months in advance of the actual date when the growing season will end, and many agricultural employers use the latest likely ending date on a temporary labor certification.

Response: DHS believes that the notification requirements should be retained, but agrees with the commenters' concerns regarding the practical application of the proposal. Therefore, the final rule modifies the notification requirements to address the commenters' concerns. The final rule requires petitioners to provide notification to DHS in the following instances: Where an H–2A worker fails to report to work within five workdays of the employment start date on the H–2A petition or within five workdays of

the start date established by the employer, whichever is later; where the agricultural labor or services for which H–2A workers were hired is completed more than 30 days earlier than the end date stated on the H–2A petition; or where the H–2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(5)(vi)(B)(*1*). DHS believes that the modified notification requirements are more workable for employers and are responsive to the commenters' concerns. Recognizing that there could be various reasons beyond the employer's control causing prospective employees' late arrival at the worksite, the final rule allows the petitioner to use a different employment start date than the start date stated in the H–2A petition to accommodate the employees' late arrival. It also changes the notification timeframes for employment that is terminated earlier than the end date stated on the petition, depending on whether the termination occurs before the work is completed or due to early completion of the work. In addition, the final rule amends 8 CFR 214.2(h)(11)(i)(A) to cross-reference the notification provision.

Where an employer establishes a different start date from that on the H–2A petition, the final rule adds the requirement that the employer retain evidence of the changed employment start date for a 1-year period. A retention period of 1 year was chosen to parallel the 1-year retention period for notifications. Such documentation must also be made available for inspection on request by DHS officers. New 8 CFR 214.2(h)(5)(vi)(B)(*2*). DHS is adding this requirement to ensure that providing a more flexible timeframe for the notification requirement will not result in misrepresentations regarding the employment start date.

Comment: Many commenters who objected to the modified notification requirements also stated that a notification within 48 hours would be difficult, if not impossible, because, in many circumstances, it may be impossible for the employer to know with certainty that the H–2A worker absconded from the worksite.

Response: DHS disagrees with the commenters concerns that the notification period would be too difficult to meet based on the speed with which an employer will gain knowledge of the worker's abscondment. An absconder is defined as a worker who has not reported to work for 5 workdays without the consent of the employer. The final rule clarifies that the time period is 5 consecutive workdays. New 8 CFR 214.2(h)(5)(vi)(E). The employer's obligation to notify DHS of an abscondment would thus not be triggered by the employer's subjective determination that the worker has indeed absconded, but rather by an objectively measured event: The passage of five consecutive workdays during which the alien has failed to report to work without the consent of the employer.

While DHS does not believe that the proposed notification period would be too onerous on employers, DHS recognizes that imposing a 48-hour time period for filing notifications may be difficult for those employers that do not conduct business 7 days of the week, such as those employers that are closed on weekends and holidays. Therefore, the final rule clarifies that the notification period is 2 workdays rather than the proposed 48 hours. New 8 CFR 214.2(h)(5)(vi)(B)(*1*).

Comment: Many comments suggested that the requirement to pay $500 in liquidated damages for failing to meet the notification requirement is excessive and will be a potential disincentive to use the H–2A program because the failure to comply with the notification requirement, an event triggering liquidated damages, could be merely a failure to notify within the required timeframe as opposed to failure to notify at all. Most of these comments suggested that DHS not increase the liquidated damages amount from the amount set forth in the current regulations ($10) or, at most, increase them only by a much smaller amount, to a level not exceeding $50 per instance.

Response: In response to public comments, DHS has decided to remove the proposed increase in liquidated damages to $500 and instead will retain the liquidated damages requirement under 8 CFR 214.2(h)(5)(vi)(B)(*3*). Under the current provision, an employer who fails to comply with the notification requirements, as revised under this final rule, must pay liquidated damages in the amount of $10.

Comment: With respect to the process following the failure to meet the notification requirements, some commenters suggested that the 10-day timeframe within which an employer is required to reply to a notice prior to being assessed liquidated damages would impose an unreasonable hardship on small employers who could be in their busy season when such a notice arrives. They recommended that employers be afforded 30 days to respond.

Response: The final rule adopts this suggestion and provides that the petitioner will be given written notice and 30 days to reply to such notice if DHS has determined that the petitioner has violated the notification requirements and it has not received the notification. New 8 CFR 214.2(h)(5)(vi)(C).

Comment: One comment suggested that the imposition of liquidated damages must include a provision for due process with such ''hefty'' amounts at stake.

Response: By including a notice requirement, as stated above, and an opportunity to reply within 30 days, DHS believes that new 8 CFR 214.2(h)(5)(vi)(C) provides sufficient due process.

Comment: Several commenters were concerned about the cost that employers will have to incur to send the notification to DHS by certified mail or similar means in order to comply with the notification requirements within 48 hours.

Response: In reply to these comments, DHS is not including in the final rule the requirement that the notification be in writing. *See* new 8 CFR 214.2(h)(5)(vi)(B)(1), (h)(5)(vi)(C), and (h)(11)(i)(A). A notice outlining the manner in which the notification may be made will be published in the **Federal Register**. DHS will provide a designated e-mail address for employers to send notifications. DHS believes that designating a dedicated e-mail address for employers' notification purpose will reduce the burden on employers. DHS will also provide a designated mailing address for employers without ready access to email.

Comment: A question was raised during a stakeholder meeting held during the comment period of the proposed rule as to what an H–2A employer needs to do in order to replace an H–2A worker whose employment is terminated or who has left the country.

Response: Upon further consideration, DHS agrees that an accommodation should be made for employers who lose H–2A workers before the work is completed. Under the current provision at 8 CFR 214.2(h)(5)(ix), an employer may file an H–2A petition to replace an H–2A worker whose employment was terminated early. However, the provision does not address the two additional situations covered by the notification provisions: When workers fail to show up at the worksite or abscond and leave the employer without a sufficient workforce to complete the work. Therefore, the final rule amends 8 CFR 214.2(h)(5)(ix) to allow an employer to file an H–2A petition to replace H–2A workers in the following

three instances: (a) Where an H–2A worker's employment was terminated prior to the completion of work and earlier than the date stated in the H–2A petition; (b) where a prospective H–2A worker has failed to report to work within five workdays of the employment start date on the temporary labor certification or within five workdays of the date established by their employer, whichever is later; or (c) where an H–2A worker absconds from the worksite. Under this revised provision, a petitioner would be able to file an H–2A petition using a copy of the previously approved temporary labor certification to replace the absent H–2A worker.

Comment: Some commenters suggested that the employer, who did not know of job placement-related fee payments made by prospective workers, should not be penalized and therefore should be able to quickly replace the worker with another H–2A worker.

Response: As discussed above, an H–2A petition will be denied or revoked if DHS determines that the employer knew or has reason to know that the H–2A worker paid or agreed to pay a job placement-related fee. If the employer did not know or have reason to know of such payment, the provision will not apply and the petition cannot be denied or revoked on this basis. Therefore, it is not necessary for the final rule to cover this possibility.

6. Violations of H–2A Status

Comment: Ten commenters objected to the proposal to revise 8 CFR 214.2(h)(5)(viii)(A) to provide that any violation of a condition of H–2A status within the 5 years prior to adjudication of a new H–2A petition would result in a denial of H–2A status. DHS did not receive any other comments on this proposal.

Response: Based on the objections of the commenters, DHS will modify the proposed rule as discussed below.

Comment: Most of the ten commenters suggested that some aliens may have unwittingly violated their previous H–2A status by absconding from their jobs as a result of their employer's illegal or inappropriate conduct, thereby causing them to engage in a protest leading to their termination or being forced to quit.

Response: DHS agrees that this situation should not trigger the consequences of 8 CFR 214.2(h)(5)(viii)(A). The final rule clarifies that an alien will be precluded from being granted H–2A status where he or she violated the conditions of H–2A status within the 5 years prior to adjudication of a new H–2A petition by DHS, except where the violation occurred through no fault of his or her own, such as where the alien absconded from the worksite as a result of the employer's illegal or inappropriate conduct. The prospective employer would have the opportunity to explain the circumstances surrounding the alien's previous status violation in its petition, as would the alien in conjunction with his or her application for H–2A status and/or an H–2A visa.

Comment: One comment arguing against the revision stated that DHS lacks the authority to impose additional or more restrictive grounds of inadmissibility than those provided in the INA.

Response: DHS does not find that this revision is an imposition of an additional ground of inadmissibility. This revision simplifies the current provision to apply to all violations of the H–2A status rather than to the two currently identified in the regulations, namely, remaining beyond the specific period of authorized stay and engaging in unauthorized employment. Further, section 214(a)(1) of the INA (8 U.S.C. 1184(a)(1)) provides authority for this requirement as a condition for H–2A admission. Under that section, the Secretary of Homeland Security is granted the authority to establish the conditions of nonimmigrant admission by regulation.

7. Revocation of Labor Certification

Comment: Twenty out of 21 commenters objected to the proposed revision to 8 CFR 214.2(h)(5)(11)(ii) providing for the immediate and automatic revocation of an H–2A petition upon the revocation of the temporary labor certification by DOL.

Response: After carefully considering the commenters' objections and discussing with DOL, the final rule adopts the proposal for the following reasons.

Comment: Many of these commenters objected to this change because a petition revocation will terminate the employment authorization of the workers and make it impossible for the employer to legally continue in business. They were concerned that DOL would make revocation of a labor certification immediate during the pendency of an employer's appeal of the revocation.

Response: In its final H–2A rule, DOL provides for a stay of revocation until the conclusion of any DOL administrative appeal. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS will revoke an H–2A petition as soon as DOL has adjudicated any administrative appeal that may have been filed and informs DHS of their decision to revoke the temporary labor certification.

Comment: A few commenters wrote that this proposed change will provide no relief for affected workers who stand to lose their jobs and their ability to earn sufficient wages that they had expected by taking H–2A employment. These commenters suggested that the former employer (whose petition was revoked) should be obligated to pay for subsistence costs for the aliens during the 30-day period.

Response: In response to these comments, the final rule provides a 30-day grace period for H–2A workers who are in the United States based on an approved petition that is later revoked because of DOL's revocation of the temporary labor certification. New 8 CFR 214.2(h)(5)(xii). During this 30-day period, such workers will be in an authorized period of stay. They may choose to find new employment and apply for an extension of stay or depart the United States. As discussed above, however, at this time, DHS does not believe that it may require employers to pay wages for workers who remain in the United States nor transportation expenses for those who chose to return to their country of origin.

8. Permitting H–2A Petitions for Nationals of Participating Countries

Comment: Five comments addressed the proposed rule to include a new provision at 8 CFR 214.2(h)(5)(i)(F) (and complementary provision at 8 CFR 214.2(h)(5)(viii)(D)) precluding DHS from approving an H–2A petition filed on behalf of one or more aliens from countries determined by the Secretary of Homeland Security to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. One commenter supported this proposed change. Two commenters sought modification to the provision, while another sought additional time to comment on the provision. A final commenter disagreed that the proposal would improve the H–2A process generally.

Response: After reviewing all comments, DHS has modified this proposal in the final rule for the reasons and in the manner as discussed below.

Instead of publishing a list of countries that consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals or residents who are subject to a final removal order, DHS at this time will be publishing in a notice in the **Federal**

Register a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2A temporary worker program. DHS is making this modification to the rule in consideration of public comments received recommending DHS rework the proposal in order to make the process more positive and to encourage countries to improve cooperation in the repatriation of their nationals.

In designating countries to allow the participation of their nationals in the H–2A program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest.

Designation of countries on the list of eligible countries will be valid for one year from publication. The designation shall be without effect at the end of that one-year period. The Secretary, with the concurrence of the Secretary of State, expects to publish a new list prior to the expiration of the previous designation by publication of a notice in the **Federal Register**, considering a variety of factors including, but not limited to the four factors for the designation of a participating country described above.

Initially, the list will be composed of countries that are important for the operation of the H–2A program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H–2A and H–2B programs during the last three fiscal years.

The Secretary of Homeland Security may allow a national from a country not on the list to be named as a beneficiary on an H–2A petition and to participate in the H–2A program based on a determination that such participation is in the U.S. interest. The Secretary's determination of such a U.S. interest will take into account a variety of factors, including but not limited to consideration of: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among workers from a country currently on the list of eligible countries for participation in the program; (2) evidence that the beneficiary has been admitted to the United States previously in H–2A status and has complied with the terms of that status; (3) the potential for abuse, fraud, or other harm to the integrity of the H–2A visa program through the potential admission of a beneficiary from a country not currently on the list of eligible countries for participation in the program; and (4) such other factors as may serve the U.S. interest. Therefore, DHS is requiring petitioners for beneficiaries who are nationals of countries not designated as participating countries to name each beneficiary. Additionally, petitions for beneficiaries from designated countries and undesignated countries are to be filed separately. These changes will permit DHS to more easily adjudicate H–2A petitions involving nationals of countries not named on the list by permitting DHS to properly evaluate the factors used to make a determination of U.S. interest, discussed above, without slowing the adjudication of petitions for nationals of designated countries.

As discussed in the proposed rule, DHS expects that the provisions in this rule intended to increase the flexibility of the H–2A visa program, complemented by the streamlining proposals the Department of Labor is making in its H–2A rule, will increase the appeal of the H–2A program to U.S. agricultural employers. *See* 73 FR 8230, 8234–5 (Feb. 13, 2008). While a more efficient H–2A program is anticipated to reduce the number of aliens entering the country illegally to seek work, it also could lead to an increase in the number of H–2A workers that abscond from their workplace or overstay their immigration status. Therefore, the success of the program will depend significantly upon countries accepting the return of their nationals.

Petitions may only be filed and approved on behalf of beneficiaries who are citizens, subjects, nationals or residents of a country that is included in the list of participating countries published by notice in the **Federal Register** or, in the case of an individual beneficiary, an alien whose participation in the H–2A program has been determined by the Secretary of Homeland Security to be in the U.S. interest. *See* new 8 CFR 214.2(h)(5)(i)(F). Likewise, in order to be admitted as an H–2A, aliens must be nationals of countries included on the list of participating countries or, in the case of an individual beneficiary, an alien whose participation in the H–2A program has been determined by the Secretary of Homeland Security to be in the U.S. interest. *See* new 8 CFR 214.2(h)(5)(viii)(D). To ensure program integrity, such petitioners must state the nationality of all beneficiaries on the petition, even if there are beneficiaries from more than one country. *See* new 8 CFR 214.2(h)(2)(iii).

9. Period of Admission

Comment: Sixteen out of 18 commenters supported the proposal to revise 8 CFR 214.2(h)(5)(viii)(B) by extending the H–2A admission period following the expiration of the H–2A petition from 10 to 30 days. These commenters believed that it would make the H–2A program a more cost efficient program.

Response: Based on the support of these commenters, the final rule adopts this proposal. New 8 CFR 214.2(h)(5)(viii)(B).

Comment: Several commenters who supported this proposed change also suggested that employers should be obligated to pay for their former employees' subsistence costs during the 30-day period, as the aliens would not be permitted to work during that time.

Response: Because H–2A workers are not required to remain in the United States during the additional 30-day period, DHS does not think that employers should be responsible for subsistence costs during that period. In addition, as discussed above, DHS does not think that it may impose such costs at this time.

Comment: Two commenters opposed the proposal. One commenter did not provide a reason for the opposition. The other commenter stated that this change would create a period of too much downtime where the worker is not accounted for and does not seem to have any significant benefits.

Response: DHS disagrees with these concerns. DHS believes that the benefit of extending the H–2A admission period following the expiration of the H–2A petition to 30 days would be to provide the H–2A worker enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment if the worker chooses to do so. Having a 30-day extension would facilitate the new benefit that the final rule provides for a worker to continue to be employment authorized while awaiting for an extension of H–2A status based on a petition filed by a new employer who is a registered user in good standing of USCIS' E-Verify program.

10. Interruptions in Accrual Towards 3-Year Maximum Period of Stay

Comment: Nine out of 12 commenters supported the proposed rule reducing

the length of time that interrupts an H–2A worker's accrual of time in H–2A status for purposes of calculating when the worker has reached the 3-year maximum period of stay. They supported this change because it would allow a worker to engage in a longer employment period, which would benefit both employers and employees.

Response: DHS agrees that this proposal would benefit both employers and H–2A workers. Accordingly, the final rule adopts the proposed revision, reducing the minimum period spent outside the United States that would be considered interruptive of accrual of time towards the 3-year limit, where the accumulated stay is 18 months or less, to 45 days. If the accumulated stay is longer than 18 months, the required interruptive period will be 2 months. *See* new 8 CFR 214.2(h)(5)(viii)(C).

Comment: One comment suggested that the existing exception for the H–1B, H–2B, and H–3 commuters under 8 CFR 214.2(h)(13)(v) be extended to the H–2A classification.

Response: The current regulation at 8 CFR 214.2(h)(13)(v) provides that the limitations on admission in H–1B, H–2B, and H–3 status do not apply to H–1B, H–2B, and H–3 individuals (1) who did not reside continually in the United States and whose employment was seasonal, intermittent, or for less than 6 months per year, and (2) who reside abroad and regularly commute to the United States. DHS does not believe that it is appropriate to extend this provision to H–2A commuters; therefore, the final rule does not include the suggested revision to 8 CFR 214.2(h)(13)(v). The H–2A classification is unique in that H–2A employment sites change from season to season. While some employment sites may be within reasonable commuting distance from the border, it cannot be anticipated that all of the alien's worksites will also be, particularly given the variabilities of growing seasons and work hours inherent in the agricultural industry. What may be reasonable commuting distance based on an 8-hour day may not be if the alien worker is required to work longer hours during the height of the growing season.

It is reasonable to assume that most aliens do not have ready access to transportation to and from their home country and the particular worksite where they are employed. As such, few H–2A workers will actually be able to commute from their homes abroad to the United States on a regular basis. Further, by statute, employers must guarantee many employee benefits such as housing, meals, tools, workers' compensation insurance, and return transportation. Section 218(c)(4) of the INA requires employers to provide housing to all H–2A workers in accordance with specific regulations. 8 U.S.C. 1188(c)(4). Employer-provided housing must meet the standards set forth under 29 CFR 1910.142 or 20 CFR 654.404–654.417. Since the statute does not contain any provision to release employers from their responsibility to provide housing to their employees, DHS does not think it appropriate to apply the commuter exception to the H–2A classification given the special nature and variabilities of H–2A agricultural work.

Comment: One commenter objected to this proposal stating that it would encourage more illegal aliens to come into the country and lead to illegal aliens who are already in the country to stay longer.

Response: DHS does not believe that reducing the time spent outside the United States to be interruptive of accrual of time towards the 3-year limit in H–2A status would encourage more illegal aliens to come to the U.S. or stay in the U.S. longer. This provision is meant to cause less disruptive breaks in the H–2A employment, benefiting both H–2A workers and their employers, and does not apply to those who attempt to enter the U.S. illegally or to those who are already here illegally.

Comment: One commenter stated that it would like to employ H–2A workers for 3 consecutive years.

Response: The current regulations provide that an alien worker's total period of stay in H–2A nonimmigrant status may last up to 3 years. A temporary need by a single employer for H–2A workers in excess of one year is possible where an H–2A employer satisfies DHS and DOL that such longer-term need is generated by ''extraordinary circumstances.'' See 8 CFR 214.2(h)(5)(iv)(A).

DHS believes that the reduction of the time to be spent outside the United States to be considered interruptive of accrual of time towards the 3-year limit in H–2A status provided in this final rule would benefit employers by reducing the amount of time that they are required to be without the services of needed workers. At the same time, this will not violate the temporary and seasonal nature of employment requirements under the H–2A program.

11. Post-H–2A Waiting Period

Comment: Twelve out of 15 commenters supported the proposed rule suggesting the reduction of the waiting period from 6 months to 3 months for an H–2A worker who has reached the 3-year ceiling on H–2A nonimmigrant status prior to seeking H–2A nonimmigrant status again (or any other nonimmigrant status based on agricultural activities). These commenters supported this proposal, stating that it will enhance the workability of the H–2A program for employers while not offending the fundamental temporary nature of employment under the H–2A program.

Response: DHS agrees with the comments in support of this proposal. Accordingly, the final rule adopts the proposed reduction in waiting time without change. New 8 CFR 214.2(h)(5)(viii)(C).

Comment: One commenter argued that this provision may lead to the displacement of U.S. workers and make some desirable year-round agricultural work unavailable to the domestic workforce. The commenter suggested that employers, including farm labor contractors, may string together several short-term job opportunities to offer job stability for a longer term, which would be desirable for many U.S. farm workers.

Response: DHS disagrees that a reduction in the waiting period will result in the displacement of U.S. farm workers. In order to protect U.S. workers, the law requires H–2A employers to obtain a temporary labor certification certifying that there are insufficient U.S. workers who are able, willing, qualified, and available to perform agricultural temporary labor or services, and that the H–2A employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. If an employer is able to find U.S. workers by offering job stability for a longer period, it will not be allowed to or have no need to utilize the H–2A program. DHS believes that this streamlining measure will encourage employers who are unable to secure their workforce among U.S. workers to use the H–2A program instead of hiring individuals who have no legal immigration status and are unauthorized to work.

Comment: One commenter objected to this proposal, stating that it would encourage more illegal aliens to come into the country and lead illegal aliens who are already in the country to stay longer. Another commenter objected to the proposal but did not provide a reason.

Response: DHS adopts this proposal because it believes that a shorter waiting period would better meet the needs of employers in the time-sensitive agricultural industry. The H–2A program is for agricultural employers, who experience labor shortage among U.S. workers, to rely on alien workers to

perform agricultural labor or services of a temporary or seasonal nature. DHS does not agree that this provision would increase the presence of illegal aliens in the United States.

12. Extending Status With a New Employer and Participation in E-Verify

Comment: Two commenters supported the proposal to provide for employment authorization to H–2A workers awaiting an extension of H–2A status based on a petition filed by a new employer. Twelve out of 15 comments opposed conditioning employment authorization on the new employer's participation in the E-Verify program, but supported the proposal to provide for employment authorization to H–2A workers awaiting an extension of H–2A status based on a petition filed by a new employer.

Response: After considering the commenters' objections and concerns, the final rule adopts this proposal at new 8 CFR 274a.12(b)(21), as discussed below. Note that new 8 CFR 274a.12(b)(21) does not include a cross reference to 8 CFR 214.6. This cross reference relates to TN nonimmigrants and was erroneously included in the proposed rule.

Comment: Many commenters questioned the reliability of the E-Verify program. Some commenters suggested that E-Verify has high error rates that disproportionately affect foreign-born U.S. workers.

Response: DHS believes that these concerns are misplaced and factually inaccurate. The ''Findings of the Web Basic Pilot Evaluation'' reported that currently 99.5 percent of all work-authorized employees queried through E-Verify were verified without receiving a Tentative Non-Confirmation (TNC) or having to take any type of corrective action.[1] Over the past year, E-Verify has automated its registration process, instituted a system change to reduce the incidence of typographical errors, incorporated a photo screening tool to combat identity fraud, added Monitoring and Compliance staff to maintain system integrity, added new databases that are automatically checked by the system, and established a new process for employees to call DHS' toll-free number to address citizenship mismatches as an alternative to visiting the Social Security Administration (SSA). These changes have been implemented in an effort to establish efficient and effective verification. A series of enhancements that E-Verify has implemented reduces mismatch rates among newly naturalized citizens and newly arriving workers. Under DHS management and in partnership with SSA, the program is continuously improving its processes to decrease mismatch rates and ensure that E-Verify is fast, easy to use, and protects employees' rights.

Comment: Some commenters stated that some employers have little or no occasion to use the E-Verify program and probably little facility with it and argued that the provision is not fair to such employers.

Response: E-Verify is a free and voluntary program. This provision is not a requirement for employers to obtain H–2 employees, but rather is a condition for the alien obtaining an extension of status and employment authorization pending adjudication of a new H–2A petition filed by another employer. DHS continues to believe that the provision will provide a valuable incentive for employers to participate in the E-Verify program, thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector.

Comment: One comment suggested that, assuming DHS has the authority to provide for portability without statutory authorization, DHS should fully use the H–1B portability provisions as the model to allow portability for the period the petition is pending.

Response: DHS has general authority to grant employment authorization. See INA section 274A(h), 8 U.S.C. 1324a(h). In an industry in which an estimated half of the 1.1 million workers in the United States are illegal aliens, DHS has determined that it is appropriate to restrict the benefit of portability during petition pendency to only those employers that have demonstrated good business/corporate citizenship through enrollment in E-Verify.

Comment: One commenter who objected to the proposal suggested that the provision to extend employment authorization would act as an inducement for a worker to breach his work contract and to change employers prior to fulfillment of the contractual obligations, which would be a violation of INA section 218(c)(3)(B), 8 U.S.C. 1188(c)(3)(B).

Response: DHS disagrees that this provision would act as such an inducement. While it is true that this provision would enable an alien to work for a new employer prior to approval of the new H–2A petition, the purpose of this provision is to enable agricultural workers to change worksites and employers as soon as they complete one agricultural job. Even if this provision acted as an inducement for some aliens to change employers before completion of the first job (e.g., to get a higher paying job), DHS believes that the overall benefit to the agricultural industry, the alien worker, and the U.S. public in allowing the alien worker to change job locations at the end of each job assignment without having to wait for the successor employer's petition to be approved outweighs the possibility of abuse of this privilege by the alien worker or the new petitioning employer.

Comment: This same commenter also suggested that the proposed change to 8 CFR 214.2(h)(2)(i)(D) would create the possibility that an extension for an H–2A employee within the three-year period of stay may not be granted for employment with the same employer.

Response: DHS disagrees with the commenter's interpretation of the proposed provision. The cited provision is specifically for change of employers. The provision for extensions of stay is governed by 8 CFR 214.2(h)(15); the rule does not amend this provision.

Comment: One commenter stated that this proposal conditioning employment authorization on the new employer's participation in the E-Verify program seems to be a waste of time because the state workforce agency (SWA) is required to verify workers' eligibility under the DOL's rule.

Response: The E-Verify program supplements the employer's obligation under section 274A(a) of the INA, 8 U.S.C. 1324a(a), to complete Forms I–9 (Employment Eligibility Verification) at the time of each new hire. The SWA's responsibility is to verify the employment authorization of applicants seeking referral under a job order. SWAs are encouraged, but not required, to enroll in E-Verify. Additionally, under INA Section 274A(a)(5), employers can rely on the SWA's verification of employment authorization only where the documentation complies with all statutory and regulatory requirements, including 8 CFR 274a.6. Incentivizing E-Verify enrollment by agricultural employers will thus reduce opportunities for unauthorized agricultural workers, not just in the situations where employers are not able to rely on a SWA's verification, but in other situations outside the SWA referral process where workers apply for employment.

13. Miscellaneous Changes to H–2A Program

a. Extensions of Stay Without New Temporary Labor Certifications

Comment: Two comments suggested changes to the proposal that would allow, in emergent circumstances, an

[1] *http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.*

application for an extension of stay for an H–2A nonimmigrant worker to not contain an approved temporary labor certification, under certain conditions.

Response: The final rule retains the provision as stated in the proposed rule. New 8 CFR 214.2(h)(5)(x).

Comment: One comment recommended that this provision continue to be automatically available upon request and that petitioners not be required to make a case for emergent circumstances.

Response: The proposed rule revised the provision at 8 CFR 214.2(h)(5)(x) to improve its readability, making no substantive changes to the provision. This provision originally was meant to allow H–2A employers to obtain a necessary workforce in case of emergencies over which employers have no control (*e.g.*, changed weather conditions), for up to two weeks. DHS does not believe that the provision should be extended beyond situations involving emergent circumstances. Many agricultural employers stated in their comments to other proposals that, due to the uncertainty as to when the growing season would end, they normally use the latest likely ending date when they apply for a temporary labor certification. Many employers further indicated that most work is completed before the date on the temporary labor certification. DHS believes that it is reasonable to provide an opportunity for an employer to file an H–2A petition without obtaining a new temporary labor certification only in emergent circumstances.

Comment: The other comment asked DHS to have the parameters of emergent circumstances include any instance that the employer could not have reasonably foreseen at the time that the petition was filed.

Response: DHS has determined that it will not include additional parameters to the provision. To do so would unnecessarily reduce the flexibility that the provision currently provides.

b. Filing Locations

Comment: Commenters were supportive of the proposed modifications to the general filing provision at 8 CFR 214.2(h)(2)(i)(A) applicable to H–1B, H–2A, H–2B, and H–3 classifications by removing specific reference to filing locations announced in the **Federal Register** and providing that the form instructions will contain information regarding appropriate filing locations for these nonimmigrant visa petitions.

Response: In the absence of negative comments on these revisions, and to maintain flexibility in the regulations to accommodate changing case management needs, the final rule adopts these modifications without change. New 8 CFR 214.2(h)(2)(i)(A). The final rule also makes conforming amendments to 8 CFR 214.2(h)(2)(i)(B) and 214.2(h)(2)(i)(C), replacing references to filing locations based on where the petitioner is located, will perform services, or receive training, or based on an established agent, with reference to the form instructions. In addition, revised 8 CFR 214.2(h)(2)(i)(B) replaces the reference to ''Service office,'' referring to the Immigration and Naturalization Service, with ''USCIS.''

Comment: DHS received one comment with respect to filing locations specific to logging employers who will need to begin using the H–2A classification once DOL's final rule making changes to the H–2A classification takes effect. Currently, such employers use the H–2B classification. 20 CFR part 655, subpart C. Under the DOL final rule, they instead would need to use the H–2A classification. The comment concerned the current filing location for H–2A petitions at USCIS' California Service Center, as announced in a notice published in the **Federal Register** on November 9, 2007. *See* 72 FR 63621. The comment requested that logging employers be allowed to continue to file their petitions at USCIS' Portland, Maine field office, the current filing location for H–2B petitions for loggers, because the Portland office is familiar with the unique characteristics and needs of the industry.

Response: At present, DHS has no plan to change its central filing location for H–2A petitions at the California Service Center. This central filing location ensures timely processing and consistent adjudication of H–2A petitions. Once DOL's final rule takes effect and requires logging employers to use the H–2A classification, and beginning on the effective date of this rule, logging employers will be required to file petitions on behalf of their prospective workers in accordance with the H–2A regulations and form instructions for H–2A petitions. As DHS monitors the processing of these petitions, if DHS determines that it is more prudent to change the filing location for logging employers to the Portland, Maine field office or any other DHS office, DHS may change the filing location via the form instructions for the H–2A petition. Note that within 30 days from the effective date of this rule (and the DOL rule), logging employers will be required to file change of status petitions for their workers who are present in the United States in H–2B status to ensure that logging workers will be classified as H–2A workers.

14. DHS Policy Applicable to H–2A Sheepherders

Comment: Ten out of 12 commenters objected to the proposal to impose on H–2A sheepherders the same departure requirement applicable to all H–2A workers.

Response: After carefully considering the commenters' objections, DHS has determined that it will change its policy regarding H–2A sheepherders as proposed for the reasons discussed below.

Comment: Many commenters who objected to this proposal suggested that the existing policy was developed based on the understanding that tending and caring for sheep over extensive expanses of open range for long periods of time is a skilled and exacting occupation that requires considerable training and experience.

Response: Although DHS recognizes the special nature of this unique type of agricultural work, it does not change the nonimmigrant nature of the H–2A classification. *See* INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). The statute provides that an H–2A worker is a nonimmigrant who has a residence in a foreign country that he has no intention of abandoning and who is coming temporarily to the United States to perform agricultural labor or services. Without a departure from the United States after reaching the 3-year maximum period of stay, an H–2A worker cannot be considered a nonimmigrant, and his or her stay cannot be considered temporary. All other H–2A workers must depart the United States after reaching the 3-year maximum period of stay, regardless of the employer's need or the degree of skill or experience required of those workers; the same rule should apply to H–2A sheepherders.

Comment: A few commenters also argued that the history of the sheep industry shows that its existing practice is in keeping with Congressional intent.

Response: DHS is aware that foreign workers skilled in sheepherding were admitted during the early 1950s for permanent employment under special laws enacted by Congress. However, Congress permitted the special laws to expire after the issuance of ''Spanish Sheepherders, Report of Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives,'' a report by the House Judiciary Committee on February 14, 1957, which undertook an investigation during 1955 and 1956 to examine allegations that a number of

foreign sheepherders admitted under the special laws were leaving sheepherding shortly after arrival in the U.S. and were employed in other industries.[2] The report by the House Judiciary Committee substantiated many of these allegations. In the report, the Committee recommended ''that the practice of admitting alien sheepherders under special legislation should be discontinued and that the problem of supplying legitimate needs of the American sheep-raising and wool-growing industry, should be met administratively under existing general law, specifically under section 101(a)(15)(H)(ii), of the Immigration and Nationality Act.'' The report also states the following:

> [I]t is further believed that the employment in the sheep-raising and woolgrowing industry is not different in nature from the employment of foreign skilled workers in other branches of agriculture and industry. It is not believed that the sheepherders should benefit from a special preferential and privileged treatment and that they should be admitted as immigrants entering this country for permanent residence. Inquiries and studies have conclusively shown that the legitimate interest of American employers will be better served if workers for the sheep-raising and woolgrowing industry were admitted temporarily for appropriate periods of time, and that at the conclusion of such periods they were required to return to their country of origin and to their families, while other workers—from domestic labor sources, if available—or other foreign workers similarly skilled be given opportunity to accept temporary employment.

It was the Committee's opinion that no additional special legislation should be enacted to admit foreign sheepherders and the importation of foreign sheepherders should be governed by the H–2 temporary worker provision. DHS acknowledges that the aforementioned legislative history predates the policy established by the Immigration and Naturalization Service (INS) and now DHS to refrain from applying the three-year maximum period of stay to H–2A aliens who work as sheepherders. However, DHS has concluded that this policy is inconsistent with the temporary nature required by the statutory provisions governing H–2A program.

Comment: One commenter asked why such special procedures are available only for sheepherders. Another commenter suggested that DHS should adapt the special procedures for sheepherders to all occupations engaged in the range production of other livestock such as cattle and horses.

Response: It is believed that the policy regarding sheepherders was grandfathered from a series of bills enacted by Congress in the early 1950s to provide relief for the sheep-raising industry by making available special nonquota immigrant visas to skilled alien sheepherders. DHS disagrees that the special procedures should be extended to all occupations engaged in the range production of other livestock. DHS has determined that all H–2A occupations should be subject to the same statutory standard and that the special procedures should be curtailed rather than extended to other H–2A occupations. With the effective date of this final rule, DHS will begin to enforce on H–2A sheepherders the same departure requirement applicable to all other H–2A workers. However, DHS will not revoke any currently valid H–2A petitions that have been approved for sheepherders.

Comment: One commenter recommended that the time period required outside the country between periods of stay be reduced to two weeks for sheepherders.

Response: For the reasons stated above, DHS believes that the same statutory and regulatory standards for all other H–2A occupations should be applied to sheepherders.

15. Temporary Worker Visa Exit Program

On August 10, 2007, the Administration announced that it would establish a new land-border exit system for guest workers, starting on a pilot basis. The proposed rule included an exit system pilot program applicable to H–2A nonimmigrants. Under the proposed program, an alien admitted on an H–2A visa at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. Details of the program, such as designated ports of entry, would be announced in a notice published in the **Federal Register**.

Comments: A few comments generally supported the proposal or encouraged more strict measures to ensure foreign workers' departure within their authorized periods of stay. However, many commenters criticized this proposal for singling out the H–2A population and unfairly seeking to punish them by imposing an undue burden on them. They suggested that workers should be permitted to use all ports to enter the United States and should not be required to depart through the same ports of entry through which they entered because the original port of entry through which they entered may not be the most convenient if workers transfer to another employer. Some commenters pointed out that it would be difficult to effectively educate H–2A workers about the required method for exit, which will likely cause them to violate the requirement inadvertently. Many commenters expressed concerns about the unknown factors of the program such as the number and location of ports through which a worker can enter and return, timeliness of the process, and overall convenience or inconvenience for a worker. Others suggested that DHS should provide sufficient time and opportunities to answer stakeholders' concerns or questions.

Response: DHS has determined that it will adopt, with due consideration of commenters' concerns, the Temporary Worker Visa Exit Program Pilot for H–2A workers in this final rule. *See* new 8 CFR 215.9. DHS will inform H–2A workers of their obligations through an educational effort among the workers, foreign governments, agricultural industry, association leaders, and U.S. employers. Before implementation of the program, DHS will implement a comprehensive communications program that engages stakeholders and reaches travelers. This communications program may include giving walk-away materials to H–2A workers when they enter the country and utilizing outreach methods such as creating customer-focused products and proactive/reactive media relations program.

Under the H–2A land exit pilot program, DHS will explore ways that participating workers can register their final departure from the United States at select ports of entry. Only those workers who enter through these designated ports will be required to register their final departure for purposes of this pilot.

III. Rulemaking Requirements

A. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

[2] *http://www.foreignlaborcert.doleta.gov/fm/fm_24-01.htm.*

B. Executive Order 12866

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, DHS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provide the assessment to the Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs.

1. Public Comments on the Estimated Costs and Benefits of the Proposed Rule

DHS invited the public to comment on the extent of any potential economic impact of this rule on small entities, the scope of these costs, or more accurate means for defining these costs. As a result, DHS received one comment directly related to the regulatory cost benefit analysis performed for the proposed rule which indicated that woolgrowers would have to hire double the number of employees as they currently do and that expenses would increase by at least 25 to 50 percent for each sheepherder employer. The comment provided no supporting data or calculations to explain exactly how this result would occur, and USCIS was unable to determine how the outcome of a requirement for an employee to go home for 3 months every 3 years would result in a doubling of the number of annual employees. Therefore, no changes were made as a result of the comment.

2. Summary of Final Rule Impacts

In summary, this rule makes several changes to the H–2A visa program that DHS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. A complete analysis has been performed in accordance with the Executive Order and is available for review in the rulemaking docket for this rule at *http://www.regulations.gov*. The results of the cost benefit analysis are summarized as follows:

i. Government Costs

The exit pilot program provided for in this rule will cost the Federal Government at least $2 million in labor costs per year to implement.

ii. Transferred Costs

A total cost of between $16.5 million and $55 million will be imposed on all H–2A petitioning firms for all H–2A workers each year as a result of this rule banning placement fee payments by employees. Those costs may range from an average of around $1,700 to almost $6,000 per employer, based on the average number of H–2A workers requested per employer petition. The total annual costs of the time for H–2A employees to comply with the exit requirements of this rule are estimated to be around $184,332, based on the opportunity cost of the time lost to the employer while registering.

The annual information collection costs imposed by the employer notification requirements in this rule are estimated to be $13,713.

The volume of applications is expected to increase from an average of 6,300 per year to around 9,900 per year. The burden of compliance both in time and fees per application will not increase above that currently imposed as a result of this rule.

iii. Benefits

This rule will benefit applicants by:

- Reducing delays caused by Interagency Border Inspection System (IBIS) checks holding up the petition application process.
- Reducing disruption of the life and affairs of H–2A workers in the United States.
- Protecting laborers' rights by precluding payment of some fees by the alien.
- Prevent the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H–2A program.
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.
- Minimizing immigration fraud and human trafficking.

C. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

D. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to conduct a regulatory flexibility analysis which describes the impact of a rule on small entities whenever an agency is publishing a notice of proposed rulemaking. In accordance with the RFA, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

1. Number of Regulated Entities

The H–2A program is used mainly by farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. The affected industries do not include support activities for agriculture. Therefore, in accordance with the RFA, USCIS has identified the industry affected by this rule as described in the North American Industry Classification System (NAICS) as encompassing NAICS subsectors 111,

Crop Production, and 112, Animal Production.[3]

In fiscal year 2007, USCIS received 6,212 Form I–129 petitions for H–2A employees, approved petitions for 78,089 H–2A workers, and 71,000 new workers were hired. In fiscal year 2006, USCIS received 5,667 Form I–129 petitions and approved 5,448 of them for 56,183 workers. Also, in fiscal year 2006, 6,717 employers requested certification from the Department of Labor (DOL) for 64,146 H–2A workers, and for those workers, the Department of State (DOS) issued 37,149 H–2A visas. In fiscal year 2005, USCIS approved Form I–129 petitions for 49,229 workers, 6,725 employers requested certification from DOL for 50,721 employees, and 31,892 visas were issued by DOS. Thus, in recent years, USCIS has received approximately 6,300 petitions per year for an average of 70,000 total H–2A workers per year. This rule is projected to result in an approximately 40,000 additional H–2A workers and 3,600 new Form I–129 petitions per year, for a total of 9,900 petitions for a total of 110,000 workers. In 2006, there were 2,089,790 farms in the United States and about 752,000 workers employed in agricultural jobs. Thus, approximately 0.47 percent of all farmers are expected to use the H–2A program and 14.6 percent of all farm workers will be aliens employed under the H–2A program.

2. Size Categories of Affected Entities

The U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121 provide that farms with average annual receipts of less than $750,000 qualify as a small business for Federal Government programs. According to the United States Department of Agriculture National Agricultural Statistics Service (NASS), 44,348, or 2.1 percent, of the 2,128,982 farms in 2002 in the U.S. had gross cash receipts of more than $500,000 and 97.9 percent of farms have sales of less than $500,000.[4] Based on these numbers, USCIS concludes that the majority of entities affected by this rule are categorized as small entities according to the SBA size standards.

The average of 11 foreign workers per year would require an expenditure of about $141,000 in annual labor expenses just for the farm's foreign workers, not including benefits. In the 2002 Census of Agriculture, 50,311 farms, or only 2.4 percent of all ''farms'' reported having any hired employees at all, and only 31,210 farms, or 1.5 percent of all farms, reported hired labor expenses in excess of $100,000 per year. Also, the 9,900 annual petitions that DHS projects it will receive after this rule takes effect represent only one-half of one percent of the 2,128,982 farms in 2002, and the 110,000 annual H–2A nonimmigrant workers account for only 14.6 percent of the 824,030 total hired farm workers reported in the 2002 Agricultural Census. Further, the 2002 Census reported that 53.3 percent of all farms reported a net loss, and only 329,490 farms reported annual net income of more than $25,000.[5] Taken together, these data indicate that for the farms that use the H–2A program to be viable, they are likely to be on the upper bounds of the small business size standard of $750,000 in gross cash receipts.

3. Other Firms That May Be Affected by This Change

A number of firms with headquarters or a significant presence in the United States recruit employees in the employees' home countries to come to the United States for temporary employment. Also, many farms hire an agent in the U.S. to help them locate workers and complete applications and petitions. Some agents collect an initial retainer from an employer and then charge additional fees based on the number of workers, the application fees, the advertising costs required, and other expenses. The total charges an employer pays the agent per H–2A employee ranges from around $500 to $4,000, including travel expenses and all application and petition fees. The actual cost depends on the home country, the skills needed for the position, and the general complexity of the worker's and employer's respective situations. This rule will not affect the ability of the recruiter or agent to collect a fee from the employer. This rule does not affect the fee agents may charge per employee to process the employer's DOL, DOS, and DHS certification, application, and petition. This rule would only affect recruiting firms to the extent that it would render the employee ineligible for H–2A employment by collecting a fee, as soon as the potential employer becomes aware that the recruiter or agent has charged the employee a fee.

4. Significance of Impact

DHS has determined that this rule will require affected employers to pay between $150 and $500 per employee because recruiter fees that are now being paid by employees will be shifted by recruiters from employees to employers. This rule will also add $13,713 in information collection costs for absconder reporting for an average cost per employee of $0.13. Based on an average of 11 employees hired by each H–2A petitioner, average costs added by this rule will be between $1,651 and $5,501 per affected entity. For the purpose of determining the significance of the impacts of this rule, this analysis uses the costs at the high end of the range of possible impacts, or $5,501 per employer, in order that any errors in determining the impacts on small entities be on the side of an over-estimation. Again, most of the affected entities are classified as small.

Guidelines suggested by the SBA Office of Advocacy provide that, to illustrate the impact could be significant, the cost of the proposed regulation may exceed 1 percent of the gross revenues of the entities in a particular sector or 5 percent of the labor costs of the entities in the sector.

The average duration of H–2A employment based on the difference between employment start and end dates for workers granted H–2A status in fiscal years 2007 and 2008 was 236 days. Thus, a new H–2A employee in 2008 worked an average of 33.7 weeks. Assuming that the typical employee worked an 8 hour workday and took two days per week off from work, the employee would have worked 169 days and accrued 1,352 hours. Using the U.S. Department of Labor hourly wage rate for the H–2A worker of $9.49, plus a multiplier of 1.4 to account for fringe benefits, DHS calculated the average hourly wage at approximately $13.29.[6] Multiplying the hourly compensation costs by the hours worked provides an average compensation cost for an H–2A employee for the period he or she is in the United States of about $17,968. If the employer is required to pay a recruiter or reimburse the employee $500 for a recruiting fee, and if that employee absconds requiring the employer to file a report, the added cost of $501 is only 2.78 percent of the $17,968 annual salary for only one H–2A worker. Since the cost increase per H–2A employee is less than 5 percent of

[3] U.S. Small Business Administration, Table of Small Business Size Standards, *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[4] Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf.*

[5] Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf.*

[6] Available at: *http://www.dol.gov/compliance/topics/wages-foreign-workers.htm.*

the costs associated with hiring only an H–2A worker, it would not be possible for the average cost increase imposed by this rule to exceed 5 percent of the average labor costs of the sector, because, among other reasons, H–2A workers are not expected to make up the entire workforce of all petitioners.

Also, as stated above, guidelines provided by the SBA Office of Advocacy suggest that an added cost of more than one percent of the gross revenues of the affected entities in a particular sector may be a significant impact. USCIS believes that it is unlikely that an employer will incur costs of $5,501 due to this rulemaking, as it is the high end of the range of possible costs. Again, if each firm affected by this rule hires the average of 11 workers and all 11 are recruited by a firm that charges or causes the employer to reimburse all 11 employees $500, the additional cost of this rule could reach as high as $5,500 per employer.

The actual revenue of the typical H–2A employer is unknown. However, according to the SBA table of size standards in the Small Business Size Regulations (13 CFR part 121), the annual gross revenue threshold for farms is $750,000. USCIS believes that the farms that use the H–2A program are likely to be on the upper bounds of the small business size standard of $750,000 in gross cash receipts. If an employer hires 11 employees and incurs recruiting costs of $500 for every one of them, the $5,500 added cost represents only 0.73 percent of $750,000. To further illustrate, for $5,500 to exceed one percent of annual revenues, sales would have to be $550,000 per year or less. While 97.9 percent of all farms have annual sales of less than $500,000, only 36 percent of all farms hire any employees. USCIS believes that farms below annual sales of $500,000 would be very unlikely to hire 11 temporary seasonal employees and incur the $5,500 in added costs. Therefore, USCIS believes that the costs of this rulemaking to small entities will not exceed one percent of annual revenues.

Therefore, using both average annual labor costs and the percentage of the affected entities' annual revenue stream as guidelines, USCIS concludes that this rule will not have a significant economic impact on a substantial number of small entities.

5. Impact on U.S.-Based Recruiting Firms

As outlined above, recruiting firms' activities may be affected tangentially by this rule's provisions. Nonetheless, the effect of the fee prohibition on recruiting companies, staffing firms, or employment agents is not a new compliance requirement on regulated entities. Establishment of a non-immigrant temporary worker program was intended to alleviate seasonal labor shortages. The formation of firms that recruit workers in foreign countries is an unintended consequence of these programs since those firms are not the intended recipients of the benefits that are supposed to inure to participants in those programs. In any event, DHS does not believe the prohibition on charging aliens for H–2A job referrals will cause a significant economic impact on the affected placement, recruiting, or staffing firms because they may, and are expected to, transfer those costs to the employers, as analyzed above.

6. Certification

For these reasons, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or record-keeping requirements inherent in a rule. It is estimated that this rule will require employers to file 3,600 more petitions using Form I–129 (OMB Control No. 1615–0009) for H–2A workers. In addition, this rule will require revisions to the Form I–129 (H Classification Supplement to the Form I–129).

This is a final rule and the revision to this information collection was not previously submitted and approved by OMB. USCIS is now requesting comments under the emergency review and clearance procedures of the PRA on this revision no later than February 17, 2009. When submitting comments on the information collection, your comments should address one or more of the following four points:

1. Evaluate whether the collection of information is necessary for the proper performance of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection for Form I–129.

a. *Type of information collection:* Revision of currently approved collection.

b. *Title of Form/Collection:* Petition for Nonimmigrant Worker.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–129 (H Classification Supplement to the Form I–129), and U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract: Individuals or Households.* This form is used by an employer to petition for aliens to come to the U.S. temporarily to perform services, labor, and training or to request extensions of stay or changes in nonimmigrant status for nonimmigrant workers.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 368,548 respondents at 2.75 hours per response.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 1,013,507 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, Attention: Chief, 202–272–8377.

In addition, this rule will allow employers of H–2A employees to employ H–2A workers for up to 120 days while they are awaiting an extension of status based on a new employer if the employer registers for E-Verify. It is estimated that 9,801 more firms will have to enroll in E-Verify so they may hire an employee under the

120-day extended authorization. Accordingly, USCIS will submit an OMB correction worksheet (OMB 83–C) to OMB increasing the number of respondents, burden hours and annual costs.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students, Victims.

8 CFR Part 215

Administrative practice and procedure, Aliens.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185, 1186a, 1187, 1221, 1253, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

■ 2. Section 214.2 is amended by:
■ a. Revising paragraphs (h)(2)(i)(A) through (D);
■ b. Revising paragraph (h)(2)(iii);
■ c. Revising paragraphs (h)(5)(i)(A) through (C);
■ d. Adding a new paragraph (h)(5)(i)(F);
■ e. Removing last sentence from (h)(5)(ii);
■ f. Revising paragraph (h)(5)(v)(B);
■ g. Revising paragraph (h)(5)(v)(C);
■ h. Revising paragraph (h)(5)(vi);
■ i. Revising paragraphs (h)(5)(viii)(A) through (C);
■ j. Revising paragraph (h)(5)(ix);
■ k. Revising paragraph (h)(5)(x);
■ l. Adding new paragraphs (h)(5)(xi) and (xii);
■ m. Adding a new sentence to the end of paragraph (h)(11)(i)(A); and by
■ n. Revising paragraph (h)(11)(ii).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, as provided in the form instructions.

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I–129 shall be where the petitioner is located for purposes of this paragraph.

(C) *Services or training for more than one employer.* If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS as provided in the form instructions.

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I–129 requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided by 8 CFR 274a.12(b)(21) or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

* * * * *

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. All H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but not the name of those beneficiaries who are not currently in the United States. However, a petitioner filing an H–2B petition on behalf of workers who are not present in the United States that is supported by a temporary labor certification requiring education, training, experience, or special requirements of the beneficiary, must name all the requested workers in the petition. Unnamed beneficiaries must be shown on the petition by total number. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions for that temporary labor certification. All H–2A petitions on behalf of workers who are not from a country that has been designated as a participating country in accordance with paragraph (h)(5)(i)(F)(1) of this section must individually name all the workers in the petition who fall within this category. All H–2A petitions must state the nationality of all beneficiaries, whether or not named, even if there are beneficiaries from more than one country. H–2A petitions for workers from designated participating countries and non-designated countries should be filed separately.

* * * * *

(5) * * *

(i) * * *

(A) *General.* An H–2A petition must be filed on Form I–129 with a single valid temporary agricultural labor certification. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the temporary labor certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.

(C) [Reserved]

* * * * *

(F) *Eligible Countries.* (*1*)(*i*) H–2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the **Federal Register**, taking into account factors, including but not limited to:

(*A*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*B*) The number of final and unexecuted orders of removal against

citizens, subjects, nationals and residents of that country;

(*C*) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(*D*) Such other factors as may serve the U.S. interest.

(*ii*) A national from a country not on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section may be a beneficiary of an approved H–2A petition upon the request of a petitioner or potential H–2A petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*A*) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section;

(*B*) Evidence that the beneficiary has been admitted to the United States previously in H–2A status;

(*C*) The potential for abuse, fraud, or other harm to the integrity of the H–2A visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*D*) Such other factors as may serve the U.S. interest.

(*2*) Once published, any designation of participating countries pursuant to paragraph (h)(5)(i)(F)(*1*)(*i*) of this section shall be effective for one year after the date of publication in the **Federal Register** and shall be without effect at the end of that one-year period.

* * * * *

(v) * * *

(B) *Evidence of employment/job training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of the past employer or employers' detailed statement(s) or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from persons who worked with the beneficiary that demonstrate the claimed employment or job training.

(C) *Evidence of education and other training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s), that show periods of attendance, majors and degrees or certificates accorded.

(vi) *Petitioner consent and notification requirements*—(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site by DHS officers where the labor is being performed for the purpose of determining compliance with H–2A requirements.

(B) *Agreements.* The petitioner agrees to the following requirements:

(*1*) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if:

(*i*) An H–2A worker fails to report to work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by his or her employer, whichever is later;

(*ii*) The agricultural labor or services for which H–2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H–2A petition; or

(*iii*) The H–2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

(*2*) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification. To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(*3*) To pay $10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(C) *Process.* If DHS has determined that the petitioner has violated the notification requirements in paragraph (h)(5)(vi)(B)(1) of this section and has not received the required notification, the petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(E) *Abscondment.* An H–2A worker has absconded if he or she has not reported for work for a period of 5 consecutive workdays without the consent of the employer.

* * * * *

(viii) * * *

(A) *Effect of violations of status.* An alien may not be accorded H–2A status who, at any time during the past 5 years, USCIS finds to have violated, other than through no fault of his or her own (e.g., due to an employer's illegal or inappropriate conduct), any of the terms or conditions of admission into the United States as an H–2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant shall be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H–2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12 or section 214(n) of the Act, the beneficiary may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H–2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H–2A status for a total of 3 years may not again be

granted H–2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H–2A nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. Eligibility under paragraph (h)(5)(viii)(C) of this section will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) of this section shall only be admitted for that abbreviated period.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated earlier than the end date stated on the H–2A petition and before the completion of work; who fail to report to work within five days of the employment start date on the H–2A petition or within five days of the start date established by his or her employer, whichever is later; or who abscond from the worksite. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated or absconded worker's name, date and country of birth, termination date, and the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(*1*) of this section.

(x) *Extensions in emergent circumstances.* In emergent circumstances, as determined by USCIS, a single H–2A petition may be extended for a period not to exceed 2 weeks without an additional approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved H–2A petition. The previously approved H–2A petition must have been based on an approved temporary labor certification, which shall be considered to be extended upon the approval of the extension of H–2A status.

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries.* (A) *Denial or revocation of petition.* As a condition to approval of an H–2A petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of H–2A employment (other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the alien to pay such costs and fees).

(*1*) If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such prohibited fee or compensation, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner has reimbursed the alien in full for such fees or compensation, or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(*2*) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H–2A employment, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner or the facilitator, recruiter, or similar employment service has reimbursed the alien in full for such fees or compensation or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(*3*) If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of obtaining the H–2A employment after the filing of the H–2A petition, the petition will be denied or revoked on notice.

(*4*) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H–2A employment after the filing of the H–2A petition and with the knowledge of the petitioner, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated, or notifies DHS within 2 workdays of obtaining knowledge in a manner specified in a notice published in the **Federal Register**.

(B) *Effect of petition revocation.* Upon revocation of an employer's H–2A petition based upon paragraph (h)(5)(xi)(A) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(C) *Reimbursement as condition to approval of future H–2A petitions.* (*1*) *Filing subsequent H–2A petitions within 1 year of denial or revocation of previous H–2A petition.* A petitioner filing an H–2A petition within 1 year after the decision denying or revoking on notice an H–2A petition filed by the same petitioner on the basis of paragraph (h)(5)(xi)(A) of this section must demonstrate to the satisfaction of USCIS, as a condition of approval of such petition, that the petitioner or agent, facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or that the petitioner has failed to locate the beneficiary. If the petitioner demonstrates to the satisfaction of USCIS that the beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H–2A petitions, except as provided in paragraph (h)(5)(xi)(C)(*2*). If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate the beneficiary with respect to each H–2A petition filed within 1 year after the decision denying or revoking the previous H–2A petition on the basis of paragraph (h)(5)(xi)(A) of this section but has failed to do so, such condition of approval shall be deemed satisfied with respect to any H–2A petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall

include contacting any of the beneficiary's known addresses.

(*2*) *Effect of subsequent denied or revoked petitions.* An H–2A petition filed by the same petitioner subsequent to a denial under paragraph (h)(5)(xi)(A) of this section shall be subject to the condition of approval described in paragraph (h)(5)(xi)(C)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(xii) *Treatment of alien beneficiaries upon revocation of labor certification.* The approval of an employer's H–2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H–2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

* * * * *

(11) * * *

(i) * * *

(A) * * * However, H–2A petitioners must send notification to DHS pursuant to paragraph (h)(5)(vi) of this section.

* * * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

■ 3. The authority citation for part 215 continues to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

■ 4. Section 215.9 is added to read as follows:

§ 215.9 Temporary Worker Visa Exit Program.

An alien admitted on an H–2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will establish a pilot program by publishing a Notice in the **Federal Register** designating which H–2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

■ 6. Section 274a.12 is amended by:

■ a. Removing the word ''or'' at the end of paragraph (b)(19);

■ b. Removing the period at the end of paragraph (b)(20), and adding ''; or'' in its place; and by

■ c. Adding a new paragraph (b)(21).

The addition reads as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H–2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion. Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the date of the denial decision. The employment authorization shall also terminate automatically if the employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

* * * * *

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8–29888 Filed 12–12–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1292

[Docket No. EOIR 160F; A.G. Order No. 3028–2008]

RIN 1125–AA59

Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule adopts, in part, the proposed changes to the rules and procedures concerning the standards of representation and professional conduct for practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board). It also clarifies who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against practitioners who engage in criminal, unethical, or unprofessional conduct, or in frivolous behavior before EOIR. The final rule increases the number of grounds for discipline, improves the clarity and uniformity of the existing rules, and incorporates miscellaneous technical and procedural changes. The changes herein are based upon the Attorney General's initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.

DATES: *Effective date:* This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600,

Falls Church, Virginia 22041, telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

On July 30, 2008, the Attorney General published a proposed rule in the **Federal Register** (73 FR 44178). The comment period ended September 29, 2008. Comments were received from four commenters, including a local bar association, a national immigration lawyer association, and two attorneys. Because some comments overlap, and three of the commenters covered multiple topics, the comments are addressed by topic, rather than by reference to each specific comment and commenter. The provisions of the proposed rule on which the public did not comment are adopted without change in this final rule. Additional technical changes and changes made in *response* to public comments are discussed below.

II. Regulatory Background

This rule amends 8 CFR parts 1001, 1003, and 1292 by changing the present definitions and procedures concerning professional conduct for practitioners, which term includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR). This rule implements measures in *response* to the Attorney General's assessment of EOIR with respect to EOIR's authority to discipline and deter professional misconduct. The rule also aims to improve EOIR's ability to effectively regulate practitioner conduct by implementing technical changes with respect to the definition of attorney and clarifying who is authorized to represent and appear on behalf of individuals in proceedings before the Board of Immigration Appeals (Board) and the immigration judges. The regulations concerning representation and appearances were last promulgated on May 1, 1997 (62 FR 23634) (final rule). The regulations for the rules and procedures concerning professional conduct were last promulgated as a final rule on June 27, 2000 (65 FR 39513).

When it was part of the Department of Justice, the former Immigration and Naturalization Service (INS) incorporated by reference in its regulations EOIR's grounds for discipline and procedures for disciplinary proceedings. Since then, the functions of the former INS were transferred from the Department of Justice (Department) to the Department of Homeland Security (DHS). DHS's immigration regulations are contained in chapter I in 8 CFR, while 8 CFR chapter V now contains the regulations governing EOIR. The rules and procedures concerning professional conduct for representation and appearances before the immigration judges and the Board are now codified in 8 CFR part 1003, subpart G. The rules for representation and appearances before the immigration judges and the Board are codified in 8 CFR part 1292. The rules for representation and appearances and for professional conduct before DHS and its components remain codified in 8 CFR parts 103 and 292.

Both sets of rules provide a unified process for disciplinary hearings as provided in 8 CFR 1003.106, regardless whether the hearing is instituted by EOIR or by DHS. *See generally Matter of Shah,* 24 I&N Dec. 282 (BIA 2007) (imposing discipline on attorney who knowingly and willfully misled USCIS by presenting an improperly obtained certified Labor Condition Application in support of a nonimmigrant worker petition). Finally, both sets of rules provide for cross-discipline, which allows EOIR to request that discipline imposed against a practitioner for misconduct before DHS also be imposed with respect to that practitioner's ability to represent clients before the immigration judges and the Board, and vice versa. *See* 8 CFR 292.3(e)(2) (DHS) and 1003.105(b) (EOIR). Additional background information regarding professional conduct rules for immigration proceedings can be found in the proposed rule, 73 FR at 44178–180.

This rule amends only the EOIR regulations governing representation and appearances, and professional conduct under chapter V in 8 CFR. This rule does not make any changes to the DHS regulations governing representation and appearances or professional conduct.

Currently, the disciplinary regulations allow EOIR to sanction practitioners, including attorneys and certain non-attorneys who are permitted to represent individuals in immigration proceedings (''representatives''), when discipline is in the public interest; namely, when a practitioner has engaged in criminal, unethical, or unprofessional conduct or frivolous behavior. Sanctions may include expulsion or suspension from practice before EOIR and DHS, and public or private censure. EOIR frequently suspends or expels practitioners who are subject to a final or interim order of disbarment or suspension by their state bar regulatory authorities—this is known as ''reciprocal'' discipline.

The Attorney General completed a comprehensive review of EOIR's responsibilities and programs, and determined that, among other things, the immigration judges should have the tools necessary to control their courtrooms and protect the adjudicatory system from fraud and abuse. Accordingly, the Attorney General determined that the existing regulations, including those at 8 CFR 1003.101–109, should be amended to provide for additional sanction authority for false statements, frivolous behavior, and other gross misconduct. Additionally, the Attorney General found that the Board should have the ability to effectively sanction litigants and practitioners for defined categories of gross misconduct.

As a result, this rule seeks to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute misconduct.

In part, the rule responds to the Attorney General's findings and conclusions by adding substantive grounds of misconduct modeled on the American Bar Association Model Rules of Professional Conduct (2006) (ABA Model Rules) that will subject practitioners to sanctions if they violate such standards and fail to provide adequate professional representation for their clients. Specifically, the grounds for sanctionable misconduct have been revised to include language that is similar, and sometimes identical, to the language found in the ABA Model Rules, as such disciplinary standards are widely known and accepted within the legal profession. Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation. *See Matter of Rivera-Claros*, 21 I&N Dec. 599, 604 (BIA 1996). In addition, these revisions will make the EOIR professional conduct requirements more consistent with the ethical standards applicable in most states.

This rule will also enhance the existing regulation by amending the current procedures and definitions through technical modifications that are more consistent with EOIR's authority to regulate practitioner misconduct. *See Koden* v. *U.S. Dep't of Justice*, 564 F.2d 228, 233 (7th Cir. 1977); 8 U.S.C. 1103, 1362. For example, the rule amends the definition of ''attorney'' at 8 CFR 1001.1(f) by adding language stating that an attorney is one who is eligible to practice law in a U.S. state or territory.

Additionally, this rule amends the language at 8 CFR 1292.1(a)(2) to clarify that law students and law graduates must be students and graduates of accredited law schools in the United States. Accordingly, the rule will allow EOIR to investigate and prosecute instances of misconduct more effectively and efficiently while ensuring the due process rights of both the client and the practitioner.

III. Responses to Comments

A. General Comments Concerning the Practitioner Discipline Regulations

Comment. One commenter raised concern about the ability of immigration judges to use these rules ''to commence retaliatory disciplinary proceedings against attorneys who complain of their * * * practices.''

Response. The comment misunderstands EOIR's disciplinary procedural structure. In 2000, the Department addressed the issue as to whether immigration judges had the authority to initiate disciplinary proceedings or impose disciplinary sanctions. *See* Professional Conduct for Practitioners—Rules and Procedures, 65 FR 39513, 39520–39521 (June 27, 2000). Under the current regulations, which have been in place since then, immigration judges have no authority to initiate disciplinary proceedings against a particular attorney. Immigration judges can file complaints about attorneys with EOIR's disciplinary counsel, just as aliens, attorneys, or others involved in an immigration proceeding may file such complaints. These complaints are independently reviewed by EOIR's disciplinary counsel, who then determines, after an independent investigation, whether to close the complaint, informally resolve it, or initiate formal disciplinary proceedings. If an attorney believes that an immigration judge improperly filed a complaint as a retaliatory action, the attorney may file a complaint against the immigration judge with the Office of the Chief Immigration Judge. *See www.usdoj.gov/eoir/sibpages/IJConduct.htm.*

Comment. One organization commented that EOIR should adjust the practitioner disciplinary procedures because EOIR is greatly expanding the scope of its grounds for discipline. The commenter stated that up until the proposed rule, EOIR mainly imposed discipline due to criminal convictions or reciprocally based on discipline imposed by other jurisdictions. The commenter was concerned that the current disciplinary structure is not adequate for the new independent disciplinary scheme that the proposed rule contemplated establishing.

Response. EOIR regularly cooperates with attorney disciplinary agencies at the state and federal levels to impose reciprocal discipline with regard to practitioners who have been suspended or disbarred in other jurisdictions. EOIR also takes prompt action to prohibit practitioners who have been convicted of serious crimes from practicing before EOIR. However, EOIR's practitioner disciplinary procedures were never intended to adjudicate matters involving only reciprocal discipline or criminal convictions. At its inception 50 years ago, the practitioner disciplinary regulations provided ten grounds for discipline that were original in nature. *See* 23 FR 2670, 2672–2673 (April 23, 1958). These regulations contemplated the possibility that practitioners would be charged with misconduct arising from practice before the Department, and that Department officials would need to adjudicate these charges without reference to another tribunal's findings as to misconduct, whether ethical or criminal in nature. As reflected in several published cases, these practitioner disciplinary procedures have been used to adjudicate original charges of professional misconduct. *See Matter of Sparrow,* 20 I&N Dec. 920 (BIA 1994) (case involving both reciprocal and original charges); *Matter of De Anda,* 17 I&N Dec. 54 (BIA, A.G. 1979); *Matter of Solomon,* 16 I&N Dec. 388 (BIA, A.G. 1977); *Matter of Koden,* 15 I&N Dec. 739 (BIA 1974, A.G. 1976). None of these cases reveals a deficiency in the procedures, and these procedures were upheld by a federal court of appeals. *See Koden U.S. Dep't of Justice*, 564 F.2d 228, 233–235 (7th Cir. 1977).

In 2000, the Department completely reviewed, revised, and expanded the practitioner disciplinary procedures. 65 FR at 39523. These regulations expressly created summary disciplinary procedures for cases based on reciprocal discipline and criminal convictions, which are not used in proceedings involving original charges of misconduct. *See* 8 CFR 1003.103–106. When the Department published these new procedures, it also consolidated and added additional grounds for discipline. The Department's major renovations in 2000 to the hearings and appeals procedures for original charges of misconduct were intended to be sufficient to adjudicate the eleven original grounds for discipline in the current regulations. The addition of several more grounds for discipline established in this final rule does not change the sufficiency or adequacy of these existing procedures.

Comment. One commenter stated that EOIR should define ''accredited representative'' and should issue identification cards to accredited representatives so that immigration judges will be able to verify that an individual appearing in court is accredited to practice before EOIR.

Response. The regulations at 8 CFR 1292.1 presently state that a person entitled to representation before EOIR may be represented by, among others, an accredited representative. This section cross-references 8 CFR 1292.2, which provides detailed information concerning accredited representatives. Because accredited representatives must go through a special process to receive accreditation, the regulations already provide more information about accredited representatives than they do about attorneys or any other type of representative. Further, 8 CFR 1003.102(a)(2) specifies the compensation that accredited representatives may receive for their services. Therefore, it is unnecessary to further define the term ''accredited representative.'' The Department also declines, at this time, to issue identification cards to accredited representatives. The regulations at 8 CFR 1292.2(d) require EOIR to maintain a roster of accredited representatives. This roster is available online at *http://www.usdoj.gov/eoir/statspub/accreditedreproster.pdf.* Immigration judges may easily refer to the roster to determine if an individual is an accredited representative. Thus, contrary to the commenter's concern, immigration judges are not ''forced to accept assertions of accredited representatives that they are, in fact, accredited.''

Comment. All of the commenters proposed that the Department apply the professional conduct regulations to government attorneys involved in immigration proceedings. Three commenters asserted that the practitioner disciplinary regulations should apply to both private practitioners and DHS attorneys who practice before EOIR. Further, two commenters indicated that immigration judge misconduct is a problem and one of those commenters argued that rules governing the conduct of immigration judges should be published contemporaneously with these final rules.

Response. As an initial matter, the Department would note for clarity that the ''rule'' of professional conduct for immigration judges referenced by the

commenter was not a proposed rule, but a notice published in the **Federal Register** seeking comment on draft ''Codes of Conduct for the Immigration Judges and Board Members.'' 72 FR 35510 (June 28, 2007). This notice did not include a process by which to discipline immigration judges or Board Members. Rather, this notice recognized certain ''canons'' of professional conduct. *Id.* at 35510–12. Attorneys concerned with an immigration judge's conduct may follow the procedures for filing a complaint regarding the conduct of an immigration judge. *See http://www.usdoj.gov/eoir/sibpages/IJConduct.htm.*

In 2000, the Department addressed the reasons why government attorneys, including immigration judges, are not subject to the same process used for disciplining practitioners. *See* 65 FR at 39522. The reasons stated in 2000 with respect to the current practitioner disciplinary process remain valid, notwithstanding the fact that the government is now represented in removal proceedings by attorneys working for DHS rather than the former INS.

Like the former INS attorneys who were subject to investigation by the Department's Inspector General and Office of Professional Responsibility, DHS's Office of the Inspector General and the Office of Professional Responsibility for Immigration and Customs Enforcement investigate DHS attorneys. Further, DHS attorneys are also required to comply with the Standards of Ethical Conduct for Employees of the Executive Branch, found at 5 CFR part 2635, and other standards applicable to government employees. In fact, DHS has adopted a formal disciplinary process for its employees that provides similar hearing and appeal rights as EOIR's practitioner disciplinary process, including removal or suspension from employment. *See* 5 CFR 9701.601–710. Moreover, applying this rule to DHS attorneys was not included in the proposed rule, and cannot be adopted in this final rule in the absence of prior notice and comment. Accordingly, the Department declines to adopt the comments requesting contemporaneous publication of the Code of Conduct for Immigration Judges and Board Members and a rule addressing professional conduct of government attorneys.

Comment. Two commenters indicated that there is a perception that an inherent conflict of interest exists when immigration judges adjudicate practitioner disciplinary cases. One of the commenters expressed the view that immigration judges do not have training in attorney discipline matters, private practice experience, or sufficient time to spare from their immigration case workload. The commenter argued that EOIR should constitute disciplinary hearing panels composed of private practice attorneys and members of the public to hear and decide practitioner discipline cases.

Response. The use of immigration judges as adjudicators in practitioner disciplinary cases was codified over twenty years ago, in 1987. *See* Executive Office for Immigration Review; Representation and Appearances, 52 FR 24980 (July 2, 1987). In 2000, the Department amended the practitioner disciplinary regulations to provide that both immigration judges and administrative law judges could be assigned to adjudicate practitioner disciplinary cases. When that final rule was published, the Department gave a detailed explanation concerning the use of immigration judges as adjudicating officials in practitioner disciplinary cases. *See* 65 FR at 39515–16. That explanation remains valid.

However, in recognition that these final rules significantly increase the regulation of practitioner conduct, EOIR has chosen to create a corps of adjudicating officials made up of immigration judges and administrative law judges who will receive specialized training in professional responsibility law, and who will hear and decide practitioner disciplinary cases as part of their normal caseload. Further, EOIR acknowledges the concern raised by the commenters and notes that the current regulations require that an immigration judge appointed to hear disciplinary cases is not the complainant and not one whom the practitioner regularly appears before. 8 CFR 1003.106(a)(1)(i).

B. Section 1003.102—Grounds of Misconduct

1. Section 1003.102(e)—Reciprocal Discipline

This rule sought to amend the existing rules that only allow the imposition of discipline where a practitioner resigns ''with an admission of misconduct'' to allow ''the imposition of discipline on an attorney who resigns while a disciplinary investigation or proceeding is pending.'' 73 FR at 44180. No comments were received regarding this part of the proposed rule. Accordingly, this rule will be adopted without change.

2. Section 1003.102(k)—Previous Finding of Ineffective Assistance of Counsel

Comment. Two organizations commented on the proposed amendment to 8 CFR 1003.102(k), which would expand the existing rule to sanction practitioners based on a finding of ineffective assistance of counsel by a federal court. One commenter questioned whether it was appropriate for a finding of ineffective assistance of counsel to serve as a ground for discipline. The commenter asserted that ineffective assistance of counsel is normally raised by aliens when seeking reopening of unfavorable decisions in their cases, and that because of this, allegations of ineffective assistance of counsel are ''rampant.'' The commenter thought that the circumstances under which ineffective assistance of counsel is raised can put well-intentioned and competent attorneys at risk of discipline. The other commenter appreciated that the proposed rule would expand consideration of ineffective assistance of counsel findings ''outside the parameters of the immigration courtroom.'' This commenter also suggested that the rule be revised to make clear that the ground of discipline must be based on a ''final order'' finding ineffective assistance of counsel, either by an immigration judge, the Board, or a federal court.

Response. The purpose of amending this rule is to permit EOIR to impose disciplinary sanctions on practitioners who have been found to have provided ineffective assistance of counsel in immigration proceedings before EOIR, regardless of whether that finding of ineffective assistance of counsel was made by an immigration judge, the Board, or a federal court. Although one of the commenters thought that practitioners would be placed at risk for discipline based on allegations of ineffective assistance of counsel that are made by aliens only seeking reopening of their immigration cases, EOIR has been administering this ground for discipline since 2000 without inappropriately disciplining a practitioner. As stated in the supplemental information for the rule that proposed ineffective assistance of counsel as a ground for discipline, an adjudicating official may determine not to impose disciplinary sanctions notwithstanding a finding of ineffective assistance of counsel in an immigration proceeding. *See* Executive Office for Immigration Review; Professional Conduct for Practitioners—Rules and Procedures, 63 FR 2901, 2902 (January

20, 1998) (proposed rule). Moreover, the EOIR disciplinary counsel does not automatically initiate disciplinary proceedings based on a finding of ineffective assistance of counsel. Rather, proceedings are initiated based on EOIR disciplinary counsel's independent review of the matter. Finally, if proceedings are initiated, practitioners receive a full and fair opportunity to dispute the underlying finding of ineffective assistance of counsel before being disciplined.

Another commenter agreed with the proposed amendment to this ground for discipline; however, the commenter misunderstood the scope of this amendment. The EOIR disciplinary process remains focused on disciplining practitioners based on a finding of ineffective assistance of counsel that occurred before EOIR in immigration proceedings (or before DHS in the case of charges brought by the DHS disciplinary counsel).

One commenter also suggested that EOIR limit discipline to matters in which the finding of ineffective assistance of counsel was made in a final order. We will not adopt this recommendation because the finding of ineffective assistance of counsel is usually not located in a final order by an immigration judge or the Board. This is because aliens most commonly assert ineffective assistance of counsel as a basis for getting their cases reopened. If an alien prevails in the ineffective assistance of counsel claim, the adjudicator who issues this determination will do so in an order that reopens the proceeding, and such an order granting reopening is itself not a final order because further proceedings will be held after the case is reopened. Therefore, for all of the reasons stated above, the Department adopts the proposed amendment to this ground for discipline as originally proposed.

3. Section 1003.102(l)—Failure To Appear in a Timely Manner

One commenter provided a comment agreeing with this change. No other comments were received. Accordingly, this rule is adopted without change.

4. Section 1003.102(m)—Assist in the Unauthorized Practice of Law

Comment. Two comments were received regarding section 1003.102(m). One comment stated that this is ''one of the most valuable rules proposed.'' The other commenter did not take a position on the rule, but suggested revising the rule to include a ''knowingly'' *mens rea* requirement to this ground of discipline that prohibits practitioners from assisting in the unauthorized practice of law.

Response. The Department did not propose a modification to this ground for discipline. This ground was only reprinted in the proposed rule to delete the period at the end of this provision and add a semi-colon. Accordingly, the Department declines to make any substantive amendments to this rule, such as including the word ''knowingly.'' Such a change is not necessary because practitioners should make certain that any other practitioner they work with is authorized to practice before EOIR. However, the Department believes that additional clarification of what constitutes the practice of law would be helpful to practitioners. Therefore, a clarifying statement will be added to this ground for discipline that will state that the practice of law before EOIR means engaging in *practice* or *preparation* as those terms are defined in 8 CFR 1001.1(i) and (k).

5. Section 1003.102(n)—Conduct Prejudicial to the Administration of Justice

Comment. Two commenters were concerned with the language used in this proposed provision. One commenter believed it was too vague. The other commenter, while acknowledging that this proposed provision is based on ABA Model Rule 8.4(d), stated that this rule was extremely broad and suggested that the Department narrow this ground by adding text from the supplemental information in the proposed rule or from the ABA's comments to Rule 8.4(d).

Response. This ground for discipline is based on ABA Model Rule 8.4(d). As such, it is a well-known ethical rule with which most attorneys must comply whenever representing parties before a tribunal. Therefore, we do not believe that additional language needs to be added to the proposed rule. The Attorney General expects that EOIR's disciplinary counsel, adjudicating officials, and the Board will consider the ABA's comments to ABA Model Rule 8.4(d), and how this rule has been applied in interpreting and applying this regulatory provision, so that this new ground for discipline would not be applied in a manner that is inconsistent with the prevailing interpretations with which attorneys are already familiar. Therefore, we are adopting the proposed rule without change.

6. Section 1003.102(o)—Competence

Comment. One commenter commended the addition of this provision, which is based on ABA Model Rule 1.1. The commenter suggested that the Department add additional text to the provision from the ABA's comments 1, 3, and 5 to Rule 1.1.

Response. As indicated in the proposed rule, this ground for discipline uses text that is nearly identical to ABA Model Rule 1.1. The proposed rule also included one sentence from the ABA's comment 5 to Rule 1.1. The Department has considered adding additional text to this ground for discipline from the ABA's comments 1, 3, and 5 to Rule 1.1. However, the Department believes that the proposed rule, as originally proposed, provides sufficient information for practitioners to be on notice of their duty to represent their clients competently. The Department's decision not to add additional text does not mean that the ABA's comments 1, 3, and 5 are not relevant to interpreting this provision. Because this ground for discipline is based on ABA Model Rule 1.1, relevant ABA comments concerning Rule 1.1, and relevant judicial interpretations, can be considered as an important aid in interpreting this ground for discipline.

7. Section 1003.102(p)—Scope of Representation

Comment. One commenter was concerned by this provision because the commenter believed that the provision would interfere with retainer agreements between attorneys and their clients, which are traditionally governed by state law. The commenter agreed that immigration judges should have a role in determining whether a practitioner can withdraw from a case; however, the commenter thought that this provision would require practitioners to continue to represent a client even when there is a conflict of interest. The commenter urged the Department to adopt standards governing whether immigration judges should permit the withdrawal of practitioners from cases. Finally, the commenter suggested that the Department permit limited appearances and allow practitioners to withdraw from cases in which clients have failed to pay fees. Another commenter views this change as ''an excellent proposal'' but suggests that the rule require clear contracts between attorneys and clients.

Response. Upon review, the Department has decided to remove the text from the proposed provision that is not based on ABA Model Rule 1.2(a) and add additional text from ABA Model Rule 1.2(a) concerning a practitioner's ability to ''take such action on behalf of the client as is impliedly authorized to carry out the representation.'' The Department is

making this change because this provision, which involves the scope of representation, should not include text discussing the withdrawal or the termination of employment of practitioners. The commenter's suggestion that the Department adopt standards governing whether immigration judges should permit the withdrawal of practitioners is outside the scope of this rule. This rule only involves practitioner disciplinary matters and does not include proposed amendments to procedures in immigration proceedings, such as 8 CFR 1003.17. Likewise, the suggestion that the Department permit limited appearances is an issue involving immigration proceedings that is not appropriately addressed in this final rule.

8. Section 1003.102(q)—Diligence

Comment. One commenter noted appreciation for this proposal but suggested that the Department add a good cause exception to the requirement that practitioners act with diligence and promptness. The commenter stated that there may always be unforeseen emergencies that occur. The commenter also suggested that the Department permit *nunc pro tunc* filings in immigration cases for good cause shown.

Response. The inclusion in this provision of a good cause exception is unnecessary. This provision requires ''reasonable'' diligence and promptness. Therefore, practitioners will not be expected to anticipate every possible contingency, such as a truly unforeseen emergency, in order to avoid discipline under this rule. However, practitioners should make an effort to prepare for foreseeable exigencies. As stated in *response* to a previous comment, this rule only involves practitioner disciplinary matters and does not include proposed amendments to procedures in immigration proceedings. Therefore, the Department will not adopt, as part of this final rule, a provision that permits late filings if there is good cause.

9. Section 1003.102(r)—Communication

Comment. Two commenters stated that this provision's requirement that practitioners communicate with aliens in their native language would be unduly burdensome. One commenter believes that the rule would transfer the expense of translation services from aliens to practitioners. Another commenter believes that the requirements in this provision would make it difficult for aliens who speak unusual foreign languages to obtain representation. The commenter asserted that aliens often rely on friends and family to translate for them, and practitioners should not be required to ensure that those translations are accurate. One commenter suggested that this provision should only require practitioners to make a diligent and reasonable effort to communicate in the alien's language. Finally, one commenter was concerned that the provision would require practitioners to locate their clients to communicate with them; the commenter suggested that the rule only require communication using the contact information provided to the practitioner from the client.

Response. The Department accepts the suggestions from the commenters and the final version of this provision has been modified to ensure that practitioners are not required to provide all translation services for their clients. However, practitioners must make reasonable efforts to communicate with clients in a language that the client understands. Further, the Department agrees that practitioners should not have to locate their clients and should be able to rely on the contact information provided by their clients. However, if a practitioner cannot locate his or her client, the practitioner is responsible for informing EOIR that the practitioner is unable to contact his or her client.

10. Section 1003.102(s)—Candor Toward the Tribunal

Comment. One commenter took issue with the explanation for this rule in the supplemental information and requested that the rule make clear that ''the duty of the lawyer is only to make reasonable disclosure of contrary authority known to him,'' not to assist DHS in preparing its brief against the lawyer's client.

Response. This provision is extremely narrow and will not require practitioners to seek out legal authority that is contrary to their client's cases just to disclose this information to EOIR. This provision only applies to controlling legal authority that is directly contrary to the client's position when this controlling legal authority is already known to the practitioner and the other party did not provide it to EOIR. In this regard, the commenter is correct that this rule does not view an alien's attorney as having a duty to also conduct research for the opposing party.

11. Section 1003.102(t)—Notice of Entry of Appearance

Comment. One commenter thought that the proposed provision was too broad because it subjects practitioners who provide pro bono services to discipline if they do not sign pleadings or submit a Form EOIR–27 or EOIR–28. The commenter suggested that disciplinary sanctions only be imposed when filings demonstrate a lack of competence or preparation, or the practitioner has undertaken ''full client services.'' Another commenter approved of this change, but suggested that pro se aliens be provided notice of this requirement in their own language and that immigration judges inform all who appear before the court of the requirement.

Response. The Department believes that all practitioners should submit Forms EOIR–27 and EOIR–28, and sign all filings made with EOIR, in cases where practitioners engage in ''practice'' or ''preparation'' as those words are defined in 8 CFR 1001.1(i) and (k). It is appropriate to require practitioners who engage in ''practice'' or ''preparation,'' whether it is for a fee or on a pro bono basis, to enter a notice of appearance and sign any filings submitted to EOIR. As stated in the supplemental information to the proposed rule, this provision is meant to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship. Any practitioner who accepts responsibility for rendering immigration-related services to a client should be held accountable for his or her own actions, including the loss of the privilege of practice before EOIR, when such conduct fails to meet the minimum standards of professional conduct in 8 CFR 1003.102. It is difficult for EOIR to enforce those standards when practitioners fail to enter a notice of appearance or sign filings made with EOIR. However, in an effort to ensure clarity of this ground for discipline, a sentence will be added to this provision that makes it clear that a notice of appearance must be submitted and filings signed in all cases where practitioners engage in ''practice'' or ''preparation.'' If a practitioner provides pro bono services that do not meet these definitions, then a notice of appearance is not necessary.

As for the suggestions made by the second commenter, the Department declines to codify in the regulations a rule that requires notice to pro se aliens or anyone appearing before an immigration judge of an attorney's obligation to enter a Notice of Appearance. The scope of this rule is to provide notice to attorneys of their responsibilities when engaging in practice and preparation before EOIR and to provide grounds for discipline when an attorney fails to carry through on his or her responsibilities.

12. Section 1003.102(u)—Repeated Filings Indicating a Substantial Failure to Competently and Diligently Represent the Client

Comment. One commenter stated that the proposed rule fails to acknowledge that boilerplate language is sometimes appropriate where used in briefs where cases present common issues of law, analysis, and argument. The commenter was concerned that the proposed rule would punish the repeated use of briefing materials regardless of the material's relevance to the case at hand. The commenter proposed limiting the proposed rule's effect to filings that reflect incorporation of incorrect or irrelevant material. Another commenter agrees with this change, but questions how the ''repeated filings'' will be tracked such that the rule will be enforceable.

Response. The rule, as written, is sufficient to meet the concerns of the first commenter and is therefore adopted as the final rule. The rule makes it clear that conduct that will lead to sanctions only includes filings that use boilerplate language that reflect little or no attention to the specific factual or legal issues in a case and thereby show a lack of competence or diligence by the practitioner. As stated in the supplemental information to the proposed rule, EOIR seeks to deter practitioners from filing briefs that provide no recitation of the specific facts in the case and fail to explain how the cited law in the brief applies to the facts of the case. Therefore, this rule is sufficiently circumscribed to ensure that a practitioner's use of a legal argument in one case, which is copied from the practitioner's brief in another case, will not subject the practitioner to sanctions unless the argument fails to connect the legal issues raised in the brief with the specific facts in the case in a manner that shows a lack of competence and diligence.

As for the enforceability of the rule, the proposed rule explained that the Board has already experienced these situations. 73 FR at 44183. In light of this experience, the Board has already developed the means to identify cases where the same attorney is filing boilerplate briefs. Immigration judges, on the other hand, may be able to identify instances of concern based on their ongoing interaction with the practitioners who appear before them.

C. Section 1003.103—Immediate Suspension and Summary Disciplinary Proceedings

Comment. One commenter stated that a petition to immediately suspend a practitioner should not be filed until a final order is issued suspending, disbarring, or criminally convicting the practitioner in another jurisdiction.

Response. The regulations currently permit the imposition of an immediate suspension of a practitioner who has been suspended or disbarred on an interim basis. The proposed rule sought to clarify this authority; however, the proposed rule did not seek to broaden or change it. It is appropriate to immediately suspend a practitioner based on an interim suspension from a state licensing authority or a Federal court pending the issuance of a final order because any practitioner who is under a suspension from another jurisdiction does not meet the definition of an ''attorney'' under 8 CFR 1001.1(f). Such a practitioner is not qualified to practice before EOIR under 8 CFR 1292.1(a)(1). Further, it is beyond argument that it is appropriate to immediately suspend practitioners who have been convicted of serious crimes. The regulations protect practitioners because they require that all criminal appeals be completed before EOIR will issue a final order imposing a suspension or expulsion on a criminally convicted practitioner. *See* 8 CFR 1003.103(b).

Comment. One commenter was concerned that EOIR did not have a provision that would permit it to vacate an immediate suspension order imposed on a practitioner who later has an underlying state bar suspension vacated.

Response. The regulations expressly provide that upon a showing of good cause, the Board may set aside an immediate suspension if it is in the interests of justice to do so. 8 CFR 1003.103(a)(2). If an immediate suspension was solely predicated upon a state bar suspension that was vacated, it would be in the interests of justice for the Board to set aside its immediate suspension order.

Comment. One organization disagreed with the proposed change in the standard of proof in practitioner disciplinary proceedings from ''clear, unequivocal, and convincing evidence'' to ''clear and convincing evidence.'' The commenter stated that removing ''unequivocal'' makes lawyers more vulnerable to discipline without providing a corresponding benefit to the justice system and indicated that the standard of proof in practitioner disciplinary cases should not mirror those in removal proceedings.

Response. The proposed rule indicated the Department's intention to change the standard of proof in practitioner disciplinary cases to clear and convincing evidence because this is now the standard of proof used in removal proceedings adjudicated by the Board and immigration judges. This is appropriate given the reason why ''unequivocal'' was first adopted as part of the standard of proof in practitioner disciplinary proceedings. *See Matter of Koden*, 15 I&N Dec. 739, 748 (BIA 1974, A.G. 1976). In *Koden*, the Board decided that the standard of proof should be clear, convincing, and unequivocal evidence, rather than clear and convincing evidence as argued by the respondent, because many other jurisdictions used ''unequivocal'' as part of their disciplinary standard, and also because the Board and other immigration adjudicators were already familiar with applying the clear, convincing, and unequivocal evidence standard as that was the standard applicable in deportation proceedings. *See id.* It is appropriate for the standard of proof in practitioner disciplinary cases to be adjusted to the clear and convincing standard because that is now the standard that the ABA recommends for all jurisdictions to adopt in disciplinary cases, *see* Model Rules for Lawyer Disciplinary Enforcement R. 18 (2002), and also because that is the standard the Board and immigration judges now apply in removal proceedings. The latter reason is supported by both *Koden* and the regulations at 8 CFR 1003.106(a)(1)(v), which state: ''[d]isciplinary proceedings shall be conducted in the same manner as Immigration Court proceedings as is appropriate . * * *'' Further, while the concerns raised by the commenter were presumably directed at a reduction of the burden the government will bear in proving charges of misconduct, it is important to note that practitioners also receive a benefit to the change in the standard of proof. Practitioners have a reduced burden of proving affirmative defenses and proving that they are morally and professionally fit to be reinstated after being disciplined. *See* 8 CFR 1003.103(b)(2); 1003.105(a)(2); 1003.107(a)(1).

Comment. One commenter suggested that the regulations concerning reciprocal discipline be revised so that reciprocal discipline imposed by the Board will run concurrently with the discipline imposed by the practitioner's state bar. The commenter believed that the proposed revisions to 8 CFR 1003.103 would cause practitioners to be suspended or disbarred for periods of time that are different than that imposed by the state bar without any basis or finding as to why that result is appropriate.

Response. EOIR attempts to ensure in reciprocal disciplinary cases that a

suspension or expulsion before EOIR will be as contemporaneous as possible with discipline imposed by state bars. The regulations at 8 CFR 1003.103(a) permit the Board to impose an immediate suspension on a practitioner who has been suspended or disbarred, and the time served during the immediate suspension can be credited toward the term of suspension or expulsion in the final order. *Id.* However, the Board cannot issue an immediate suspension order against a practitioner contemporaneously with a state bar order of suspension or disbarment unless the practitioner complies with 8 CFR 1003.103(c) and informs EOIR of the suspension or disbarment in a timely fashion. In cases where practitioners fail to inform EOIR of state bar discipline, EOIR will have no alternative but to impose discipline at a later date after learning of the discipline. Even though Board precedent establishes that identical or comparable discipline is generally to be imposed in reciprocal disciplinary matters, *see Matter of Truong,* 24 I&N Dec. 52, 55 (BIA 2006); *Matter of Ramos,* 23 I&N Dec. 843, 848 (BIA 2005); *Matter of Gadda*, 23 I&N Dec. 645, 649 (BIA 2003), EOIR will not reward a practitioner's failure to comply with his or her duty to timely inform EOIR of state bar discipline by shortening the length of the reciprocal discipline imposed.

Further, while the Board generally subscribes to the concept of identical or comparable reciprocal discipline, there have been circumstances where the Board has imposed non-identical reciprocal discipline or denied reinstatement to a practitioner who has since been reinstated to practice before his state bar. *See Matter of Krivonos*, 24 I&N Dec. 292, 293 (BIA 2007) (denying reinstatement to practitioner who had been convicted of immigration-related fraud even though practitioner was reinstated by the state bar); *Matter of Jean-Joseph*, 24 I&N Dec. 295 (BIA 2007) (suspending practitioner for double the length of state bar suspension because practitioner violated the Board's immediate suspension order). Therefore, while identical or comparable reciprocal discipline is generally employed by the Board, the Board must have the flexibility to respond to the facts and circumstances presented in each case.

Comment. One commenter suggested that the rule allowing for public postings of immediate suspensions require that such postings be placed in the waiting rooms of the immigration courts.

Response. The regulatory language specifically states that ''the Board may require that notice of such suspension be posted at the Board, the Immigration Courts, or the DHS.'' In all immediate suspension orders issued by the Board to date, the Board has included a requirement that the immediate suspension be posted in a public area. In addition, such information is accessible to the public online at *http://www.usdoj.gov/eoir/profcond/chart.htm.*

D. Section 1003.105—Notice of Intent To Discipline and Section 1003.106—Hearing and Disposition

Comment. One commenter suggested that a Notice of Intent to Discipline should only be issued when there is a preliminary finding that the charges of misconduct could be sustained on clear and convincing evidence.

Response. This comment involves an existing regulation that was not subject to amendment in the proposed rule and, therefore, is outside the scope of the proposed rule. In 2000, the practitioner disciplinary regulations were amended to provide that a Notice of Intent to Discipline would only be issued when there is sufficient prima facie evidence to warrant charging a practitioner with misconduct. 8 CFR 1003.105(a). However, those charges would have to be proven by clear and convincing evidence. 8 CFR 1003.106(a)(1)(iv). Therefore, implicit in the filing of all charges is the belief by the EOIR disciplinary counsel that the charges can be proven by clear and convincing evidence.

Comment. One commenter took issue with the proposal to limit the circumstances under which a preliminary inquiry report will be served with a Notice of Intent to Discipline. The commenter understood the proposal to mean that the practitioner will no longer be informed of the basis for the charge of disciplinary action.

Response. The supplemental information and language of the proposed rule clearly state that this limitation applies only in summary proceedings because those proceedings will always be brought as a result of a disciplinary decision issued by a state licensing authority or a federal court, or a criminal conviction which will be set forth in the Notice of Intent to Discipline itself. Thus, a preliminary inquiry report would do nothing but repeat the basis of the charges already contained in the Notice. Accordingly, this final rule adopts this proposed rule without change.

Comment. One commenter disagreed with the proposed language for limiting a practitioner's eligibility for a hearing where the practitioner is subject to summary disciplinary proceedings.

Response. In light of the comment and upon further consideration of the proposed change to 8 CFR 1003.105 concerning the availability of in-person hearings in summary disciplinary proceedings, the Department has decided not to adopt the proposed language. Rather, the Department will codify in the regulations the prevailing standard in Board precedent concerning evidentiary hearings in summary discipline cases. In *Matter of Ramos,* 23 I&N Dec. 843, 848 (BIA 2005), the Board held that in summary disciplinary proceedings, a practitioner must show that there is a material issue of fact in dispute that necessitates an evidentiary hearing. *Id.* Therefore, the final regulations reflect this standard. The Department has also decided that this provision should appear in 8 CFR § 1003.106 because it relates to a practitioner's right to a hearing. 8 CFR § 1003.105 involves filing Notices of Intent to Discipline and answers to those notices. Therefore, it is more appropriate for this provision to be located in the section related to disciplinary hearings.

IV. Technical Amendments to Regulations

This final rule also includes technical changes to 8 CFR 1003.101–108 that were not included in the proposed rule. In 8 CFR 1003.101, 1003.103, 1003.104–105, and 1003.107, the words ''Immigration and Naturalization Service,'' ''the Service'' and ''the Office of the General Counsel of the Service'' are being replaced with the term ''DHS,'' which is defined at 8 CFR 1001.1(w). As discussed above, since the promulgation of the final rule concerning the practitioner disciplinary process in June of 2000, the functions of the former Immigration and Naturalization Service (INS) were transferred from the Department to DHS. These changes reflect the creation of DHS and the transfer of the former INS's functions.

The definition of the term ''practice'' in 8 CFR 1001.101(i) is being updated to reflect the fact that immigration judges, and not ''officers of the Service,'' are the adjudicators at the hearing level in immigration proceedings before EOIR. The definition has been unchanged since its adoption nearly forty years ago. *See* 34 FR 12213 (July 24, 1969). At that time, INS officers held hearings in immigration cases and the Board decided appeals from INS's decisions. However, those INS officers eventually became immigration judges employed by EOIR. Therefore, the Department is updating the definition to remove

reference to the ''Service'' and ''officer of the Service,'' and is replacing them with the terms ''DHS'' and ''immigration judge.''

In 8 CFR 1003.103–108, the term ''Office of the General Counsel of EOIR'' is being replaced with the term ''EOIR disciplinary counsel'' as it is used in 8 CFR 1003.0(e)(2)(iii). This change is made to more accurately reflect EOIR's practice of assigning an attorney within the Office of the General Counsel to serve as the chief prosecutor for practitioner disciplinary matters. The EOIR disciplinary counsel is responsible for the day-to-day management of the disciplinary program for attorneys and accredited representatives, and investigates allegations of misconduct against practitioners, including referrals from EOIR's anti-fraud officer concerning ''instances of fraud, misrepresentation, or abuse pertaining to an attorney or accredited representative.'' 8 CFR 1003.0(e)(1), (2)(iii). The EOIR disciplinary counsel determines when to dismiss complaints against practitioners, informally resolve those complaints, or initiate disciplinary proceedings.

The Department has also made technical changes to 8 CFR 1003.105–106 to replace the terms ''Office of the General Counsel for EOIR'' and ''Office of the General Counsel of the Service'' with ''counsel for the government.'' These changes are made to the provisions that relate directly to the litigation of practitioner disciplinary cases. Finally, 8 CFR 1003.106(a)(1)(iii) is being amended to clarify that both parties to a practitioner disciplinary case, and not just the practitioner, have the right to examine and object to evidence presented by the other party, to present evidence, and to cross-examine witnesses presented by the other party. Further, an additional sentence is being added to this provision to indicate that if a practitioner files an answer to the Notice of Intent to Discipline but does not request a hearing, the parties have the right to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

Regulatory Requirements

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only those practitioners who practice immigration law before EOIR. This rule will not affect small entities, as that term is defined in 5 U.S.C. 601(6), because the rule is similar in substance to the existing regulatory process.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866—Regulatory Planning and Review

The Attorney General has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects

8 CFR Part 1001

Administrative practice and procedures, Immigration, Legal services.

8 CFR Part 1003

Administrative practice and procedures, Immigration, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 1292

Administrative practice and procedures, Immigration, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, parts 1001, 1003, and 1292 of title 8 of the Code of Federal Regulations are amended as follows:

PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103.

■ 2. Amend § 1001.1 to revise paragraphs (f) and (i) to read as follows:

§ 1001.1 Definitions.

* * * * *

(f) The term *attorney* means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

* * * * *

(i) The term *practice* means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board.

* * * * *

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103; 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100.

■ 4. Amend § 1003.1 by removing from paragraph (d)(5) the citation ''§ 1.1(j) of this chapter'' and adding in its place the citation ''§ 1001.1(j) of this chapter''.

Subpart G—Professional Conduct for Practitioners—Rules and Procedures

§ 1003.101 [Amended]

■ 5. Amend § 1003.101 by:
■ a. Removing from paragraph (a)(1) the words ''Immigration and Naturalization Service (the Service)'' and adding in its place ''DHS'';
■ b. Removing from paragraph (a)(2) the words ''the Service'' and adding in its place ''DHS'';
■ c. Removing from paragraph (b) the words ''the Service'' and adding in its place ''DHS''.

■ 6. Amend § 1003.102 by:
■ a. Removing from paragraph (j)(2) the citation ''§ 1003.1(d)(1–a)'' and adding in its place the citation ''§ 1003.1(d)'';
■ b. Revising paragraphs (e), (k), (l), and (m); and by
■ c. Adding paragraphs (n) through (t), to read as follows:

§ 1003.102 Grounds.

* * * * *

(e) Is subject to a final order of disbarment or suspension, or has resigned while a disciplinary investigation or proceeding is pending;

* * * * *

(k) Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board, an immigration judge in an immigration proceeding, or a Federal court judge or panel, and a disciplinary complaint is filed within one year of the finding;

(l) Repeatedly fails to appear for pre-hearing conferences, scheduled hearings, or case-related meetings in a timely manner without good cause;

(m) Assists any person, other than a practitioner as defined in § 1003.101(b), in the performance of activity that constitutes the unauthorized practice of law. The practice of law before EOIR means engaging in *practice* or *preparation* as those terms are defined in §§ 1001.1(i) and (k);

(n) Engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct that will generally be subject to sanctions under this ground includes any action or inaction that seriously impairs or interferes with the adjudicative process when the practitioner should have reasonably known to avoid such conduct;

(o) Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners;

(p) Fails to abide by a client's decisions concerning the objectives of representation and fails to consult with the client as to the means by which they are to be pursued, in accordance with paragraph (r) of this section. A practitioner may take such action on behalf of the client as is impliedly authorized to carry out the representation;

(q) Fails to act with reasonable diligence and promptness in representing a client.

(1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.

(2) A practitioner has the duty to act with reasonable promptness. This duty includes, but shall not be limited to, complying with all time and filing limitations. This duty, however, does not preclude the practitioner from agreeing to a reasonable request for a postponement that will not prejudice the practitioner's client.

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal;

(r) Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands. A practitioner is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner. In order to properly maintain communication, the practitioner should:

(1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;

(3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and

(4) Promptly comply with reasonable requests for information, except that when a prompt *response* is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a *response* may be expected;

(s) Fails to disclose to the adjudicator legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel;

(t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:

(1) Has engaged in *practice* or *preparation* as those terms are defined in §§ 1001.1(i) and (k), and

(2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. Notwithstanding the foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name; or

(u) Repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.

* * * * *

■ 7. Amend § 1003.103 by:
■ a. Revising the first sentence in paragraph (a)(1);
■ b. Revising the first and second sentences in paragraph (a)(2);
■ c. Adding a new sentence after the second sentence in paragraph (a)(2);
■ d. Revising the first and second sentences in paragraph (b) introductory text;

■ e. Revising paragraph (b)(2) introductory text; and by

■ f. Revising the first sentence of paragraph (c).

The revisions and addition read as follows:

§ 1003.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify EOIR of conviction or discipline.

(a) *Immediate Suspension*—

(1) *Petition*. The EOIR disciplinary counsel shall file a petition with the Board to suspend immediately from practice before the Board and the Immigration Courts any practitioner who has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in § 1003.102(h), or any practitioner who has been suspended or disbarred by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court, or who has been placed on an interim suspension pending a final resolution of the underlying disciplinary matter. A copy of the petition shall be forwarded to DHS, which may submit a written request to the Board that entry of any order immediately suspending a practitioner before the Board or the Immigration Courts also apply to the practitioner's authority to practice before DHS. Proof of service on the practitioner of DHS's request to broaden the scope of any immediate suspension must be filed with the Board.

(2) *Immediate suspension*. Upon the filing of a petition for immediate suspension by the EOIR disciplinary counsel, together with a certified copy of a court record finding that a practitioner has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, or has been disciplined or has resigned, as described in paragraph (a)(1) of this section, the Board shall forthwith enter an order immediately suspending the practitioner from practice before the Board, the Immigration Courts, and/or DHS, notwithstanding the pendency of an appeal, if any, of the underlying disciplinary proceeding, pending final disposition of a summary disciplinary proceeding as provided in paragraph (b) of this section. Such immediate suspension will continue until imposition of a final administrative decision. If an immediate suspension is imposed upon a practitioner, the Board may require that notice of such suspension be posted at the Board, the Immigration Courts, or DHS. * * *

* * * * *

(b) *Summary disciplinary proceedings*. The EOIR disciplinary counsel shall promptly initiate summary disciplinary proceedings against any practitioner described in paragraph (a) of this section by the issuance of a Notice of Intent to Discipline, upon receipt of a certified copy of the order, judgment, and/or record evidencing the underlying criminal conviction, discipline, or resignation, and accompanied by a certified copy of such document. However, delays in initiation of summary disciplinary proceedings under this section will not impact an immediate suspension imposed pursuant to paragraph (a) of this section. * * *

* * * * *

(2) In the case of a summary proceeding based upon a final order of disbarment or suspension, or a resignation while a disciplinary investigation or proceeding is pending (*i.e.*, reciprocal discipline), a certified copy of a judgment or order of discipline shall establish a rebuttable presumption of the professional misconduct. Disciplinary sanctions shall follow in such a proceeding unless the attorney can rebut the presumption by demonstrating clear and convincing evidence that:

* * * * *

(c) *Duty of practitioner to notify EOIR of conviction or discipline*. Any practitioner who has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in § 1003.102(h), or who has been disbarred or suspended by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court, must notify the EOIR disciplinary counsel of any such conviction or disciplinary action within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending.* * *

* * * * *

■ 8. Amend § 1003.104 by:

■ a. Revising paragraph (a);

■ c. Revising the first, third, and fourth sentences in paragraph (b);

■ d. Revising paragraph (c); and by

■ e. Revising paragraph (d), to read as follows:

§ 1003.104 Referral of Complaints

(a) *Filing complaints*—(1) *Practitioners authorized to practice before the Board and the Immigration Courts*. Complaints of criminal, unethical, or unprofessional conduct, or of frivolous behavior by a practitioner who is authorized to practice before the Board and the Immigration Courts shall be filed with the EOIR disciplinary counsel. Disciplinary complaints must be submitted in writing and must state in detail the information that supports the basis for the complaint, including, but not limited to, the names and addresses of the complainant and the practitioner, the date(s) of the conduct or behavior, the nature of the conduct or behavior, the individuals involved, the harm or damages sustained by the complainant, and any other relevant information. Any individual may file a complaint with the EOIR disciplinary counsel using the Form EOIR–44. The EOIR disciplinary counsel shall notify DHS of any disciplinary complaint that pertains, in whole or part, to a matter before DHS.

(2) *Practitioners authorized to practice before DHS*. Complaints of criminal, unethical, or unprofessional conduct, or frivolous behavior by a practitioner who is authorized to practice before DHS shall be filed with DHS pursuant to the procedures set forth in § 292.3(d) of this chapter.

(b) *Preliminary inquiry*. Upon receipt of a disciplinary complaint or on its own initiative, the EOIR disciplinary counsel will initiate a preliminary inquiry. * * * If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may, in its discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. * * *

(c) *Resolution reached prior to the issuance of a Notice of Intent to Discipline*. The EOIR disciplinary counsel, in its discretion, may issue warning letters and admonitions, and may enter into agreements in lieu of discipline, prior to the issuance of a Notice of Intent to Discipline.

(d) *Referral of complaints of criminal conduct*. If the EOIR disciplinary counsel receives credible information or allegations that a practitioner has engaged in criminal conduct, the EOIR disciplinary counsel shall refer the matter to DHS or the appropriate United States Attorney and, if appropriate, to the Inspector General, the Federal Bureau of Investigation, or other law enforcement agency. In such cases, in making the decision to pursue

disciplinary sanctions, the EOIR disciplinary counsel shall coordinate in advance with the appropriate investigative and prosecutorial authorities within the Department to ensure that neither the disciplinary process nor criminal prosecutions are jeopardized.

* * * * *

■ 9. Amend § 1003.105 by:
■ a. Revising paragraph (a);
■ b. Revising the first and second sentences of paragraph (b);
■ c. Revising the third sentence of paragraph (c)(1); and by
■ d. Revising paragraph (d)(2) introductory text, to read as follows:

§ 1003.105 Notice of Intent to Discipline.

(a) *Issuance of Notice to practitioner.* (1) If, upon completion of the preliminary inquiry, the EOIR disciplinary counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 1003.102, he or she will file with the Board and issue to the practitioner who was the subject of the preliminary inquiry a Notice of Intent to Discipline. Service of this notice will be made upon the practitioner by either certified mail to his or her last known address, as defined in paragraph (a)(2) of this section, or by personal delivery. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board. In summary disciplinary proceedings brought pursuant to § 1003.103(b), a preliminary inquiry report is not required to be filed with the Notice of Intent to Discipline.

(2) For the purposes of this section, the last known address of a practitioner is the practitioner's address as it appears in EOIR's case management system if the practitioner is actively representing a party before EOIR on the date that the EOIR disciplinary counsel issues the Notice of Intent to Discipline. If the practitioner does not have a matter pending before EOIR on the date of the issuance of a Notice of Intent to Discipline, then the last known address for a practitioner will be as follows:

(i) Attorneys in the United States: the attorney's address that is on record with a state jurisdiction that licensed the attorney to practice law.

(ii) Accredited representatives: the address of a recognized organization with which the accredited representative is affiliated.

(iii) Accredited officials: the address of the embassy of the foreign government that employs the accredited official.

(iv) All other practitioners: the address for the practitioner that appears in EOIR's case management system for the most recent matter on which the practitioner represented a party.

(b) *Copy of Notice to DHS; reciprocity of disciplinary sanctions.* A copy of the Notice of intent to Discipline shall be forwarded to DHS. DHS may submit a written request to the Board or the adjudicating official requesting that any discipline imposed upon a practitioner which restricts his or her authority to practice before the Board or the Immigration Courts also apply to the practitioner's authority to practice before DHS. * * *

(c) * * *

(1) * * * A copy of the answer and any such motion shall be served by the practitioner on the counsel for the government.

* * * * *

(d) * * *

* * * * *

(2) Upon such a default by the practitioner, the counsel for the government shall submit to the Board proof of service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The Board shall issue a final order adopting the proposed disciplinary sanctions in the Notice of Intent to Discipline unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted or not in the interests of justice. With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A practitioner may file a motion to set aside a final order of discipline issued pursuant to this paragraph, with service of such motion on the EOIR disciplinary counsel, provided:

* * * * *

■ 10. Amend § 1003.106 by:
■ a. Revising the section heading to read as set forth below;
■ b. Revising the heading of paragraph (a);
■ c. Redesignating paragraphs (a)(1) and (a)(2) as paragraphs (a)(2) and (a)(3);
■ d. Adding a new paragraph (a)(1);
■ e. Revising the first and second sentences of newly redesignated paragraph (a)(2)(ii),
■ f. Revising paragraphs (a)(2)(iii) and (a)(2)(iv);
■ g. Revising the first sentence of paragraph (a)(2)(v) introductory text;
■ h. Revising paragraph (a)(3) introductory text;
■ i. Revising paragraph (a)(3)(ii);
■ j. Revising paragraphs (b) and (c); and by
■ k. Revising the first and third sentences of paragraph (d).

The revisions read as follows:

§ 1003.106 Right to be heard and disposition.

(a) *Right to be heard*—(1) *Summary disciplinary proceedings.* If a practitioner who is subject to summary disciplinary proceedings pursuant to § 1003.103(b) requests a hearing, he or she must make a prima facie showing to the Board in his or her answer that there is a material issue of fact in dispute with regard to the basis for summary disciplinary proceedings, or with one or more of the exceptions set forth in § 1003.103(b)(2)(i)–(iii). If the Board determines that there is a material issue of fact in dispute with regard to the basis for summary disciplinary proceedings, or with one or more of the exceptions set forth in § 1003.103(b)(2)(i)–(iii), then the Board shall refer the case to the Chief Immigration Judge for the appointment of an adjudicating official. Failure to make such a prima facie showing shall result in the denial of a request for a hearing. The Board shall retain jurisdiction over the case and issue a final order.

(2) * * *

(ii) Except as provided in § 1003.105(c)(3), upon the practitioner's request for a hearing, the adjudicating official may designate the time and place of the hearing with due regard to the location of the practitioner's practice or residence, the convenience of witnesses, and any other relevant factors. When designating the time and place of a hearing, the adjudicating official shall provide for the service of a notice of hearing, as the term ''service'' is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. * * *

(iii) The practitioner may be represented by counsel at no expense to the government. Counsel for the practitioner shall file a Notice of Entry of Appearance on Form EOIR–28 in accordance with the procedures set

forth in this part. Each party shall have a reasonable opportunity to examine and object to evidence presented by the other party, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the other party. If a practitioner files an answer but does not request a hearing, then the adjudicating official shall provide the parties with the opportunity to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

(iv) In rendering a decision, the adjudicating official shall consider the following: The complaint, the preliminary inquiry report, the Notice of Intent to Discipline, the answer, any supporting documents, and any other evidence, including pleadings, briefs, and other materials. Counsel for the government shall bear the burden of proving the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline by clear and convincing evidence.

(v) The record of proceedings, regardless of whether an immigration judge or an administrative law judge is the adjudicating official, shall conform to the requirements of 8 CFR part 1003, subpart C and 8 CFR 1240.9. * * *

* * * * *

(3) *Failure to appear in proceedings.* If the practitioner requests a hearing as provided in section 1003.105(c)(3) but fails to appear, the adjudicating official shall then proceed and decide the case in the absence of the practitioner, in accordance with paragraph (b) of this section, based upon the available record, including any additional evidence or arguments presented by the counsel for the government at the hearing. In such a proceeding, the counsel for the government shall submit to the adjudicating official proof of service of the Notice of Intent to Discipline as well as the Notice of the Hearing. The practitioner shall be precluded thereafter from participating further in the proceedings. A final order of discipline issued pursuant to this paragraph shall not be subject to further review, except that the practitioner may file a motion to set aside the order, with service of such motion on the counsel for the government, provided:

* * * * *

(ii) His or her failure to appear was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

(b) *Decision.* The adjudicating official shall consider the entire record and, as soon as practicable, render a decision. If the adjudicating official finds that one or more of the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear and convincing evidence, he or she shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified. Any grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline that have not been established by clear and convincing evidence shall be dismissed. The adjudicating official shall provide for the service of a written decision or a memorandum summarizing an oral decision, as the term ''service'' is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. Except as provided in paragraph (a)(2) of this section, the adjudicating official's decision becomes final only upon waiver of appeal or expiration of the time for appeal to the Board, whichever comes first, nor does it take effect during the pendency of an appeal to the Board as provided in § 1003.6.

(c) *Appeal.* Upon the issuance of a decision by the adjudicating official, either party or both parties may appeal to the Board to conduct a review pursuant to § 1003.1(d)(3). Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in Part 1003, and must use the Form EOIR–45. The decision of the Board is a final administrative order as provided in § 1003.1(d)(7), and shall be served upon the practitioner as provided in 8 CFR 1003.1(f). With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A copy of the final administrative order of the Board shall be served upon the counsel for the government. If disciplinary sanctions are imposed against a practitioner (other than a private censure), the Board may require that notice of such sanctions be posted at the Board, the Immigration Courts, or DHS for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.

(d) *Referral.* In addition to, or in lieu of, initiating disciplinary proceedings against a practitioner, the EOIR disciplinary counsel may notify an appropriate Federal or state disciplinary or regulatory authority of any complaint filed against a practitioner. * * * In addition, the EOIR disciplinary counsel shall transmit notice of all public discipline imposed under this rule to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

* * * * *

■ 11. Amend § 1003.107 by:
■ a. Revising the second and third sentences of paragraph (b) introductory text;
■ b. Revising paragraph (b)(1); and by
■ c. Adding a new paragraph (c), to read as follows:

§ 1003.107 Reinstatement after expulsion or suspension.

* * * * *

(b) Petition for reinstatement. * * * A copy of such a petition shall be served on the EOIR disciplinary counsel. In matters in which the practitioner was ordered expelled or suspended from practice before DHS, a copy of such petition shall be served on DHS.

(1) The practitioner shall have the burden of demonstrating by clear and convincing evidence that he or she possess the moral and professional qualifications required to appear before the Board and the Immigration Courts or DHS, or before all three authorities, and that his or her reinstatement will not be detrimental to the administration of justice. The EOIR disciplinary counsel and, in matters in which the practitioner was ordered expelled or suspended from practice before DHS, DHS may reply within 30 days of service of the petition in the form of a written *response* to the Board, which may include documentation of any complaints filed against the expelled or suspended practitioner subsequent to his or her expulsion or suspension.

* * * * *

(c) *Appearance after reinstatement.* A practitioner who has been reinstated to practice by the Board must file a new Notice of Entry of Appearance of Attorney or Representative in each case on the form required by applicable rules and regulations, even if the reinstated practitioner previously filed such a form in a proceeding before the practitioner was disciplined.

* * * * *

■ 12. Amend § 1003.108 by:

■ a. Revising the second sentence of paragraph (a) introductory text;

■ b. Revising paragraph (a)(1) introductory text;

■ c. Revising the second sentence of paragraph (a)(1)(i);

■ d. Revising paragraph (a)(1)(iv); and by

■ e. Revising paragraph (a)(2), to read as follows:

§ 1003.108 Confidentiality.

(a) *Complaints and preliminary inquiries.* * * * A practitioner whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the EOIR disciplinary counsel may decline to permit a waiver of confidentiality if it is determined that an ongoing preliminary inquiry may be substantially prejudiced by public disclosure before the filing of a Notice of Intent to Discipline.

(1) *Disclosure of information for the purpose of protecting the public.* The EOIR disciplinary counsel may disclose information concerning a complaint or preliminary inquiry for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality in circumstances including, but not limited to, the following:

* * * * *

(i) * * * If disclosure of information is made pursuant to this paragraph, the EOIR disciplinary counsel may define the scope of information disseminated and may limit the disclosure of information to specified individuals and entities;

* * * * *

(iv) A practitioner is the subject of multiple disciplinary complaints and the EOIR disciplinary counsel has determined not to pursue all of the complaints. The EOIR disciplinary counsel may inform complainants whose allegations have not been pursued of the status of any other preliminary inquiries or the manner in which any other complaint(s) against the practitioner have been resolved.

(2) *Disclosure of information for the purpose of conducting a preliminary inquiry.* The EOIR disciplinary counsel, in the exercise of discretion, may disclose documents and information concerning complaints and preliminary inquiries to the following individuals and entities: * * *

* * * * *

PART 1292—REPRESENTATION AND APPEARANCES

■ 13. The authority citation for Part 1292 continues to read as follows:

Authority: 8 U.S.C. 1103, 1252b, 1362.

■ 14. In § 1292.1, remove paragraph (a)(6) and revise paragraph (a)(2) introductory text, to read as follows:

§ 1292.1 Representation of others.

(a) * * *

* * * * *

(2) *Law students and law graduates not yet admitted to the bar.* A law student who is enrolled in an accredited U.S. law school, or a graduate of an accredited U.S. law school who is not yet admitted to the bar, provided that:

* * * * *

Dated: December 12, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–30027 Filed 12–17–08; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1240 and 1241

[EOIR Docket No. 163; AG Order No. 3027–2008]

RIN 1125–AA60

Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is publishing this final rule to amend the regulations regarding voluntary departure. This rule adopts, without substantial change, the proposed rule under which a grant of voluntary departure is automatically withdrawn upon the filing of a motion to reopen or reconsider with the immigration judge or the Board of Immigration Appeals (Board) or a petition for review in a federal court of appeals. This final rule adopts, with some modification, the proposed rule under which an immigration judge will set a presumptive civil monetary penalty of $3,000 if the alien fails to depart within the time allowed. However, this rule adopts only in part the proposals to amend the provisions relating to the voluntary departure bond. Finally, this rule adopts the notice advisals in the proposed rule and incorporates additional notice requirements in light of public comments.

DATES: This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

The Attorney General published a proposed rule in the **Federal Register** on November 30, 2007 (72 FR 67674). The comment period ended on January 29, 2008. Comments were received from nine commenters, including public interest law and advocacy groups, a law firm, three non-attorneys, and one immigration bond agency. Since some comments overlap, and other commenters covered multiple topics, the comments are addressed by topic in sections III–VIII of this preamble, rather than by reference to each specific comment and commenter.

II. Introduction

A. Background

The Immigration and Nationality Act (INA or Act) provides that, as an alternative to formal removal proceedings and entry of a formal removal order, ''[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense.'' INA 240B(a)(1), (b)(1) (8 U.S.C. 1229c(a)(1), (b)(1)). Voluntary departure ''is a privilege granted to an alien in lieu of deportation.'' *Iouri* v. *Aschroft,* 487 F.3d 76, 85 (2d Cir. 2007), cert. denied, 128 S.Ct. 2986 (2008) (citing *Ballenilla-Gonzalez* v. *INS,* 546 F.2d 515, 521 (2d Cir. 1976)). It is ''an agreed upon exchange of benefits between the alien and the government.'' *Banda-Ortiz* v. *Gonzales,* 445 F.3d 387, 389 (5th Cir. 2006), cert. denied, 127 S.Ct. 1874 (2007). This *quid pro quo* offers an alien ''a specific benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government.'' *Id.* at 390 (quoting *Ngarurih* v. *Ashcroft,* 371 F.3d 182, 194 (4th Cir. 2004)). When choosing to seek voluntary departure, the alien agrees to take the benefits and burdens of the statute together. *Ngarurih,* 371 F.3d at 194. In order to obtain voluntary departure at the conclusion of removal proceedings, an alien must establish to the immigration judge by clear and convincing evidence that he or she is both willing and able

to depart voluntarily. 72 FR at 67674–75.

Section 240B of the Act provides that an alien who is granted voluntary departure at the conclusion of removal proceedings is allowed a period of no more than 60 days after the issuance of a final order in which the alien may voluntarily depart from the United States, and certain penalties apply to aliens who do not voluntarily depart within the time allowed. See INA 240B(b)(2), (d) (8 U.S.C. 1229c(b)(2), (d)). Another section of the Act provides that an alien has up to 90 days to file a motion to reopen or 30 days to file a motion to reconsider after entry of a final administrative order issued in removal proceedings. INA 240(c)(6), (7) (8 U.S.C. 1229a(c)(6), (7)). Under longstanding regulation, however, an alien's departure from the United States, including under a grant of voluntary departure, has the effect of withdrawing the motion. 8 CFR 1003.2(d), *Matter of Armendarez,* 24 I&N Dec. 646, 686 (BIA 2008) (noting that the current regulation bears a strong resemblance to the regulation first introduced in 1952).

B. Summary of Regulatory Changes From the Proposed Rule

The proposed rule explained that the amendments set forth therein were ''intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions and judicial review without risking the imposition of the voluntary departure penalties, to promote uniformity, and also to bring the voluntary departure process back to its statutory premises.'' 72 FR at 67679, 67682. The proposed rule provided an in-depth background discussion of voluntary departure and motions to reopen and reconsider. *Id.* at 67674–77. This final rule adopts, without change, the sections of the proposed rule providing that an alien's grant of voluntary departure will automatically terminate if the alien files a motion to reopen or reconsider with an immigration judge or the Board within the time period the alien was granted to depart voluntarily.

The proposed rule also sought to address divergent motions practice among the courts of appeals concerning the impact on the voluntary departure period when filing a petition for review. *See* 72 FR at 67681. This final rule adopts, without change, the sections of the proposed rule providing that an alien's grant of voluntary departure automatically terminates upon the filing of a petition for review.

The proposed rule provided for additional notice to aliens regarding the consequences of filing a motion to reopen or reconsider, or a petition for review after a grant of voluntary departure. This final rule adopts those amendments, without change, and includes additional notice requirements in light of public comments.

The rule also specified that an immigration judge shall set a specific dollar amount of less than $3,000 as a civil monetary penalty in the event that the alien fails to depart voluntarily within the time allowed. This final rule adopts modified language providing that an immigration judge will set a presumptive civil monetary penalty of $3,000 unless the immigration judge sets a higher or lower amount at the time of granting voluntary departure.

Further, the proposed rule revised the applicable bond provisions to clarify that an alien's failure to post a voluntary departure bond as required did not have the effect of exempting the alien from the penalties for failure to depart under the grant of voluntary departure. This was a reversal of the Board's decision in *Matter of Diaz-Ruacho,* 24 I&N Dec. 47 (BIA 2006). The final rule adopts without change the proposed rule regarding reversal of *Matter of Diaz-Ruacho.*

Finally, the proposed rule provided that the alien remained liable for the amount of the voluntary departure bond if he or she did not depart as agreed, and that failure to post the bond could be considered as a negative discretionary factor in determining whether the alien is a flight risk and in determining whether to grant a discretionary application for relief. Under certain circumstances, however, the proposed rule provided that an alien could get a refund of the bond amount upon proof that he or she was physically outside the United States or if the final administrative order was later overturned, reopened, or remanded. This final rule does not include the language of the proposed rule that an alien forfeits his or her bond upon automatic termination of voluntary departure due to the filing of a motion to reopen or reconsider or petition for review. That issue raises a question about the scope of the authority of the immigration judges and the Board, on the one hand, and the authority of the Department of Homeland Security (DHS) with respect to bond issues. Accordingly, the final rule takes no position at this time with respect to the forfeiture of bond, and language providing for forfeiture of the voluntary departure bond upon the filing of a motion to reopen or reconsider or the filing of a petition for review has been deleted. Because this final rule is not adopting the changes regarding forfeiture of the bond, there is no need to adopt the provisions for a refund upon proof of being physically outside the country. However, this final rule adopts, in part, the proposed rule regarding the circumstances under which an alien can obtain a refund of the bond amount where the final administrative order is overturned or remanded, and the rule that failure to post the bond could be considered as a negative discretionary factor in determining whether the alien is a flight risk or whether to grant a discretionary application for relief.

III. Relationship Between Voluntary Departure and Motions To Reopen or Reconsider

A. The Proposed Rule

While four courts of appeals had held that the alien's filing of a motion to reopen with the Executive Office for Immigration Review (EOIR) within the time allowed for voluntary departure automatically ''tolled'' the voluntary departure period, thereby allowing the alien to remain in the United States under the grant of voluntary departure until after the immigration judge or the Board had adjudicated the motion,[1] three other courts of appeals have held that the filing of a motion to reopen did not toll the period allowed for voluntary departure.[2]

The proposed rule sought to address this circuit split by amending the voluntary departure regulations to provide that an alien's timely filing of a motion to reopen or reconsider prior to the expiration of the voluntary departure period automatically terminates the grant of voluntary departure. Because the grant of voluntary departure would be terminated upon the filing of such a motion, there would be no remaining voluntary departure period and thus no tolling of the period allowed for voluntary departure upon the filing of the motion. In the Department's view, this course of action would protect aliens who file administrative motions within the voluntary departure period from facing the consequences of failing to depart pursuant to a voluntary departure order, such as the loss of eligibility for certain forms of relief.

[1] *See Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006); *Kanivets* v. *Gonzales*, 424 F.3d 330, 331 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Barrios* v. *United States Att'y General*, 399 F.3d 272 (3rd Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005).

[2] *See Chedad* v. *Gonzales*, 497 F.3d 57, 63–64 (1st Cir. 2007); *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006); *Banda-Ortiz*, 445 F.3d at 389.

B. Dada v. Mukasey and Related Changes to the Proposed Rule

On June 16, 2008, the Supreme Court decision in *Dada* v. *Mukasey,* ____ U.S. ____, 128 S.Ct. 2307 (2008), resolved the split among the courts of appeals concerning how the filing of a motion to reopen impacts a grant of voluntary departure. The alien in *Dada* had requested that an immigration judge continue his removal proceedings pending the adjudication of a second visa petition filed on his behalf by his United States citizen spouse. The immigration judge denied the request, and granted the alien a period of voluntary departure pursuant to section 240B(b) of the Act. The Board dismissed the alien's appeal and reinstated the grant of voluntary departure for a 30-day period. Two days before the end of the period allowed for voluntary departure, the alien filed a motion to reopen with the Board, asserting that he had new evidence to support the bona fides of his marriage, and requesting a continuance until his visa petition was adjudicated by DHS. The alien also sought to withdraw his request for voluntary departure. Several months later, the Board denied reopening and cited section 240B(d) of the Act, which bars an alien from adjustment of status and other relief when he or she fails to depart voluntarily within the permitted period. The Board did not address the respondent's request to withdraw his voluntary departure request.

The respondent subsequently filed a petition for review with the United States Court of Appeals for the Fifth Circuit, which affirmed the Board's decision, concluding that there was no automatic tolling of the voluntary departure period.

On certiorari, the Supreme Court considered the situation faced by an alien who abides by a voluntary departure grant and departs within the time allowed. If the alien had filed a timely motion before he or she departed under the grant of voluntary departure, the alien's departure, pursuant to regulation, would have the effect of withdrawing the motion to reopen. Alternatively, if the alien chose to remain in the United States to await a decision on the motion, he or she could then become ineligible for the relief sought in the motion because in most instances the motion would not be adjudicated until after the voluntary departure period had expired, exposing the alien to the bars under section 240B(d) of the Act. The Court framed the issue as ''whether Congress intended the statutory right to reopen to be qualified by the voluntary departure process.'' *Dada,* 128 S.Ct. at 2311. The Court concluded that, under the current regulations, an alien does not knowingly give up the right to file a motion to reopen once he or she accepts voluntary departure.

The Court rejected the alien's contention that there should be ''automatic tolling'' of the period of voluntary departure upon the filing of a motion to reopen or a motion to reconsider removal proceedings before the immigration judge or the Board. The Court concluded that such an interpretation ''would reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design,'' and it found no ''statutory authority for this result.'' *Dada,* 128 S.Ct. at 2311, 2319.

In its decision, the Court held that ''[a]lthough a statute or regulation might be adopted to resolve the dilemma in a different manner, as matters now stand the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period.'' *Id.* at 2311.

The Department has considered whether to adopt the Court's approach in *Dada* in this final rule, rather than the automatic termination approach set forth in the proposed rule. The Department has also considered whether to incorporate the Court's suggestion that ''[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture.'' *Id.* at 2320. For the reasons explained below, the Department is adopting the automatic termination approach set forth in the proposed rule, and thereby is ''resolv[ing] the dilemma in a different manner.'' *Id.* at 2311.

C. Termination of Voluntary Departure Upon the Filing of a Motion To Reopen or Reconsider

The proposed rule provided that the filing of a motion to reopen or reconsider would have the effect of automatically terminating the grant of voluntary departure. Because voluntary departure is ''an agreed upon exchange of benefits between the alien and the Government [that] offers an alien 'a specific benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government,' '' 72 FR at 67675 (internal citations omitted), the proposed rule took the position that an alien's decision to challenge a final administrative order through a post-decision motion or petition for review demonstrates that ''the alien is no longer willing to abide by the initial *quid pro quo.*'' *Id.* at 67679. Instead, an automatic termination of an alien's grant of voluntary departure upon the filing of a motion to reopen or reconsider would allow the alien to remain in the United States to pursue the motion or petition without becoming subject to the penalties for failure to voluntarily depart. *Id.* at 67680.

Several commenters challenge the Department's characterization of the *quid pro quo* aspect of voluntary departure in the proposed regulation and the proposal to automatically terminate voluntary departure upon the filing of a post-decision motion to reopen or reconsider. In addition, several of these commenters suggest, as an alternative to the proposed automatic termination rule, that the regulations be amended to provide for the tolling or administrative stay of voluntary departure during the filing of a motion to reopen or reconsider, or that the immigration judges and the Board be given the discretion to waive the automatic termination procedure and stay or reinstate voluntary departure when appropriate.[3] One commenter suggests that the voluntary departure time could be improved by changing the expiration date on the voluntary departure order to a suitable time, taking into account when the case can be reopened and when it will most likely be completed.

As the Supreme Court recognized in *Dada*, there is no statutory authority for tolling. *Id.* at 2311, 2319; *see also* section 240B(b)(2) of the Act (providing for no more than 60 days to voluntarily depart). To the extent the commenters were relying on previous appellate decisions to the contrary, those holdings have now been overruled. Further, as the proposed rule explained, tolling the period of voluntary departure deprives the government of an important element of the voluntary departure agreement—''a quick departure without the considerable expense of protracted litigation.'' 72 FR at 676814.[4] Thus, after

[3] With regard to reinstatement, the ability to reinstate voluntary departure is already covered under the current regulations in the context of permitting reinstatement of voluntary departure in a proceeding which has been reopened for another purpose if reopening was granted prior to the expiration of the original period of voluntary departure. 8 CFR 1240.26(f), (h).

[4] It is the considerable expense of protracted litigation that negates any savings to the government of avoiding the costs of removal. The Department has not ignored avoiding the costs of removal as a potential benefit for savings through

Continued

the issuance of a final order, immigration judges and the Board cannot stay the voluntary departure period, or extend the expiration of the voluntary departure period, beyond the amount of time provided by statute.

The Court's decision also discusses the *quid pro quo* benefits to the government and the alien in much the same way as the proposed rule. *Dada*, 128 S.Ct. at 2314. The Court found that allowing an alien to elect to withdraw voluntary departure before the expiration of the voluntary departure period ''preserve[d] the alien's right to pursue reopening while respecting the government's interest in the *quid pro quo* of the voluntary departure arrangement.'' *Dada* at 2319. Accordingly, this final rule retains the *quid pro quo* analysis of the proposed rule as a basis for these regulatory amendments. *See* 72 FR at 67675–76, 67679–80.

This final rule also retains the proposal that an alien's grant of voluntary departure will automatically terminate upon the filing of a motion to reopen or motion to reconsider. In *Dada*, the Court provided the alien with a different option: a unilateral right to withdraw from the voluntary departure agreement in connection with the filing of a motion to reopen or reconsider. *Dada*, 128 S.Ct. at 2319. The Department does not believe that this is the best approach to adopt by rule for the future, for several reasons.

First, the Department finds it preferable to adopt the proposed rule that was subject to a comment period, rather than delay finalizing this new rule for further consideration of the *Dada* approach. Second, allowing the option of withdrawal would seem to require an immigration judge to provide additional advisals to an alien regarding another aspect of the bargain to which the alien is agreeing. The Department is concerned that the growing number of advisals surrounding voluntary departure creates the potential for confusion and unnecessary complexity; this would be especially true for the many pro se aliens who appear before immigration judges. The Department is considering the use of an application form to request voluntary departure, which can then set forth all of the necessary advisals for voluntary departure. However, we do not want to delay publication of this final rule for development and implementation of a form. Further, even with a form that includes advisals, the option to withdraw might continue to be difficult to navigate.

Finally, allowing an alien the option to withdraw from voluntary departure carries the potential for confusion, inadvertent omissions of withdrawal requests, and collateral challenges over whether the alien actually intended, or should have sought, to withdraw voluntary departure in filing a motion. For instance, an alien filing a motion to reopen to seek adjustment of status might either intend to request withdrawal but fail to include the request, or not know to make the request. The alien might later argue that the motion should have been construed as a request for withdrawal since he or she would not otherwise be eligible for the relief sought if the voluntary departure bar applies. The automatic termination rule is more clear-cut and saves the Department from having to dedicate additional resources to a second round of collateral litigation.

This rule will apply to motions filed before immigration judges and the Board. For instance, some aliens file motions to reopen with immigration judges before seeking appeal with the Board. In this case, the alien's voluntary departure would be terminated upon the filing of the motion with the immigration judge. If, while the alien's motion is pending with the immigration judge, the alien subsequently files a Notice of Appeal with the Board, the Board assumes jurisdiction over the case, and the motion becomes nugatory. In this instance, the Board may reinstate the alien's voluntary departure, if the alien demonstrates, as set forth in the rule, that he or she properly posted the voluntary departure bond within the required time period. *See* Section VI, *infra*, for further discussion regarding notice to the immigration judge or the Board that the bond was posted.

Several commenters took issue with this automatic termination rule and asserted that if an alien is forced to give up voluntary departure to pursue a motion, the alien would be improperly discouraged from filing a motion to reopen. These comments note examples of applicants for asylum who benefit from voluntary departure by being able to choose the country to which they will depart, or by returning to their home countries without the ''high profile that accompanies deportation.''

The Department is cognizant of the various ways in which aliens benefit from voluntary departure. However, the Department must balance these considerations against the overriding responsibility to implement the voluntary departure process in accordance with its statutory premises. There is no statutory authority for tolling. *See Dada*, 128 S.Ct. at 2311, 2319; *see also* INA 240B(b)(2) (providing for no more than 60 days voluntary departure when granted at the conclusion of proceedings). Therefore, expiration of the voluntary departure period cannot be changed beyond the amount of time provided by statute.

Even the approach taken by the Supreme Court in *Dada* requires the alien to make a choice: ''As a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits of voluntary departure, or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion.'' *Dada*, 128 S.Ct. at 2319. As the proposed rule recognized, ''it is often the case that an immigration judge or the Board cannot reasonably be expected to adjudicate a motion to reopen or reconsider during the voluntary departure period.'' 72 FR at 67677. Thus, even if the filing of a motion did not result in automatic termination of voluntary departure, an alien who was granted voluntary departure and later files a motion to reopen to apply for asylum is going to be faced with a choice because it is unlikely that the alien's motion would be adjudicated in enough time to allow the alien to depart within the limited time period permitted for voluntary departure if the motion is denied. *See Dada*, 128 S.Ct. at 2317 (''It is foreseeable, and quite likely, that the time allowed for voluntary departure will expire long before the BIA issues a decision on a timely filed motion to reopen.'') (citing the proposed rule). In any event, an applicant for asylum is not an appropriate example to use to illustrate the choice faced by aliens granted voluntary departure but seeking discretionary relief through a post-order motion because the consequences for overstaying the period of voluntary departure do not preclude an alien from receiving asylum. Section 240B(d) bars an alien from obtaining future voluntary departure grants, adjustment of status under INA section 245, cancellation of removal, change of nonimmigrant status, and registry. Section 240B(d) does not make an alien ineligible for asylum, withholding of removal under section 241(b)(3), protection under Article 3 of the Convention Against Torture, or adjustment of status for asylees and refugees under INA section 209.

The only other means by which aliens facing a choice between voluntary departure and filing a post-order motion might continue to benefit from voluntary departure and pursue a

a voluntary departure grant, as suggested by several commenters. Rather, the Department is equally deprived of this benefit where an alien fails to quickly depart in accordance with a voluntary departure order.

motion to reopen would be the Supreme Court's suggestion that ''[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture.'' *Dada*, 128 S.Ct. at 2320. The Board recently discussed many of these issues in *Matter of Armendarez, supra.* As the Board stated, ''the physical removal of an alien from the United States is a transformative event that fundamentally alters the alien's posture under the law.'' 24 I&N Dec. at 656. While aliens who voluntarily depart may not be considered ''physically removed'' through execution of a removal order, the controlling regulatory provisions and the force of the Board's statement apply equally in both situations. An alien's departure from the United States, even under a grant of voluntary departure, may trigger a new ground of inadmissibility under section 212(a)(9)(B) or (C) of the Act (8 U.S.C. 1182(a)(9)(B), (C)). Under section 212(a)(9)(B)(i)(II), an alien is inadmissible for ten years from the date of departure (whether voluntary or removed) if he or she was unlawfully present in the United States for one year or more after April 1, 1997. Though this provision is inapplicable to several categories of aliens including, for example, minors and aliens who have filed a bona fide asylum application, many aliens will be subject to this ground of inadmissibility because of the period of unlawful presence they have already accrued. On the other hand, in order to be eligible for voluntary departure at the conclusion of proceedings, aliens must demonstrate that they have been ''physically present in the United States for a period of at least one year immediately preceding the alien's application for voluntary departure.'' INA 240B(b)(1) (8 U.S.C. 1229c(b)(1)). While some aliens may be able to satisfy this physical presence requirement through the time within which an alien may have been lawfully in the United States, in many other cases the period of physical presence includes the amount of time an alien was not lawfully present. Many aliens who depart the United States due to being subject to a removal proceeding have accrued one year or more of unlawful presence and would be inadmissible under section 212(a)(9)(B)(i)(II) of the Act if they depart and then seek admission to the United States. Similarly, under section 212(a)(9)(C)(i)(I), an alien who was unlawfully present in the United States for an aggregate period of more than 1 year, departs, and thereafter enters or attempts to enter the United States without being admitted is inadmissible.

Further, waivers of inadmissibility under section 212(a)(9)(B) of the Act are limited to ''an immigrant'' who is the spouse, son, or daughter of a United States citizen or legal permanent resident and can show that this qualifying relative would suffer ''extreme hardship'' if his or her admission were denied. For aliens inadmissible under section 212(a)(9)(C) of the Act, the alien must wait for ten years after the date of the alien's last departure before the alien may request that the Secretary of Homeland Security consent to an alien's reapplying for admission (with a narrow exception for aliens who have been battered or subjected to extreme cruelty).

In addition, there are issues with respect to aliens who voluntarily departed, if the immigration judge or the Board thereafter grants the motion to reopen or reconsider after the alien has departed from the United States. One possibility is that the alien might seek to be paroled back into the United States to pursue the benefits of reopening, but the granting of parole is not within the authority of the immigration judges or the Board. *Matter of Armendarez, supra* at 656–57, FN8 (recognizing that ''the Immigration Judges and the Board have been given no authority to compel the DHS to admit or parole such aliens into the United States''); *Matter of Conceiro,* 14 I&N Dec. 278 (BIA 1973), *aff'd, Conceiro* v. *Marks*, 360 F.Supp 454 (S.D.N.Y. 1973). Instead, DHS determines whether to grant parole for ''urgent humanitarian reasons or significant public benefit'' pursuant to section 212(d)(5) of the Act, 8 U.S.C 1182(d)(5).

With respect to aliens seeking adjustment of status, the same inadmissibility impediments discussed herein may exist since in general, in order to be eligible for adjustment, an alien must be ''admissible to the United States.'' INA 245(a) (8 U.S.C. 1255(a)). Moreover, allowing an alien to pursue a motion to reopen from outside the United States in order to obtain adjustment of status is in clear tension with the purpose of adjustment of status, which is to provide a means for aliens to obtain lawful permanent resident status from within the United States without the need to depart in order to obtain an immigrant visa from a consular officer abroad. For aliens outside the United States, Congress has designed the immigration system such that aliens seeking admission as immigrants are to obtain an immigrant visa from a consular officer abroad.

Further complicating matters is the fact that the alien would have departed voluntarily. This is significantly different than the situation where an alien is ordered removed, the removal order is executed, and a federal court of appeals later vacates the removal order. In the latter circumstance, if the court finds that the alien's removal was improper, the government may be required to return the alien to the United States. In the context of voluntary departure, there would be no improper voluntary departure that the government must rectify, since the alien departed after the issuance of the grant of voluntary departure as he or she had promised to do. In addition, unlike a federal court of appeals, EOIR does not have the authority to order the return of an alien upon the granting of a motion.

The foregoing demonstrates the complex issues raised by allowing an alien granted voluntary departure, or any alien, the ability to pursue an administrative motion after departing the United States. While the Department is not foreclosing the idea of adopting such an approach in the future, it has concluded that the present rulemaking does not provide an adequate basis for addressing and resolving these issues and concerns at this time, particularly in the absence of an opportunity for public comment on such a proposal and how it might be implemented.

This final rule does not adopt the proposed rule regarding forfeiture of the voluntary departure bond where an alien's voluntary departure is terminated upon the filing of a motion to reopen or reconsider. *See* section VI, *infra*, for further discussion.

Finally, no comments were received regarding the separate provision in the proposed rule providing ''that the granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.'' 72 FR at 67680. This rule explicitly declines to follow an interpretation that may have been reflected in prior court decisions to the effect that the Board's grant of reopening would have the effect of vacating the underlying voluntary departure order and the penalties attributable to the alien's voluntary failure to depart during the time allowed. This rule will be adopted in this final rule, without change.

IV. Termination of Voluntary Departure Upon the Filing of a Petition for Review

Several commenters criticize the proposal to terminate voluntary departure upon the filing of a petition for review in a federal court of appeals, arguing that it is overreaching, beyond the scope of the Attorney General's authority, and would restrict access to judicial review. One of the commenters states that ''there is no role for EOIR to play in maintaining the uniformity of the courts of appeals' own procedures and practices,'' and the proposed rule ''takes discretion away from federal judges.''

The proposed rule clearly sets forth the Attorney General's authority to ''implement the voluntary departure provisions of the Act and to limit eligibility for voluntary departure for specified classes or categories of aliens, as provided in section 240B(e) of the Act.'' 72 FR at 67678. In this context, the Attorney General is not ''maintaining the uniformity of the courts of appeals' procedures and practices,'' or taking discretion away from federal judges. Rather, pursuant to section 240B(e) of the Act, the Attorney General is exercising his authority to limit eligibility for voluntary departure to ensure uniform application of the immigration laws.

The Supreme Court's decision did not resolve the separate issue of whether the courts of appeals have the authority to grant a motion to stay the period allowed for voluntary departure pending a petition for judicial review with the court of appeals. *See Dada*, 128 S.Ct. at 2314; *compare Thapa* v. *Gonzales*, 460 F.3d 323, 329–32 (2d Cir. 2006) (holding that the court may stay voluntary departure pending consideration of a petition for review on the merits), and *Obale* v. *Attorney General of United States,* 453 F.3d 151, 155–57 (3d Cir. 2006) (same), *with Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (holding that the court may not stay voluntary departure period pending consideration of a petition for review).

The divergent practice among the federal courts of appeals undermines the sound public policy reasons to ''promote a greater measure of uniformity and expedition in the administration of the immigration laws.'' *See* 72 FR at 67678. As the Supreme Court stated in *Dada*, the voluntary departure statute ''contains no ambiguity: The period within which the alien may depart voluntarily 'shall not be valid for a period exceeding 60 days.' '' *Dada*, 128 S.Ct. at 2316. Yet, an alien's ability to obtain a judicial stay in some circuits, but not others, provides certain aliens with a different rule than that recognized by the Supreme Court, that is, the ability to extend their voluntary departure periods well beyond 60 days. The grant of a stay of voluntary departure by a circuit court essentially tolls the voluntary departure period. Although not addressing voluntary departure in the circuit court context, the Supreme Court made clear that there is no statutory authority for tolling. *Dada*, at 2311, 2319; see also section 240B(b)(2) of the Act (providing for no more than 60 days to voluntarily depart). A stay deprives the government of the same principal considerations of the voluntary departure period—''a quick departure without the considerable expense of protracted litigation.'' 72 FR at 67681.

The concern expressed by the Department in the proposed rule regarding the granting of judicial stays continues to be significant. 72 FR at 67681–82. In practice, we have seen that those who seek judicial review do not adhere to the terms of the agreement and depart, despite the clear statutory authority for such aliens to continue to pursue judicial review even after they have departed from the United States. *See Mendez-Alcaraz* v. *Gonzales*, 464 F.3d 842, 844 n.8–13 (9th Cir. 2006) (holding that permanent rules under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, Div. C, 110 Stat. 3009 (Sept. 30, 1996), effective April 1, 1997, ''do not include the old jurisdiction-stripping provision for excluded, deported, or removed aliens'' under former 8 U.S.C. 1105a(c); that the court retains jurisdiction over a petition for review after an alien has departed; and that a petitioner's removal does not render a case moot). Rather, aliens have sought to remain in the United States, which has resulted in this ''non-uniform, patchwork system of motions practice in the courts of appeals.'' 72 FR at 67681. Aliens granted stays are effectively allowed to remain in the United States for months and years after the statutorily required time to depart.

While the Supreme Court did not consider the effect of judicial stays of voluntary departure in *Dada* because the issue was not presented for decision in that case, the Court's analysis regarding the time allowed to voluntarily depart supports the Department's position that the time for an alien to voluntarily depart should be limited to that allowed by statute. *Dada*, 128 S.Ct. at 2319 (recognizing that there is no statutory authority for tolling, and finding that ''the alien when selecting voluntary departure is [under] the obligation to arrange for departure, and actually depart, within the 60-day period''); 72 FR at 67682 (''This [automatic termination rule for petitions for review] is consistent with the congressional intent, as expressed in the 1996 changes to the Act, that aliens may no longer remain in a period of voluntary departure for years, but instead are strictly limited to a discrete period of time for voluntary departure.'').

Because few aliens choose to use the authority granted by Congress to pursue judicial review after departing from the United States, and because the practice of granting stays has resulted in non-uniform application of the immigration laws, the Attorney General is exercising his statutory authority to limit eligibility for voluntary departure to those aliens who do not seek judicial review. Accordingly, this final rule adopts the automatic termination rule for an alien granted voluntary departure who files a petition for review in order to result in ''a uniform application of the effect of the voluntary departure period in all the circuit courts of appeals.'' 72 FR at 67682.

However, in an effort to provide an incentive for aliens to depart during their voluntary departure periods and pursue judicial review from their home countries, the proposed rule sought comment on ''whether or not it might be advisable (and the possible means for accomplishing such a result) to consider adopting a rule that those aliens who do depart the United States during the period of time specified in the grant of voluntary departure, after filing a petition for review, would not be deemed to have departed under an order of removal for purposes of section 212(a)(9)(A) of the Act.'' 72 FR at 67682.

One comment was submitted in response to this request. This comment suggests that the recommendation in the proposed rule regarding section 212(a)(9)(A) of the Act be adopted. Based on this favorable comment, and further consideration by the Department, this final rule adopts new 8 CFR 1240.26(i) to provide that if an alien who was granted voluntary departure files a petition for review any grant of voluntary departure shall terminate automatically upon the filing of the petition and the alternate order of removal shall immediately take effect, except that the alien will not be deemed to have departed under an order of removal if the alien (i) departs the United States no later than 30 days following the filing of a petition for review; (ii) provides to DHS such evidence of his or her departure as the ICE Field Office Director may require;

and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.

The voluntary departure statutory provision states that an order granting voluntary departure is entered ''in lieu of removal.'' INA 240B(b)(1). It is by regulation, however, that the Attorney General requires immigration judges and the Board to enter an alternate order of removal upon granting voluntary departure. 8 CFR 1240.26(d). It is also by regulation that the Attorney General dictates when this alternate order of removal becomes effective. *See e.g.,* 8 CFR 1240.26(c)(3) (''If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day''). In addition, immigration judge and Board orders state that ''if the respondent fails * * * to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following orders shall thereupon become immediately effective.'' In the proposed rule, the Attorney General further proposed that if an alien's voluntary departure terminates due to the filing of a post-order motion or petition for review, ''the alternate order of removal will take effect immediately.'' 72 FR at 67686. This final rule adopts an exception to the proposed rule. If an alien does depart and meets the conditions described above, the alien will not have departed under a removal order.

In order for an alien to take advantage of this opportunity to avoid the stigma of departing under an order of removal, it will be necessary for the alien to establish a contemporaneous record documenting the alien's departure from the United States by notice to DHS documenting his or her departure and to establish that he or she remains outside of the United States. Evidence sufficient to meet these requirements may include proof of the alien's intended departure and itinerary, and prompt presentation by the alien along with such evidence necessary to prove his or her timely departure to a United States consulate. DHS may determine other acceptable proof documenting the alien's time of departure or define the timely period as meeting the definition of prompt presentation.

A statement setting forth this rule will be added to the advisals regarding voluntary departure that are already included with Board decisions.

Finally, this final rule does not adopt the provisions of the proposed rule regarding forfeiture of the voluntary departure bond where an alien's voluntary departure is automatically terminated upon the filing of a petition for review. *See* Section VI, *infra* for further discussion.

V. Notice to the Alien Under the Rule

Several commenters state that the notice provisions set forth in the proposed rule are insufficient because they only provide notice of the consequences of accepting voluntary departure after an alien actually does accept voluntary departure. One commenter posits that the large majority of aliens who are unrepresented in immigration proceedings base their limited knowledge of penalties and obligations on the explanations given by immigration judges. In addition, this commenter suggests that the Board notify aliens when dismissing their appeals of aliens' right to file a petition for review in a federal court of appeals within 30 days. Another commenter states that the rule fails to include a requirement that the immigration judge notify aliens of their obligation to submit proof to the Board that the bond has been posted in order for the Board to reinstate their voluntary departure. This same commenter argues that the timeframe to submit this proof to the Board—''in connection with the filing of an appeal with the Board''—is ''unnecessarily restrictive.''

The Department agrees that timely notice to aliens regarding their rights, responsibilities, and the consequences associated with voluntary departure is an important issue. This final rule retains the proposed changes to 8 CFR 1240.11 to provide that the immigration judge will advise an alien that voluntary departure will be automatically terminated if the alien files a motion to reopen or reconsider during the pendency of the period in which to depart; and for the Board to inform aliens that voluntary departure will be automatically terminated if the alien files a motion to reopen or petition for review during the pendency of the period in which to depart. In addition, this final rule also amends 8 CFR 1240.26 to require immigration judges to inform aliens of the bond amount that will be set before allowing the alien to accept voluntary departure, as well as any other conditions the immigration judge may set in granting voluntary departure. The alien will then have an opportunity to accept the grant of voluntary departure, upon the conditions set forth, or in the alternative the alien may decline the voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

Regarding the requirement to submit proof to the Board that the bond has been posted in order for the Board to reinstate voluntary departure, section 1240.26 is revised to require notice regarding the need to file proof of posting a bond with the Board in the immigration judge's decision, and the effect of failing to timely post the bond. Further, this rule revises the timeframe to submit this proof to the Board to ''within 30 days of filing of an appeal with the Board.'' After an immigration judge issues his or her decision, an alien has five business days to post the bond and thirty days to file an appeal with the Board. From the date the appeal is filed with the Board, the alien will have thirty days to submit proof to the Board that the bond was posted. Evidence that the bond was posted may include a copy of Form I–352, the Immigration Bond worksheet that will be provided to the obligor when the bond is posted with DHS Immigration and Customs Enforcement (ICE) Detention and Removal Office (DRO), or Form I–305, which is the fee receipt provided by DRO.

The Department has also considered the suggestion that the Board notify aliens of their right to file a petition for review within 30 days of the Board's dismissal of the alien's appeal. This advisal is beyond the scope of this rule, as it would require the Board to include such an advisal in every decision, not just those involving voluntary departure. However, such an advisal can be implemented administratively without the need for a regulation. The Board historically has not given such a notice, but the Department will give further consideration to the matter administratively.

VI. Issues Relating to the Voluntary Departure Bond

Four commenters provided comments regarding the voluntary bond provisions included in the proposed rule. The proposed rule provided for the following unless the alien departs within the time permitted to depart, or is successful in reopening or overturning the final administrative order: (1) Aliens who are granted voluntary departure but fail to post the bond within the required five business days remain liable for the bond amount regardless of whether voluntary departure is later terminated due to the filing of a motion or petition for review; (2) aliens who are granted voluntary departure and post bond will forfeit the bond if voluntary departure is later terminated due to the filing of a motion or petition; (3) an alien's failure to post bond does not relieve the alien of the

obligation to depart and the alien will be subject to the consequences for failure to depart if the alien does not depart within the permitted period (reversing the Board's decision in *Matter of Diaz-Ruacho,* 24 I&N Dec. 47 (BIA 2006)); (4) an alien's failure to post bond within the required five business days may be considered in determining whether the alien is a flight risk and as a negative discretionary factor with respect to discretionary forms of relief; (5) aliens who waive their administrative appeal at the conclusion of proceedings and fail to post bond within the required five business days will become subject to the final order of removal after the fifth business day; and (6) in order to have voluntary departure reinstated by the Board on appeal, the alien must provide proof to the Board at the time of the appeal that the bond was posted.

None of the comments took issue with the proposed rule that aliens who are granted voluntary departure and fail to post their bond remain liable for the bond. However, based on further discussion below, this final rule does not adopt the part of the proposed rule that imposed continuing liability for the bond ''regardless of whether voluntary departure is later terminated due to the filing of a motion or petition for review.'' Because issues relating to forfeiture of bond can be complex, and also implicate the authority of DHS as well as that of the immigration judge and the Board, the final rule does not include the provision that the alien will forfeit the bond if the alien's voluntary departure is later terminated upon the filing of a post-order motion or a petition for judicial review.

Three of the commenters describe the proposed rules as unduly burdensome, unfair, and punitive. Two of them state that these rules should not be adopted because notice to the alien of these rules is insufficient. As discussed in section IV, part C, this final rule requires that notice of the consequences of failing to depart voluntarily, the consequences of filing a post-decision motion, the amount of bond and any other conditions the immigration judge intends to impose, all be provided to aliens at the time they request voluntary departure.

One commenter posits that the rules appear to regulate enforcement related issues that are within the purview of DHS, not EOIR, because they involve bond and monetary penalties. This commenter, as well as one other, objects to the rules proposing forfeiture of the bond where voluntary departure is later terminated and the alien is no longer under an obligation to voluntarily depart. This commenter describes this rule as a due process violation precisely because the alien is no longer under an obligation to depart, and because in some cases the alien may be prevented from departing because he or she is detained pending execution of the removal order.

Pursuant to section 103(g)(2) of the Act, the Attorney General has the authority to ''establish such regulations, prescribe such forms of bond * * * and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' Further, section 240B(b)(3) of the Act states that the bond amount will ''be surrendered upon proof that the alien has departed the United States within the time specified,'' and does not, by its terms, provide exceptions for the circumstances of an alien who later decides that he or she does not wish to depart within the time specified. As explained in the proposed rule, ''the purpose of the bond [is] to ensure that the alien does depart during the time allowed, as the alien had promised to do at the time of the immigration judge's order granting voluntary departure.'' 72 FR 67683. The Department considers the bond akin to earnest money provided by the alien at the time the voluntary departure contract is entered. By posting the bond, the alien is manifesting the intent to follow through with the bargain under which he or she intends to depart the United States within the specific time period allotted at no cost to the government. While the alien may later change his or her mind, this does not extinguish the initial promise and the government's reliance on that promise.

On the other hand, the Department recognizes that issues relating to forfeiture of bond also implicate the authority of DHS. Public comments stated that aliens should not be penalized for filing a post-order motion or a petition for review. The Department has also considered the language of the Supreme Court's decision in *Dada* (''the alien who withdraws from a voluntary departure arrangement *is in the same position* as an alien who was not granted voluntary departure in the first instance''), *Id.* at 2320 (emphasis added), though it is worth noting that the Court's observation there was in the context of the option for withdrawal of a request for voluntary departure, an option that the Department has chosen not to follow in this final rule.

In light of the foregoing considerations, this final rule does not include the bond forfeiture rule previously proposed. Because this final rule is not adopting the changes regarding forfeiture of the bond, there is no need to adopt the provisions for a refund of the bond upon proof of being physically outside the country. These are issues that DHS will be able to address in carrying out its responsibilities relating to the posting and surrender of bonds.

However, this final rule adopts, in part, the proposed rule regarding the circumstances under which an alien can obtain a refund of the bond amount where the final administrative order is overturned or remanded. This rule allows for refund of the bond where an alien is granted voluntary departure by an immigration judge, posts the voluntary departure bond within the time required, appeals the immigration judge's decision to the Board, and obtains reversal or remand of the immigration judge's decision regarding the order of removal. If, pursuant to the Board's decision, the alien is no longer removable then the alien should obtain a refund of his or her bond. In that situation, the grant of voluntary departure did not take effect since the immigration judge's decision is stayed upon the filing of an appeal to the Board, and the Board's decision overturning or remanding the immigration judge's decision on the merits thereby renders issues relating to voluntary departure moot. Likewise, if, pursuant to a remand by the Board, the alien is not currently subject to an order of removal, the alien should obtain a refund of the bond amount.

Lastly, this commenter states that DHS should provide the Board with information regarding whether the alien actually posted bond, and that 30 days to provide this information to the Board is a restrictive amount of time. The commenter provides the example of a detained alien whose family member may have posted the bond. In this case, the commenter argues, the 30 days may not be enough time for the alien to gather the information needed regarding bond and provide it to the Board.

In light of the comments, the Department is revising this rule to allow an alien to provide proof to the Board of having posted the bond within 30 days of the filing of the Notice of Appeal. As for requiring DHS to provide the information, such a process would assume that every alien granted voluntary departure by the immigration judge would request reinstatement by the Board. Further, it is the alien's burden to demonstrate to the Board continuing eligibility for voluntary departure. *See* 8 CFR 1240.11(d); 72 FR 67685 (''the burden of proof is on the alien to establish eligibility for a discretionary form of relief'') (internal

citations omitted). Thus, it would be inappropriate to require DHS to be responsible for providing this information relating to the posting of the bond by the alien, as the alien had agreed to do.

Another commenter opposes the flight risk and negative discretion factors. This commenter argues that this categorical approach ignores individual circumstances and creates penalties for the small fraction of aliens who only qualify for voluntary departure due to their strong equities and characteristics in the first place. This rule does not mandate that aliens who do not post their voluntary departure bonds are flight risks or that they should be denied relief in the exercise of discretion. Rather, this rule provides guidance to adjudicators regarding particular factors they may consider in exercising discretion.

For instance, an alien's failure to post the bond ''may be considered'' a negative discretionary factor with regard to relief. 72 FR 67684, 67686. Specific inclusion of these potentially adverse factors in the voluntary departure regulations is appropriate to encourage aliens to adhere to the bond requirement within the required five business days, as they had specifically promised to do. If a rule carries no consequence for failure to comply, then the rule may be rendered effectively meaningless. The proposed rule that an alien's voluntary departure is terminated upon failure to post bond where the alien waived administrative appeal serves the same purpose. 72 FR 67684 (stating that ''this proposal ensures that aliens who waive appeal before the immigration judge still have an incentive to post bond as they agreed to do.''). Accordingly, the Department adopts without change the provisions of the proposed rule regarding the adverse factors for failure to post bond and termination of voluntary departure for failure to post bond by an alien who waives administrative appeal.

One commenter objects to the proposed rule changing the result in *Matter of Diaz-Ruacho,* 24 I&N Dec. 47 (BIA 2006). As noted in the proposed rule, the result in *Diaz-Ruacho* is not a sound policy approach because the alien's default should not exempt the alien from the penalties for failure to depart. 72 FR 67684. Moreover, the commenter does not state how the practical concerns of retaining *Diaz-Ruacho* might be avoided if *Diaz-Ruacho* were retained. *See Id.* (''using the failure to post a bond as the trigger that vitiates the grant of voluntary departure does not make practical sense because it is not an open, discrete, affirmative step and there is no ready process for highlighting the absence of a bond'').

The approach set forth in this final rule recognizes that aliens who request voluntary departure and enter into this agreement with the government may not simply back out of the agreement because they later realize that they actually have to depart or be subject to the consequences of failing to voluntarily depart. This rule is designed to address the conflict recognized in *Dada* for aliens whose circumstances have changed and want to pursue a motion to reopen, or who believe error exists in the administrative decision and want to pursue a motion to reconsider but cannot do so if they comply with the voluntary departure order. As for those aliens who file petitions for review, this rule is also designed to prevent the voluntary departure period from being extended beyond the statutorily permitted amount of time by the issuance of a judicial stay. Neither of these intended purposes of the rule allows for an alien unilaterally to change his or her mind after having been granted voluntary departure; which is what would occur if an alien's failure to post bond merely resulted in vitiating the original grant of voluntary departure.

None of the comments specifically object to the rule that an alien who waives appeal at the conclusion of proceedings and fails to post bond within the required five business days will immediately become subject to the final order of removal. The proposed rule also stated, however, that ''if the alien thereafter does depart within the voluntary departure period, the alien will not be subject to the penalties under 240B(d) of the Act (8 U.S.C. 1229a(c)(4)(B)) or inadmissibility under 212(a)(9)(A) of the Act.'' 72 FR at 67684. This final rule adopts this provision. However, in order to maintain consistency between this provision and the similar provision being adopted for the filing of petitions for review, this final rule revises the regulatory language to read: ''if the alien had waived appeal of the immigration judge's decision, the alien's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 CFR 1241.1(f), except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien: (i) Departs the United States no later than 25 days following the failure to post bond; (ii) provides to DHS such evidence of his or her departure as the ICE Field Office Director may require; and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.''

As explained above in the context of petitions for review, in order for an alien to take advantage of this opportunity to avoid the stigma of departing under an order of removal, it will be necessary for the alien to establish a contemporaneous record documenting the alien's departure from the United States by notice to DHS documenting his or her departure and to establish that he or she remains outside of the United States. Evidence sufficient to meet these requirements may include proof of the alien's intended departure and itinerary, and prompt presentation by the alien to a United States consulate along with such evidence necessary to prove his or her timely departure. DHS may determine other acceptable proof documenting the alien's time of departure or define the timely period as meeting the definition of prompt presentation.

Finally, one commenter asks whether the filing of a motion would terminate the voluntary departure bond. As explained earlier, issues relating to the cancellation of bond implicate the authority of DHS. Thus, the Department is not in a position to unilaterally respond to this comment in this rulemaking. However, the Department has consulted with DHS regarding this question and DHS is considering the appropriate way to respond and provide guidance for this and similar bond questions.

In addition, this commenter states that the bond should be raised to $5,000 because $500 is not enough leverage to ensure departure. Under the regulations, the specific bond amount is within the discretion of the immigration judge, to be set ''in an amount necessary to ensure that the alien departs within the time specified,'' except that it can be no less than $500. 8 CFR 1240.26(c)(3). The Department did not include an increase in the minimum bond amount in the proposed rule, and declines at this time to impose such a change by regulation. However, as explained in the previous discussion, this rule uses other means to implement the requirement that the bond set by the immigration judge is posted.

The proposed rule also sought comment on whether the rule should provide for additional sanctions for aliens who fail to post the required bond. 72 FR 67684. One commenter urged the Department to table consideration of such a provision because it would be punitive and hurt

individuals who would be least able to carry the additional financial burden. The Department is not adopting further changes in this final rule regarding posting of the bond. However, this issue may be revisited in the future, if necessary to address additional concerns.

VII. Amount of the Monetary Penalty for Failure To Depart Voluntarily

Two commenters object to the proposed rule to set a minimum $3,000 civil penalty for failure to depart pursuant to section 240B(d)(1)(A) of the Act. One of the commenters argues that if Congress had intended the minimum penalty to be $3,000, it would not have specifically set the minimum at $1,000. The commenter also states that immigration judges should have discretion to set the amount anywhere between the statutory range of $1,000 and $5,000. Finally, this commenter argues that it does not make sense to have the immigration judge set the penalty when factors relevant to overstaying the voluntary departure period in order to determine an appropriate fine would only arise during the voluntary departure period.

Congress has provided that failure to depart is subject to a civil penalty. Through this regulation, the Department is using the consequences provided by Congress to further encourage aliens to adhere to their voluntary departure orders. As stated in the proposed rule, the Department does not have authority to enforce or collect the penalty, but this rule deals only with the authority to set the amount of the penalty. 72 FR at 67685. There is nothing in the statute that precludes having the immigration judge set the penalty in advance prior to the granting of voluntary departure. Moreover, nothing in this rule precludes DHS from adopting a process that allows for mitigation of the amount of a civil penalty that it seeks to collect based on the particular circumstances of an alien's case. Finally, there is much to be said for providing the additional clarity for the alien, up front, in deciding whether to accept voluntary departure and in choosing ultimately to comply with the obligation to depart voluntarily, rather than facing an uncertain and unknowable penalty amount to be selected in the future within a broad monetary range.

The final rule does make one change to allow greater flexibility regarding the amount of the monetary penalty, within the allowable statutory range. Rather than setting a minimum amount of $3,000 as the civil penalty, the final rule will set a rebuttable presumption that the civil penalty amount should be $3,000. The immigration judge will have discretion to set a lower or higher amount based on an alien's individual circumstances, including a consideration of the likelihood that the alien will comply or fail to comply with the grant of voluntary departure. The final rule will adopt, without change, the proposed rule that failure to pay a required civil penalty may be a relevant discretionary factor in later applications for relief.

VIII. Effective Date

One commenter argues that the final rule regarding motions should apply retroactively to persons granted voluntary departure before the effective date of the rule. Because the Department did not present such retroactive application as an option in the proposed rule, and because aliens would not otherwise receive notice that the filing of their motions would automatically terminate their voluntary departure, the Department will not apply this rule retroactively.

Since the provisions of this rule are prospective only, this rule does not provide transition rules with respect to aliens who were granted voluntary departure and had motions pending before an immigration judge or the Board or a petition for review pending with a federal court of appeals on or after the date of the Supreme Court's decision in *Dada*, and before the effective date of this final rule. It is worth noting that an alien who was within a period of voluntary departure on the day *Dada* was issued could have relied on that decision to withdraw from the request of voluntary departure in order to pursue a motion without being subject to the consequences for failing to voluntarily depart.

There are no other reasons to apply this rule retroactively. Accordingly, the proposed rule to apply this final rule prospectively only will be adopted without change. This means that this rule will apply to all cases pending before EOIR, or adjudicated by EOIR, on the effective date of this rule and any cases that later come before it. For instance, an alien who receives a decision by an immigration judge granting voluntary departure on or after the effective date of this rule will be subject to the voluntary departure bond provisions of this rule as well as all other applicable provisions. An alien who receives a decision by the Board reinstating voluntary departure on or after the day of the effective date of this rule will be subject to the automatic termination rule if that alien decides to seek judicial review, as well as all other application provisions. Likewise, if an alien's case is pending before a circuit court, and the case is remanded to the Board on or after the day of the effective date of this rule, any subsequent grant of voluntary departure will be subject to this rule.

IX. Regulatory Requirements

A. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individual aliens and does not affect small entities as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and also will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 (Regulatory Planning and Review)

The Attorney General has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive

Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1241

Administrative practice and procedure, Aliens, Immigration.

■ Accordingly, for the reasons stated in the preamble, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1229(c)(e), 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100, (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

■ 2. Section 1240.11 is amended by adding a new sentence at the end of paragraph (b) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(b) * * * The immigration judge shall advise the alien of the consequences of filing a post-decision motion to reopen or reconsider prior to the expiration of the time specified by the immigration judge for the alien to depart voluntarily.

* * * * *

■ 3. Section 1240.26 is amended by:

■ a. Adding new paragraphs (b)(3)(iii) and (b)(3)(iv);

■ b. Revising paragraph (c)(3);

■ c. Adding new paragraphs (c)(4), (e)(1), and (e)(2);

■ d. Adding a new sentence at the end of paragraph (f); and by

■ e. Adding new paragraphs (i) and (j), to read as follows:

§ 1240.26 Voluntary Departure—authority of the Executive Office for Immigration Review.

* * * * *

(b) * * *

(3) * * *

(iii) If the alien files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply if the alien has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the immigration judge shall advise the alien of the provisions of this paragraph (b)(3)(iii).

(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(c) * * *

(3) *Conditions.* The immigration judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. The immigration judge shall advise the alien of the conditions set forth in this paragraph (c)(3)(i)–(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the alien of such conditions before granting voluntary departure. Upon the conditions being set forth, the alien shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than $500. Before granting voluntary departure, the immigration judge shall advise the alien of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.

(ii) An alien who has been granted voluntary departure shall, within 30 days of filing of an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the alien does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the immigration judge shall advise the alien that if the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the alien satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the alien may apply to the ICE Field Office Director for the bond to be canceled, upon submission of proof of the alien's timely departure by such methods as the ICE Field Office Director may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the alien is subsequently successful in overturning or remanding the immigration judge's decision regarding removability.

(4) *Provisions relating to bond.* The voluntary departure bond shall be posted with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure, and the ICE Field Office Director may, at his or her discretion, hold the alien in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the alien does depart from the United States, as promised, the failure to post the bond, when required, within 5 business days may be considered in evaluating whether the alien should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. The alien's failure to post the required voluntary departure bond within the time required does not terminate the alien's obligation to depart within the period allowed or exempt the

alien from the consequences for failure to depart voluntarily during the period allowed. However, if the alien had waived appeal of the immigration judge's decision, the alien's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 CFR 1241.1(f), except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien:

(i) Departs the United States no later than 25 days following the failure to post bond;

(ii) Provides to DHS such evidence of his or her departure as the ICE Field Office Director may require; and

(iii) Provides evidence DHS deems sufficient that he or she remains outside of the United States.

* * * * *

(e) * * *

(1) *Motion to reopen or reconsider filed during the voluntary departure period.* The filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii) of this section. If the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.

(2) *Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure.* The filing of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the alien's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.

(f) * * * The filing of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The filing of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

* * * * *

(i) *Effect of filing a petition for review.* If, prior to departing the United States, the alien files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the alien will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to an alien who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000 unless the immigration judge specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge shall advise the alien of the amount of this civil penalty at the time of granting voluntary departure.

* * * * *

PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

■ 4. The authority citation for part 1241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

■ 5. Section 1241.1 is amended by revising paragraph (f), to read as follows:

§ 1241.1 Final order of removal.

* * * * *

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

Dated: December 12, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–30025 Filed 12–17–08; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 516 and 575

[OTS No. 2008–0023]

Technical Amendments

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its regulations to incorporate technical and conforming amendments. They include clarifications and corrections of typographical errors.

DATES: *Effective Date:* December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Sandra E. Evans, Legal Information Assistant (Regulations), (202) 906–6076, or Marvin Shaw, Senior Attorney, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS is amending its regulations to incorporate

technical and conforming amendments. OTS is making the following miscellaneous changes:

Section 516.40—Application Processing Procedures. The final rule revises the table in 12 CFR 516.40 to add contact information for the agency's Central region.

Sections 575.9 and 575.14—Optional Charter Provisions in Mutual Holding Company Structures. OTS permits certain MHC subsidiaries to adopt an optional charter provision that would prohibit any person from acquiring, or offering to acquire beneficial ownership of more than ten percent of the MHC subsidiary's minority stock (stock held by persons other than the subsidiary's MHC).[1] This final rule modifies the instruction contained in sections 12 CFR 575.9(c) and 575.14(c)(3) to read: ''[insert date within five years of a minority stock issuance] * * *.'' Today's change corrects the July final rule which inadvertently stated ''[insert date of minority stock issuance].''

Administrative Procedure Act; Riegle Community Development and Regulatory Improvement Act of 1994

OTS finds that there is good cause to dispense with prior notice and comment on this final rule and with the 30-day delay of effective date mandated by the Administrative Procedure Act.[2] OTS believes that these procedures are unnecessary and contrary to public interest because the rule merely makes technical changes to existing provisions. Because the amendments in the rule are not substantive, these changes will not affect savings associations.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 provides that regulations that impose additional reporting, disclosure, or other new requirements may not take effect before the first day of the quarter following publication.[3] This section does not apply because this final rule imposes no additional requirements and makes only technical changes to existing regulations.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act,[4] the OTS Director certifies that this technical corrections regulation will not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

OTS has determined that this rule is not a ''significant regulatory action'' for purposes of Executive Order 12866.

Unfunded Mandates Reform Act of 1995

OTS has determined that the requirements of this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995.

List of Subjects

12 CFR Part 516

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 575

Administrative practice and procedure, Capital, Holding companies, Reporting and recordkeeping requirements, Savings Associations, Securities.

■ Accordingly, the Office of Thrift Supervision amends title 12, chapter V of the Code of Federal Regulations, as set forth below.

PART 516—APPLICATION PROCESSING PROCEDURES

■ 1. The authority citation for part 516 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464, 2901 *et seq.*

■ 2. Revise the table in § 516.40(a)(2) to read as follows:

§ 516.40 Where do I file my application?

(a) * * *

(2) * * *

Region	Office address	States served
Northeast	Office of Thrift Supervision, Harborside Financial Center, Plaza Five, Suite 1600, Jersey City, New Jersey 07311.	Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, West Virginia.
Southeast	Office of Thrift Supervision, 1475 Peachtree Street, NW., Atlanta, Georgia 30309 (Mail Stop: P.O. Box 105217, Atlanta, Georgia 30348–5217).	Alabama, District of Columbia, Florida, Georgia, Kentucky, Maryland, North Carolina, Puerto Rico, South Carolina, Virginia, the Virgin Islands.
Central	Office of Thrift Supervision, 1 South Wacker Drive, Suite 2000, Chicago, Illinois 60606.	Illinois, Indiana, Ohio, Michigan, Wisconsin.
Midwest	Office of Thrift Supervision, 225 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062–2326 (Mail to: P.O. Box 619027, Dallas/Ft. Worth, Texas 75261–9027.	Arkansas, Iowa, Kansas, Louisiana, Mississippi, Missouri Nebraska, Oklahoma, Tennessee, Texas.
West	Office of Thrift Supervision, Pacific Plaza, 2001 Junipero Serra Boulevard, Suite 650, Daly City, California.	Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oregon, South Dakota, Utah, Washington, Wyoming.

* * * * *

PART 575—MUTUAL HOLDING COMPANIES

■ 3. The authority citation for 12 CFR part 575 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828, 2901.

§ 575.9 [Amended]

■ 4. Amend the second paragraph of § 575.9(c) by adding the phrase ''within five years'' after the word ''date'' in the bracketed language of the second sentence.

§ 575.14 [Amended]

■ 5. Amend the second paragraph of § 575.14(c)(3) by adding the phrase ''within five years'' after the word

[1] *See* 73 FR 39216 (July 9, 2008).

[2] 5 U.S.C. 553.

[3] Pub. L. 103–325, 12 U.S.C. 4802.

[4] Pub. L. 96–354, 5 U.S.C. 601.

''date'' in the bracketed language of the second sentence.

Dated: December 11, 2008.

By the Office of Thrift Supervision.

John M. Reich,

Director.

[FR Doc. E8–30021 Filed 12–17–08; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1018; Airspace Docket No. 08–AAL–31]

Revocation of Class E Airspace; Metlakatla, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revokes Class E airspace at Metlakatla, AK. The privately funded special instrument approaches serving Metlakatla Airport have been removed. There is no longer a requirement for the controlled airspace. This action revokes existing Class E airspace surrounding the Metlakatla Airport, Metlakatla, AK.

DATES: *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

History

On Friday, October 17, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revoke the Class E airspace at Metlakatla, AK (73 FR 61752). The action was proposed in order to remove controlled airspace no longer necessary, due to the removal of the existing instrument approach procedure previously serving the Metlakatla Airport. Class E controlled airspace associated with the Metlakatla Airport area is revoked by this action.

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

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revokes Class E airspace at the Metlakatla Airport, Alaska. This Class E airspace is revoked because there are no longer any instrument procedures at the Metlakatla Airport, and the airspace depiction will be removed from aeronautical charts.

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

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it revokes Class E airspace no longer necessary for the Metlakatla Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

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

* * * * *

AAL AK E5 Metlakatla, AK [Revoked]

* * * * *

Issued in Anchorage, AK, on December 4, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–30013 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 408, 416, and 422

[Docket No. SSA–2008–0005]

RIN 0960–AG75

Clarification of Evidentiary Standard for Determinations and Decisions

AGENCY: Social Security Administration.

ACTION: Final Rules.

SUMMARY: We are amending our rules to clarify that we apply the preponderance of the evidence standard when we make determinations and decisions at all levels of our administrative review

process. These rules do not change our policy that the Appeals Council applies the substantial evidence standard when it reviews a decision by an administrative law judge (ALJ) to determine whether to grant a request for review. We are also adding definitions of the terms ''substantial evidence'' and ''preponderance of the evidence'' for use in applying these rules.

DATES: These final rules are effective on January 20, 2009.

FOR FURTHER INFORMATION CONTACT: Joshua Silverman, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 594–2128, for information about these rules. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

Explanation of Changes

Our Administrative Review Process

We currently decide claims for benefits using an administrative review process that consists of four levels: Initial determination, reconsideration, hearing before an ALJ, and Appeals Council review. See 20 CFR 404.900, 408.1000, and 416.1400. We make an initial determination at the first level. If a person is dissatisfied with the initial determination, he may request reconsideration.[1] If a person is dissatisfied with the reconsidered determination, he may request a hearing before an ALJ.[2] Finally, if a person is dissatisfied with the ALJ's decision,[3] he may request that the Appeals Council review that decision. Once a person has completed these administrative steps and received our final decision, the person may request judicial review of the final decision in Federal district court.

Each adjudicator reviewing a claim in the administrative process makes an independent (or de novo) determination or decision based on the evidence in the record.[4] For example, an ALJ would not simply review a State agency's initial and reconsideration disability determinations to determine whether they were correct. Rather, the ALJ would review the evidence in the record and make an independent decision.

In contrast, in deciding whether to grant a person's request for Appeals Council review of an ALJ's decision, the Appeals Council first considers the ALJ's decision and the evidence before the ALJ using the substantial evidence standard of review, which we discuss below. If the Appeals Council does not grant a request for review, the ALJ's decision becomes our final decision.[5] If the Appeals Council grants the request for review, it will usually either remand the case to an ALJ for additional proceedings and a new decision or issue its own decision.

Our Standard of Proof

A claimant has the burden of proving his claim with us. Adjudicators at each level of the administrative review process, including the Appeals Council, consider whether a claimant has proven his claim using an evidentiary standard called the ''preponderance of the evidence'' when they make a determination or decision. We define preponderance of the evidence as ''such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.'' 20 CFR 405.5.

The Social Security Act does not specify the standard of proof to use when we make a determination or decision. Courts and scholars have long recognized that the preponderance of the evidence standard is the traditional standard of proof in a civil or an administrative adjudicatory proceeding.[6] Our longstanding policy has been that the preponderance of the evidence standard applies to determinations or decisions on claims under parts 404, 408, and 416.[7] Prior to these final rules, we did not have regulations in parts 404, 408, and 416 that clearly stated that we use the preponderance of the evidence standard when we make a determination or decision. The absence of explicit language in these parts explaining the standards we use at each level of the administrative process caused some confusion about the applicable standard. By issuing these final rules, we intend to resolve any confusion about the applicable standard.

Our Standard of Review at the Appeals Council

When the Appeals Council considers whether to grant a request for review of an ALJ's decision, it does not use a preponderance of the evidence standard. Instead, it considers, among other things, whether the action, findings, or conclusions of the ALJ are supported by substantial evidence.[8] 20 CFR 404.970(a) and 416.1470(a). The definition of substantial evidence in these final rules is ''such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'' The substantial evidence standard of review gives deference to the findings of the ALJ rather than requiring a decision based on a new evaluation of the evidence.[9]

[1] For disability claims, there are ten States that are participating in a ''prototype'' test under 20 CFR 404.906 and 416.1406. In these States, the second step for people who are dissatisfied with their initial determinations in disability cases is a hearing before an ALJ. The ten States are: Alabama, Alaska, California (Los Angeles North and West Branches), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.

[2] In some cases, attorney advisors in our Office of Disability Adjudication and Review make wholly favorable decisions before an ALJ hearing is conducted. 20 CFR 404.942 and 416.1442.

[3] The words ''determination'' and ''decision'' are defined in 20 CFR 404.900 and 416.1400. At the initial and reconsideration levels of the administrative review process, we issue ''determinations.'' At the ALJ hearing and Appeals Council levels, we issue ''decisions.''

[4] In some States, adjudicators must consider, and sometimes adopt, certain findings made in prior disability adjudications under acquiescence rulings (ARs) that we have issued to address circuit court holdings. See AR 97–4(9), 62 FR 64038, available at: *http://www.socialsecurity.gov/OP_Home/rulings/ar/09/AR97-04-ar-09.html*; AR 98-3(6), 63 FR 29770, available at: *http://www.socialsecurity.gov/OP_Home/rulings/ar/06/AR98-03-ar-06.html*; AR 98-4(6), 63 FR 29771, corrected at 63 FR 31266, available at: *http://www.socialsecurity.gov/OP_Home/rulings/ar/06/AR98-04-ar-06.html*; and AR 00-1(4), 65 FR 1936, available at: *http://www.socialsecurity.gov/OP_Home/rulings/ar/04/AR2000-01-ar-04.html.*

[5] The Appeals Council may also dismiss the request for review either with or without first granting the request. Additionally, the Appeals Council may review a case on its own motion without an individual asking it to do so. See 20 CFR 404.967, 404.969, 404.984, 416.1467, 416.1469, and 416.1484. See also 20 CFR 408.1050, which incorporates the relevant provisions of 20 CFR 416.1467–416.1482 by reference.

[6] Federal courts apply a substantial evidence standard when they review our final decisions. 42 U.S.C. 405(g), 1009(b), and 1383(c)(3).

[7] A claimant must give us ''convincing'' evidence to prove that he meets certain requirements for eligibility, as described in subpart H of parts 404 and 416. Because these final rules address the appropriate standard of proof to be applied in making determinations or decisions rather than the burden of proving eligibility for benefits, these final rules are not applicable to subpart H of parts 404 and 416.

[8] The Appeals Council also reviews any new and material evidence under 20 CFR 404.970(b) and 416.1470(b).

[9] Our regulations also provide that the Associate Commissioner for Disability Determinations or his delegate may use the substantial evidence standard of review when reviewing a sample of disability hearing officers' reconsideration determinations. 20 CFR 404.918 and 416.1418. In general, disability hearing officers make reconsideration determinations in cases of beneficiaries who we have determined are no longer disabled. See 20 CFR 404.914–404.918 and 416.1414–416.1418.

As stated earlier, the Appeals Council uses the substantial evidence standard to decide whether to review an ALJ's decision. If it grants review and then issues its own decision, the Appeals Council uses the preponderance of the evidence standard when it issues its decision.

Explanation of Changes

We are revising several regulation sections in parts 404, 408, 416, and 422 to clarify that we use the preponderance of the evidence standard of proof to adjudicate claims at all levels of the administrative review process. We also are adding a definition of the term ''preponderance of the evidence'' in 20 CFR 404.901, 408.1001, and 416.1401, and a definition of the term ''substantial evidence'' in 20 CFR 404.901 and 416.1401. These are the same definitions we currently use in 20 CFR 405.5.

We are also making additional changes from the language proposed in the NPRM. None of these changes alter the meaning of these sections. First, we are revising several of the affected regulatory sections in these final rules to put them in active voice and to use consistent language. Second, we are making two changes to 20 CFR 422.203(c). We are adding a reference to attorney advisor decisions under 20 CFR 404.942 and 416.1142 and deleting the phrase ''under applicable provisions of the law and regulations and appropriate precedents.'' These changes make the language in section 20 CFR 422.203(c) consistent with the language in final 20 CFR 404.953(a) and 416.1453(a), and they acknowledge that, under certain circumstances, attorney advisors can make decisions instead of an ALJ under 20 CFR 404.942 and 416.1442.

We believe these clarifications will improve the accuracy and consistency of the decision-making process.

We have the authority to make these changes under 42 U.S.C. 405(a), 902(a)(5), 1010(a), and 1383(d)(1).

Public Comments

In the notice of proposed rulemaking published at 73 FR 33745 (June 13, 2008), we provided the public with a 60-day period in which to comment on the proposed changes. That comment period ended on August 12, 2008. We received comments from four people. We carefully considered each comment. Because some of the comments were long and quite detailed, we have condensed, summarized, and paraphrased them in the following discussions. However, we have tried to present all views adequately and to address carefully all of the significant issues raised by the commenters that are within the scope of the proposed rules. We generally have not addressed comments that are outside the scope of the rulemaking proceeding.

Comment: One commenter generally supported the proposed rules and said that there should be only one evidentiary standard used by our adjudicators at all levels of the adjudication process.

Response: We agree with the commenter that adjudicators at each level of the administrative review process, including the Appeals Council, should use the same evidentiary standard. These rules provide that they will all use the preponderance of the evidence standard of proof when they make determinations or decisions. As stated above, the Appeals Council only uses the substantial evidence standard of review when it considers whether to grant a request for review of an ALJ's decision. Although it is unclear from the commenter's letter, to the extent that the commenter suggested that the Appeals Council should apply the preponderance of the evidence standard of proof when it reviews an ALJ's decision, we are not adopting the comment. Our rules governing the Appeals Council's use of the substantial evidence standard to review ALJ decisions have worked well, and we do not believe that there is any reason to change them.

Comment: Two commenters were concerned that the proposed changes could create an ambiguity about who has the burden of proof. One of these commenters also said that our determinations and decisions should be made based on substantial evidence and that the burden of a party is to provide proof by a preponderance of the evidence. Both commenters expressed concern that the proposed changes could appear to shift the burden of proof in disability cases to us by requiring that we base our determinations and decisions on a preponderance of the evidence. One of these commenters suggested that we add regulatory text to explain who has the burden of proof at each of the five steps of the sequential evaluation process that we use to decide whether a person is disabled. See 20 CFR 404.1520 and 416.920.

Response: We are not adopting this comment. These final rules concern the appropriate standard of proof, not who has the burden of proof at any stage of our sequential evaluation process. Our current regulations explain the burden of proof in disability claims.[10] We previously explained the concept of how the burden of proof, a term traditionally associated with adversarial litigation, applies in the context of our nonadversarial system. 68 FR 51153, 51154–51155 (Aug. 26, 2003). We do not believe that it is appropriate to make the changes suggested by the commenters because these final rules do not change the allocation of the burden of proof in our adjudications.

Comment: One commenter said that our use of the word ''review'' in several of the proposed sections was ambiguous. The commenter thought that it was unclear whether we meant a review of the evidence or a review of the determination or decision. The commenter suggested that we use a phrase such as ''again look'' instead of ''review'' when we refer to reviewing evidence.

Response: We are not adopting this comment. In many sections of our rules, we use the word ''review'' to refer generally to a consideration of evidence. With regard to the Appeals Council's review of a decision or a dismissal, we use the word ''review'' as a term of art.[11] We believe that the plain meaning of the word is readily apparent in the context of the sections of the regulations in which we use it, and we are not aware that these longstanding usages have confused either adjudicators or the public.

Comment: One commenter suggested changes to our proposed language for 20 CFR 404.979, 404.984, 416.1479, and 416.1484. Specifically, the commenter suggested amending those sections to state that the Appeals Council uses the substantial evidence standard when it remands a case to an ALJ, and that the Appeals Council will remand a case it reviewed to an ALJ for further proceedings unless the decision being appealed is supported by substantial evidence.

Response: We are not adopting this comment because it is inconsistent with our existing regulations, which provide that the Appeals Council may grant a request for review and remand a case for reasons other than a lack of substantial evidence to support a decision. See 20

[10] See 20 CFR 404.1512, 404.1560(c)(2), 404.1566(c), 416.912, 416.960(c)(2), and 416.966(c).

A claimant has the burden of providing proof of his disability under each of the first four steps in the sequential evaluation process. In the fifth and final step of the sequential evaluation process, we become responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can perform after considering the claimant's residual functional capacity, age, education, and work experience. However, a claimant must persuade us that he is disabled at each step of the sequential evaluation process. See *Bowen* v. *Yuckert*, 482 U.S. 137, 146 (1987).

[11] See, *e.g.*, 20 CFR 404.967 and 416.1467.

CFR 404.970 and 416.1470. The Appeals Council may also remand a case to an ALJ pursuant to a Federal court's instructions without conducting its own review. See 20 CFR 404.983 and 416.1483.

Comment: One commenter suggested that we change both of our proposed definitions. He also suggested that we adopt a new term— ''substantial evidence standard of review''— that would address when a reviewing body may remand a decision based on an adjudicator's failure to discuss evidence and that we amend 20 CFR 404.902 and 416.1492 accordingly.

Response: We are not adopting this comment. As we noted above, our definitions of the terms ''preponderance of the evidence'' and ''substantial evidence'' are taken directly from our existing rule in 20 CFR 405.5. The definitions in that rule are based on accepted definitions and are consistent with our longstanding usage. The commenter's proposed additions to these definitions would not appreciably clarify our rules, and some of the language the commenter proposed could raise questions among the public and our adjudicators. We also believe that our adjudicators and the public are familiar with the concept of substantial evidence because our subregulatory instructions have included a definition of ''substantial evidence'' for approximately 37 years. See SSR 71–53c.

The commenter's other proposals are beyond the scope of this rulemaking because they focus on how the Appeals Council or a Federal court can determine whether a decision is supported by substantial evidence. If we decide that it would be appropriate to adopt rules along the lines proposed by the commenter, we would first follow the Administrative Procedure Act's rulemaking procedures.

Regulatory Procedures

Executive Order 12866, as Amended

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866, as amended. Thus, they were not subject to OMB review.

Regulatory Flexibility Act

We certify that these rules will not have a significant economic impact on a substantial number of small entities as they affect individuals only. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These rules will impose no additional reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 408

Administrative practice and procedure, Aged, Reporting and recordkeeping requirements, Social Security, Supplemental Security Income (SSI), Veterans.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

20 CFR Part 422

Administrative practice and procedure, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Social Security.

Dated: December 12, 2008.

Michael J. Astrue,

Commissioner of Social Security.

■ For the reasons set forth in the preamble, we are amending subpart J of part 404, subpart J of part 408, subpart N of part 416, and subparts B and C of part 422 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J—[Amended]

■ 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a), (b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a), (b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend § 404.901 by adding the definitions for *''Preponderance of the evidence''* and *''Substantial evidence''* in alphabetical order to read as follows:

§ 404.901 Definitions.

* * * * *

Preponderance of the evidence means such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.

* * * * *

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

* * * * *

■ 3. Amend § 404.902 by revising the second sentence and adding a new sentence before the existing third sentence in the introductory text to read as follows:

§ 404.902 Administrative actions that are initial determinations.

* * * We will base our initial determination on the preponderance of the evidence. We will state the important facts and give the reasons for our conclusions in the initial determination. * * *

* * * * *

■ 4. Amend § 404.917 by revising the second sentence of paragraph (b) to read as follows:

§ 404.917 Disability hearing–disability hearing officer's reconsidered determination.

* * * * *

(b) * * * The disability hearing officer must base the reconsidered determination on the preponderance of the evidence offered at the disability hearing or otherwise included in your case file.

* * * * *

■ 5. Revise § 404.920 to read as follows:

§ 404.920 Reconsidered determination.

After you or another person requests a reconsideration, we will review the evidence we considered in making the initial determination and any other evidence we receive. We will make our determination based on the preponderance of the evidence.

■ 6. Amend § 404.941 by revising the second sentence of paragraph (a) to read as follows:

§ 404.941 Prehearing case review.

(a) * * * That component will decide whether it should revise the determination based on the preponderance of the evidence. * * *

* * * * *

■ 7. Amend § 404.942 by revising the second sentence of paragraph (a) to read as follows:

§ 404.942 Prehearing proceedings and decisions by attorney advisors.

(a) * * * If after the completion of these proceedings we can make a decision that is wholly favorable to you and all other parties based on the preponderance of the evidence, an attorney advisor, instead of an administrative law judge, may issue the decision. * * *

* * * * *

■ 8. Amend § 404.948 by revising the first sentence of paragraph (a) to read as follows:

§ 404.948 Deciding a case without an oral hearing before an administrative law judge.

(a) * * * If the evidence in the hearing record supports a finding in favor of you and all the parties on every issue, the administrative law judge may issue a hearing decision based on a preponderance of the evidence without holding an oral hearing. * * *

* * * * *

■ 9. Amend § 404.953 by revising the second sentence of paragraph (a), the first sentence of paragraph (b), and the first sentence of paragraph (c) to read as follows:

§ 404.953 The decision of an administrative law judge.

(a) * * * The administrative law judge must base the decision on the preponderance of the evidence offered at the hearing or otherwise included in the record. * * *

(b) * * * The administrative law judge may enter a wholly favorable oral decision based on the preponderance of the evidence into the record of the hearing proceedings. * * *

(c) * * * Although an administrative law judge will usually make a decision, the administrative law judge may send the case to the Appeals Council with a recommended decision based on a preponderance of the evidence when appropriate. * * *

■ 10. Amend § 404.979 by adding a new third sentence to read as follows:

§ 404.979 Decision of Appeals Council.

* * * If the Appeals Council issues its own decision, it will base its decision on the preponderance of the evidence. * * *

■ 11. Amend § 404.984 by revising the last sentence of paragraph (a), the second sentence of paragraph (b)(3), and the last sentence of paragraph (c) to read as follows:

§ 404.984 Appeals Council review of administrative law judge decision in a case remanded by a Federal court.

(a) * * * The Appeals Council will either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, or it will remand the case to an administrative law judge for further proceedings.

(b) * * *

(3) * * * If the Appeals Council assumes jurisdiction, it will make a new, independent decision based on the preponderance of the evidence in the entire record affirming, modifying, or reversing the decision of the administrative law judge, or it will remand the case to an administrative law judge for further proceedings, including a new decision. * * *

(c) * * * After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either issue a final decision of the Commissioner based on the preponderance of the evidence affirming, modifying, or reversing the decision of the administrative law judge, or remand the case to an administrative law judge for further proceedings, including a new decision.

* * * * *

PART 408—SPECIAL BENEFITS FOR CERTAIN WORLD WAR II VETERANS

Subpart J—[Amended]

■ 12. The authority citation for subpart J of part 408 continues to read as follows:

Authority: Secs. 702(a)(5) and 809 of the Social Security Act (42 U.S.C. 902(a)(5) and 1009).

■ 13. Amend § 408.1001 by adding the definition for *''Preponderance of the evidence''* in alphabetical order to read as follows:

§ 408.1001 Definitions.

* * * * *

Preponderance of the evidence means such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.

* * * * *

■ 14. Amend § 408.1002 by adding a new third sentence to read as follows:

§ 408.1002 What is an initial determination?

* * * We will base our initial determination on the preponderance of the evidence.

■ 15. Amend § 408.1020 by revising the second sentence to read as follows:

§ 408.1020 How do we make our reconsidered determination?

* * * We will make our determination based on the preponderance of the evidence in the record. * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N—[Amended]

■ 16. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 17. Amend § 416.1401 by adding the definitions for *''Preponderance of the evidence''* and *''Substantial evidence''* in alphabetical order to read as follows:

§ 416.1401 Definitions.

* * * * *

Preponderance of the evidence means such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.

* * * * *

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

* * * * *

■ 18. Amend § 416.1402 by revising the second sentence and adding a new sentence before the existing third sentence in the introductory text to read as follows:

§ 416.1402 Administrative actions that are initial determinations.

* * * We will base our initial determination on the preponderance of the evidence. We will state the important facts and give the reasons for our conclusions in the initial determination. * * *

* * * * *

■ 19. Amend § 416.1417 by revising the second sentence of paragraph (b) to read as follows:

§ 416.1417 Disability hearing—disability hearing officer's reconsidered determination.

* * * * *

(b) * * * The disability hearing officer must base the reconsidered determination on the preponderance of the evidence offered at the disability

hearing or otherwise included in your case file.

* * * * *

■ 20. Revise § 416.1420 to read as follows:

§ 416.1420 Reconsidered determination.

After you or another person requests a reconsideration, we will review the evidence we considered in making the initial determination and any other evidence we receive. We will make our determination based on the preponderance of the evidence. The person who makes the reconsidered determination will have had no prior involvement with the initial determination.

■ 21. Amend § 416.1441 by revising the second sentence of paragraph (a) to read as follows:

§ 416.1441 Prehearing case review.

(a) * * * That component will decide whether it should revise the determination based on the preponderance of the evidence. * * *

* * * * *

■ 22. Amend § 416.1442 by revising the second sentence of paragraph (a) to read as follows:

§ 416.1442 Prehearing proceedings and decisions by attorney advisors.

(a) * * * If after the completion of these proceedings we can make a decision that is wholly favorable to you and all other parties based on the preponderance of the evidence, an attorney advisor, instead of an administrative law judge, may issue the decision. * * *

* * * * *

■ 23. Amend § 416.1448 by revising the first sentence of paragraph (a) to read as follows:

§ 416.1448 Deciding a case without an oral hearing before an administrative law judge.

(a) * * * If the evidence in the hearing record supports a finding in favor of you and all the parties on every issue, the administrative law judge may issue a hearing decision based on a preponderance of the evidence without holding an oral hearing. * * *

* * * * *

■ 24. Amend § 416.1453 by revising the second sentence of paragraph (a), the first sentence of paragraph (b), and the first sentence of paragraph (d) to read as follows:

§ 416.1453 The decision of an administrative law judge.

(a) * * * The administrative law judge must base the decision on the preponderance of the evidence offered at the hearing or otherwise included in the record. * * *

(b) * * * The administrative law judge may enter a wholly favorable oral decision based on the preponderance of the evidence into the record of the hearing proceedings. * * *

* * * * *

(d) * * * Although an administrative law judge will usually make a decision, the administrative law judge may send the case to the Appeals Council with a recommended decision based on a preponderance of the evidence when appropriate. * * *

■ 25. Amend § 416.1479 by adding a new third sentence to read as follows:

§ 416.1479 Decision of Appeals Council.

* * * If the Appeals Council issues its own decision, it will base its decision on the preponderance of the evidence. * * *

■ 26. Amend § 416.1484 by revising the last sentence of paragraph (a), the second sentence of paragraph (b)(3), and the last sentence of paragraph (c) to read as follows:

§ 416.1484 Appeals Council review of administrative law judge decision in a case remanded by a Federal court.

(a) * * * The Appeals Council will either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, or it will remand the case to an administrative law judge for further proceedings.

(b) * * *

(3) * * * If the Appeals Council assumes jurisdiction, it will make a new, independent decision based on the preponderance of the evidence in the entire record affirming, modifying, or reversing the decision of the administrative law judge, or it will remand the case to an administrative law judge for further proceedings, including a new decision. * * *

(c) * * * After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either issue a final decision of the Commissioner based on the preponderance of the evidence affirming, modifying, or reversing the decision of the administrative law judge, or remand the case to an administrative law judge for further proceedings, including a new decision.

* * * * *

PART 422—ORGANIZATION AND PROCEDURES

Subpart B—[Amended]

■ 27. The authority citation for subpart B of part 422 continues to read as follows:

Authority: Secs. 205, 232, 702(a)(5), 1131, and 1143 of the Social Security Act (42 U.S.C. 405, 432, 902(a)(5), 1320b–1, and 1320b–13), and sec. 7213(a)(1)(A) of Pub. L. 108–458.

■ 28. Amend § 422.130 by revising the first sentence of paragraph (c) to read as follows:

§ 422.130 Claim procedure.

* * * * *

(c) * * * In the case of an application for benefits, the establishment of a period of disability, a lump-sum death payment, a recomputation of a primary insurance amount, or entitlement to hospital insurance benefits or supplementary medical insurance benefits, after obtaining the necessary evidence, we will determine, based on the preponderance of the evidence (see §§ 404.901 and 416.1401 of this chapter) as to the entitlement of the individual claiming or for whom is claimed such benefits, and will notify the applicant of the determination and of his right to appeal. * * *

Subpart C—[Amended]

■ 29. The authority citation for subpart C of part 422 continues to read as follows:

Authority: Secs. 205, 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 421, and 902(a)(5)); 30 U.S.C. 923(b).

■ 30. Revise the last sentence of § 422.203(c) to read as follows:

§ 422.203 Hearings.

* * * * *

(c) * * * The administrative law judge, or an attorney advisor under §§ 404.942 or 416.1442 of this chapter, must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.

[FR Doc. E8–30056 Filed 12–17–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0039]

21 CFR Parts 520 and 558

New Animal Drugs; Tylosin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of two supplemental new animal drug applications (NADAs) filed by Elanco Animal Health. The supplemental NADAs provide for use of tylosin tartrate soluble powder in drinking water of swine followed by tylosin phosphate in medicated swine feed for the treatment and control of swine dysentery and the control of porcine proliferative enteropathies.

DATES: This rule is effective December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Cindy L. Burnsteel, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8341, e-mail: *cindy.burnsteel@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed a supplement to NADA 12 491 for use of TYLAN (tylosin phosphate) Type A medicated article. The supplement provides for use of tylosin tartrate in medicated drinking water for swine for 3 to 10 days followed by administration of tylosin phosphate in medicated swine feed for 2 to 6 weeks for the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval qualifies for 3 years of marketing exclusivity beginning on the date of approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Elanco Animal Health also filed a supplement to NADA 13 076 for use of TYLAN (tylosin tartrate) Soluble. The supplement provides for use of tylosin tartrate in medicated drinking water for swine for 3 to 10 days followed by administration of tylosin phosphate in medicated swine feed for 2 to 6 weeks for the treatment and control of swine dysentery associated with *Brachyspira hyodysenteriae* and for the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval qualifies for 3 years of marketing exclusivity beginning on the date of approval. This period of marketing exclusivity applies only to the claim for the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

The supplemental NADAs are approved as of November 13, 2008, and the regulations in 21 CFR 520.2640 and 558.625 are amended to reflect the approval.

The agency has determined under 21 CFR 25.33(a)(1) that these actions are of a type that do not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

List of Subjects

21 CFR Part 520

Animal drugs.

21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 520 and 558 are amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

■ 2. In § 520.2640, remove paragraph (c); redesignate paragraphs (d) and (e) as paragraphs (c) and (d); and revise paragraphs (a) and newly redesignated paragraphs (d)(1), (d)(2), and (d)(3) to read as follows:

§ 520.2640 Tylosin.

(a) *Specifications*. Each jar contains tylosin tartrate equivalent to 100 grams tylosin base.

* * * * *

(d) * * *

(1) *Chickens*—(i) *Amount*. 2 grams per gallon for 1 to 5 days as the sole source of drinking water. Treated chickens should consume enough medicated drinking water to provide 50 milligrams (mg) tylosin per pound of body weight per day.

(ii) *Indications for use*. As an aid in the treatment of chronic respiratory disease (CRD) associated with *Mycoplasma gallisepticum* sensitive to tylosin in broiler and replacement chickens. For the control of chronic respiratory disease (CRD) associated with *M. gallisepticum* sensitive to tylosin at time of vaccination or other stress in chickens. For the control of chronic respiratory disease (CRD) associated with *Mycoplasma synoviae* sensitive to tylosin in broiler chickens.

(iii) *Limitations*. Prepare a fresh solution every 3 days. Do not use in layers producing eggs for human consumption. Do not administer within 24 hours of slaughter.

(2) *Turkeys*—(i) *Amount*. 2 grams per gallon for 2 to 5 days as the sole source of drinking water. Treated turkeys should consume enough medicated drinking water to provide 60 mg tylosin per pound of body weight per day.

(ii) *Indications for use*. For maintaining weight gains and feed efficiency in the presence of infectious sinusitis associated with *Mycoplasma gallisepticum* sensitive to tylosin.

(iii) *Limitations*. Prepare a fresh solution every 3 days. Do not use in layers producing eggs for human consumption. Do not administer within 5 days of slaughter.

(3) *Swine*—(i) *Amount*. 250 mg per gallon as the only source of drinking water for 3 to 10 days, depending on the severity of the condition being treated.

(ii) *Indications for use*. For the control and treatment of swine dysentery associated with *Brachyspira hyodysenteriae* and for the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

(iii) *Limitations*. Prepare a fresh solution daily. Do not administer within 48 hours of slaughter. Follow with tylosin phosphate medicated feed as in § 558.625(f)(1)(vi)(*c*) of this chapter.

* * * * *

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 4. In § 558.625, revise paragraphs (a), (f)(1)(vi)(*c*)(*1*), (f)(1)(vi)(*c*)(*2*), and (f)(1)(vi)(*e*)(*1*) to read as follows:

§ 558.625 Tylosin.

(a) *Specifications*. Type A medicated articles containing tylosin phosphate.

* * * * *

(f) * * *

(1) * * *

(vi) * * *

(*c*) * * *

(*1*) *Indications for use*. For the treatment and control of swine dysentery associated with *Brachyspira hyodysenteriae* and for the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

(*2*) *Limitations*. Administer as tylosin phosphate in feed for 2 to 6 weeks, immediately after treatment with tylosin tartrate in drinking water as in § 520.2640(d)(3) of this chapter.

* * * * *

(*e*) * * *

(*1*) *Indications for use*. For the control of porcine proliferative enteropathies (PPE, ileitis) associated with *Lawsonia intracellularis*.

* * * * *

Dated: December 10, 2008.

Steven D. Vaughn,

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

[FR Doc. E8–29861 Filed 12–17–08; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0537; FRL–8731–3]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the South Coast Air Quality Management District portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on July 24, 2008 and concern the District's analysis of whether its rules met reasonably available control technology (RACT) under the 8-hour ozone National Ambient Air Quality Standards (NAAQS). We are approving the analysis under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on January 20, 2009.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2008–0537 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Stanley Tong, EPA Region IX, (415) 947–4122, *tong.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On July 24, 2007 (73 FR 43186), EPA proposed to approve the following document into the California SIP.

Local agency	Document	Adopted	Submitted
SCAQMD	Reasonably Available Control Technology Analysis	07/14/06	01/31/07

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the submitted RACT analysis and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, no comments were received.

III. EPA Action

No comments were submitted that change our assessment that the submitted RACT analysis complies with the relevant CAA requirements under the 8-hour ozone NAAQS. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this document into the California SIP.

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 17, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 24, 2008.

Wayne Nastri,

Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(358) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(358) The 8–Hour Ozone Reasonable Available Control Technology State Implementation Plans (RACT)(SIP) for the following Air Quality Management Districts (AQMDs)/Air Pollution Control Districts (APCDs) were submitted on January 31, 2007, by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(*1*) Resolution 06–24 (A Resolution of the South Coast Air Quality Management District (SCAQMD) Board certifying that the SCAQMD's current air pollution rules and regulations fulfill the 8-hour Reasonably Available Control Technology (RACT) requirements, and adopting the RACT SIP revision, dated July 14, 2006.

(*2*) South Coast Air Quality Management District (SCAQMD) Staff Report, SCAQMD 8–Hour Ozone Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Demonstration, including appendices, dated June 2006.

(*3*) Notice of Exemption from the California Environmental Quality Act, SCAQMD 8–Hour Ozone Reasonably Available Control Technology (RACT) State Implementation Plan (SIP), dated June 2, 2006.

(*4*) EPA comment letter to South Coast Air Quality Management District dated June 28, 2006, on 8-hour Ozone Reasonably Available Control Technology—State Implementation Plan (RACT SIP) Analysis, draft staff report dated May 2006, from Andrew Steckel, Chief, Rulemaking Office, U.S. EPA to Mr. Joe Cassmassi, Planning and Rules Manager, South Coast Air Quality Management District.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 302 and 355

[EPA–HQ–SFUND–2007–0469; FRL–8753–9]

RIN 2050–AG37

CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule provides an administrative reporting exemption from particular notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended. In addition, this final rule provides a limited administrative reporting exemption in certain cases from requirements under the Emergency Planning and Community Right-to-Know Act, also known as Title III of the Superfund Amendments and Reauthorization Act. Specifically, the administrative reporting exemption applies to releases of hazardous substances to the air that meet or exceed their reportable quantity where the source of those hazardous substances is animal waste at farms.

Nothing in this final rule changes the notification requirements if hazardous substances are released to the air from any source other than animal waste at farms (*e.g.*, ammonia tanks), or if any hazardous substances from animal waste are released to any other environmental media, (*e.g.*, soil, ground water, or surface water) when the release of those hazardous substances is at or above its reportable quantity. Also, the administrative reporting exemption under section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act, does not limit any of the Agency's other authorities under the Comprehensive Environmental Response, Compensation, and Liability Act sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of the Comprehensive Emergency Response, Compensation, and Liability Act or the

Emergency Planning and Community Right to Know Act.

Accordingly, EPA believes this administrative reporting exemption not only leaves in place important Agency response authorities that can be used to protect human health and the environment if needed, but also is consistent with the Agency's goal to reduce reporting burden, particularly considering that Federal, State or local response officials are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms.

DATES: This final rule is effective on January 20, 2009.

ADDRESSES: EPA has established a docket for this action under Docket ID No. [EPA–HQ–SFUND–2007–0469]. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Superfund 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 Superfund Docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: Lynn Beasley, Regulation and Policy Development Division, Office of Emergency Management (5104A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–1965; fax number: (202) 564–2625; e-mail address: *Beasley.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION: The contents of this preamble are listed in the following outline:

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I. General Information

A. Does This Action Apply to Me?

Type of entity	Examples of affected entities
Industry	NAICS Code 111—Crop Production. NAICS Code 112—Animal Production.
State and/or Local Governments	State Emergency Response Commissions, and Local Emergency Planning Committees.
Federal Government	National Response Center.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is currently aware could potentially be affected by this action; however, other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the criteria in section III.A of this final rule and the applicability criteria in § 302.6 of title 40 of the Code of Federal Regulations (CFR) and 40 CFR Part 355, Subpart C-Emergency Release Notification.[1] If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Is the Statutory Authority for This Rulemaking?

Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, gives the Federal government broad authority to respond

[1] On November 3, 2008, EPA published a final rule, ''Emergency Planning and Community Right-to-Know Act; Amendments to Emergency Planning and Notification; Emergency Release Notification and Hazardous Chemical Reporting'' (''EPCRA rule''). (*See* 73 FR 65452.) That rule included revisions to the Emergency Planning Notification, Emergency Release Notification and Hazardous Chemical Reporting regulations. One of the revisions included reorganizing the Code of Federal Regulations (CFR) so that it follows a plain language format. This final rule uses the CFR citations of the EPCRA rule.

Subpart C—Emergency Release Notification includes regulations for, ''Who Must Comply'' (355.30—What facilities must comply with the emergency release notification requirements? 355.31—What types of releases are exempt from the emergency release notification requirements of this subpart?, 355.32—Which emergency release notification requirements apply to continuous releases?, and 355.33—What release quantities of EHSs and CERCLA hazardous substances trigger the emergency release notification requirements of this subpart?) ''How to Comply'' (355.40—What information must I provide?, 355.41—In what format should the information be submitted?, 355.42—To Whom Must I Submit the Information?, and 355.43—When Must I Submit the Information?).

to releases or threats of releases of hazardous substances from vessels and facilities. The term *hazardous substance* is defined in section 101(14) of CERCLA primarily by reference to other Federal environmental statutes. Section 102 of CERCLA gives the Environmental Protection Agency (EPA or the Agency) authority to designate additional hazardous substances. Currently, there are approximately 760 CERCLA hazardous substances, exclusive of Radionuclides, F-, K-, and Unlisted Characteristic Hazardous Wastes.

CERCLA section 103(a) calls for immediate notification to the National Response Center (NRC) when the person in charge of a facility has knowledge of a release of a hazardous substance equal to or greater than the reportable quantity (RQ) established by EPA for that substance. In addition to the notification requirements established pursuant to CERCLA section 103, section 304 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, requires the owner or operator of certain facilities to immediately report to State and local authorities releases of CERCLA hazardous substances or any extremely hazardous substances (EHSs) if they exceed their RQ (see 40 CFR 355.33). This final rule only applies to CERCLA section 103 notification requirements, including the provisions that allow for continuous release reporting found in paragraph (f)(2) of CERCLA section 103, and EPCRA section 304 notification requirements.

The Agency has previously granted such administrative reporting exemptions (AREs) under the CERCLA section 103 and EPCRA section 304 notification requirements where the Agency has determined that a Federal response to such a release is impracticable or unlikely. For example, on March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that granted exemptions for releases of naturally occurring radionuclides. The rule, entitled Administrative Reporting Exemptions for Certain Radionuclide Releases (''Radionuclide ARE''), granted exemptions for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461).

The Agency relies on CERCLA sections 102(a), 103, and 115 (the general rulemaking authority under CERCLA) as authority to issue regulations governing section 103 notification requirements. The Agency relies on EPCRA section 304 as authority to issue regulations governing EPCRA section 304 notification requirements, and EPCRA section 328 for general rulemaking authority. The Agency will continue to require certain reports under EPCRA section 304, specifically for those facilities that meet the size thresholds in 40 CFR 355.31(g) and outlined below in section III.B.ii of this preamble.

C. Which Hazardous Substances Are We Exempting From the Notification Requirements of CERCLA and EPCRA?

EPA is exempting certain releases of hazardous substances to the air from the notification requirements of CERCLA and to a limited extent EPCRA emergency notifications, as implemented in 40 CFR 302.6 and 40 CFR Part 355, Subpart C-Emergency Notification Requirement, respectively. Specifically, we are exempting those hazardous substance releases that are emitted to the air from animal waste at farms. The exemption to the CERCLA section 103 notification requirements will apply to all releases of hazardous substances to the air from animal waste at farms. However, to respond to comments expressing the desire to receive information regarding releases from large concentrated animal feeding operations (CAFOs), EPA is bifurcating these administrative reporting exemptions in order to continue to require EPCRA section 304 emergency notifications for those CAFO operations that confine the large CAFO threshold of an animal species or above, as defined in the National Pollutant Discharge Elimination System (NPDES) program regulations. As such, the exemption to EPCRA section 304 emergency notification requirements will apply to air releases of hazardous substances from animal waste at farms that are below the thresholds in 40 CFR 355.31(g) and for those farms that have animals that are not stabled or confined. (See 40 CFR 355.31(h)) For the purposes of this rule, EPA considers animals (*i.e.*, cattle) that reside primarily outside of an enclosed structure (*i.e.*, a barn or a feed lot) and graze on pastures, not to be stabled or confined, and thus are exempted from the reporting requirements under EPCRA Section 304.

Section 324 of EPCRA requires that the follow-up emergency notice shall be made available to the general public; thus emergency notifications filed under EPCRA section 304 will be available to the public. Farms that are required to report their releases under EPCRA section 304 emergency notifications may continue to use continuous release reporting as described in 40 CFR 355.32.

Ammonia and hydrogen sulfide are the most recognized hazardous substances that are emitted from animal waste. Specifically, ammonia is a by-product of the breakdown of urea and proteins that are contained in animal waste, while hydrogen sulfide is another by-product of the breakdown of animal waste under anaerobic conditions. However, other hazardous substances, such as nitrogen oxide (NO) and certain volatile organic compounds (VOCs) may also be released from animal waste. This rule extends the administrative reporting exemption to all hazardous substances emitted to the air from animal waste at farms.

These hazardous substances can be emitted when animal waste is contained in a lagoon or stored in under-floor manure pits in some animal housing, manure stockpiles, or where animals are stabled or confined.

II. Background

Under CERCLA section 103(a), the person in charge of a vessel or facility from which a CERCLA hazardous substance has been released into the environment in a quantity that equals or exceeds its RQ must immediately notify the NRC of the release. A release is reportable if an RQ or more is released into the environment within a 24-hour period (see 40 CFR 302.6). This reporting requirement serves as a trigger for informing the Federal government of a release so that Federal personnel can evaluate the need for a response in accordance with the National Contingency Plan (NCP) and undertake any necessary response action in a timely fashion.

The NRC is located at the United States Coast Guard (USCG) headquarters and is the national communications center for the receipt of all pollution incidents reporting. The NRC is continuously staffed for processing activities related to receipt of the notifications. The NCP regulations, 40 CFR 300.125, require that notifications of discharges and releases be made by telephone and state that the NRC will immediately relay telephone notices of discharges or releases to the appropriate predesignated Federal on-scene coordinator (OSC). The NRC receives an average of approximately 34,000 notifications of releases or discharges per year, 99 percent of which are relayed to EPA.

Under EPCRA section 304(a), three release scenarios require notification.

- First, if a release of an extremely hazardous substance occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of CERCLA, the owner or operator of a facility shall immediately provide notice to the community emergency coordinator for the local

emergency planning committees (LEPC) for any area likely to be affected by the release and to the State emergency response commission (SERC) of any State likely to be affected by the release. (EPCRA section 304(a)(1))

- EPCRA section 304(a) also requires the owner or operator of the facility to immediately provide notice under EPCRA section 304(b) for either of the following two scenarios:
  - If the release is an extremely hazardous substance, but not subject to the notifications under section 103(a) of CERCLA. (EPCRA section 304(a)(2))
  - If the release is not an extremely hazardous substance and only subject to the notifications under section 103(a) of CERCLA. (EPCRA section 304(a)(3))

EPCRA notification is to be given to the community emergency coordinator for each LEPC for any area likely to be affected by the release, and the SERC of any state likely to be affected by the release. Through this notification, state and local officials can assess whether a response action to the release is appropriate. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a ''hazardous chemical,'' as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (OSHA) (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

Owners and operators of farms, like all other facilities, are required to report the release of hazardous substances into the environment in accordance with CERCLA section 103 and EPCRA section 304 when it meets or exceeds the RQ of the hazardous substance. For example, releases into the environment of ammonia or any other hazardous substance, from tanks located on a farm, at or above an RQ are required to be reported under CERCLA section 103 and EPCRA section 304.

In 2005, EPA received a petition (poultry petition) from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association, seeking an exemption from the CERCLA and EPCRA reporting requirements for ammonia emissions from poultry operations. The Agency published a notice in the **Federal Register** on December 27, 2005 (70 FR 76452), that acknowledged receipt of the poultry petition and requested public comment. The comment period closed on March 27, 2006. This final rule does not address that petition. EPA will respond to the petition in a separate action.

Also, in 2005, EPA offered the owners and operators of animal agricultural operations an opportunity to participate in the National Air Emissions Monitoring Study (air monitoring study), that is being conducted by an independent, non-profit organization and overseen by EPA, through a consent agreement with the Agency. The purpose of the air monitoring study is to develop emissions estimating methodologies for all animal agricultural operations. Over 2,600 animal feeding operations, representing over 14,000 farms, signed up to participate in the study. The monitoring study, which began in the spring of 2007 includes 25 representative sites (lagoons or barns) on 21 different farms in ten states (NC, NY, IA, WI, CA, KY, TX, WA, IN, and OK). The sites will be monitored for a period of two years, allowing the Agency to account for emissions variability by season, and for the effect of any seasonal operational changes (such as pumping out lagoons), that could have an effect on emission levels.

The consent agreement also requires that within 120 days after receiving an executed copy of the consent agreement, for any farm that confines more than ten times the large CAFO threshold of animal species, as defined in the NPDES program regulations, the animal feeding operation provide to the NRC and to the relevant State and local emergency response authorities written notice describing its location and stating substantially as follows:

> ''This operation raises [species] and may generate routine air emissions of ammonia in excess of the reportable quantity of 100 pounds per 24 hours. A rough estimate of those emissions is [ ] pounds per 24 hours, but this estimate could be substantially above or below the actual emission rate, which is being determined through an ongoing monitoring study in cooperation with the U.S. Environmental Protection Agency. When that emission rate has been determined by this study, we will notify you of any reportable releases pursuant to CERCLA section 103 or EPCRA section 304. In the interim, further information can be obtained by contacting [insert contact information for a person in charge of the operation].''

The requirement that these very large animal feeding operations (AFOs) immediately report estimated releases of ammonia was solely for the purposes of the air compliance agreement and not for purposes of reporting under CERCLA or EPCRA. (*See* 70 FR 4958, Jan. 31, 2005.)

At the end of the monitoring study, EPA will use the data along with other relevant available data to develop emissions estimating methodologies. The monitoring study results will be publicly available upon completion of the study. In addition, EPA will publish the emissions estimating methodologies based on these results within 18 months of the study's conclusion. Thus, such information will be widely available to the public. Further details on the air monitoring study are available at *http://www.epa.gov/oecaagct/airmonitoringstudy.html.*

III. Summary of This Action

A. What Is the Scope of This Final Rule?

The scope of this rule is limited to releases of hazardous substances to the air from animal waste at farms. Specifically, the Agency is issuing an administrative reporting exemption from the CERCLA section 103 notification requirements to the NRC (Federal government) as implemented in 40 CFR 302.6 and a limited administrative reporting exemption from the EPCRA section 304 notification requirements as implemented in 40 CFR Part 355, Subpart C—Emergency Notification Requirement. (*See* Section III.B.ii. for the thresholds that limit the administrative reporting exemption for EPCRA section 304.) The scope of this rule is intended to include all hazardous substances that may be emitted to the air from animal waste at farms that would otherwise be reportable under those sections. The Agency is not, in this rule, defining facility, normal application of fertilizer, or routine agricultural operations.

B. How Does This Rule Differ From the Proposed Rule?

On December 28, 2007, the Agency proposed an administrative reporting exemption from the CERCLA section 103 notification requirements and the EPCRA section 304 emergency notification requirements for air releases of hazardous substances that meet or exceed their RQ from animal waste at all farms. The public comment period lasted 90 days and closed on March 27, 2008. Through the public comment process, the Agency received approximately 12,900 comments. A substantial number of those comments (about 11,600) came in the form of 15 mass mail campaigns that either supported or opposed the proposed rule. We also received many comments from people who appear to have misunderstood the proposed rule, or assumed that the proposed rule was a response to the poultry petition. Our response to significant comments are generally addressed below in Section III.G of this preamble, with all comments addressed in a response to comment document, which is in the

docket (EPA–HQ–SFUND–2007–0469) to this final rule.[2]

i. Exemption From CERCLA Section 103 Reporting

This rule finalizes the administrative reporting exemption from the CERCLA section 103 notification requirements as proposed, but limits the administrative reporting exemption to EPCRA section 304 emergency notification requirements by adding a size threshold. That is, at or above the threshold adopted in this final rule, farms that generate animal waste that release hazardous substances to the air at or above the RQ must still report under EPCRA section 304, using the existing notification procedures, including the use of continuous release reporting. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure.

The Agency is finalizing the administrative reporting exemption from the CERCLA section 103 notification requirements because EPA continues to believe that Federal on-scene coordinators are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms.

The Agency also believes that State or local emergency response authorities are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms. However, the Agency did receive comments from the public, as well as from environmental groups, a coalition of family farmers and others expressing the desire for information regarding emissions of hazardous substances to the air from large animal feeding operations. Accordingly, EPA decided to bifurcate the administrative reporting exemption for EPCRA section 304 so as to retain certain emergency notifications for large CAFOs. In addition, we sought comment on possible alternative definitions for *farm*, indicating EPA might take factors such as size into account. Although not specifically addressing the definition of a *farm*, we did receive many comments asserting that very large farms are no different than other industrial sources and should be regulated as such. We believe that our threshold approach addresses those concerns.

ii. Thresholds for Exemption From EPCRA Section 304 Reporting

A *farm* is above the threshold if it stables or confines[3] animals in numbers equal to or more than the numbers of animals specified for each category given in the NPDES program regulations for large CAFOs. These thresholds are discussed further in section II*I.E.* below.

(1) 700 mature dairy cows, whether milked or dry.

(2) 1,000 veal calves.

(3) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.

(4) 2,500 swine each weighing 55 pounds or more.

(5) 10,000 swine each weighing less than 55 pounds.

(6) 500 horses.

(7) 10,000 sheep or lambs.

(8) 55,000 turkeys.

(9) 30,000 laying hens or broilers, if the farm uses a liquid manure handling system.

(10) 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system.

(11) 82,000 laying hens, if the farm uses other than a liquid manure handling system.

(12) 30,000 ducks (if the farm uses other than a liquid manure handling system).

(13) 5,000 ducks (if the farm uses a liquid manure handling system).

iii. Continuous Release Reporting

Continuous release reporting is available for those farms that are at or above the threshold described above in section II.B.ii. In general, the Agency believes that emissions from animal waste into the air are usually continuous and stable in quantity and rate to qualify as continuous releases pursuant to 40 CFR 302.8. The regulations implementing EPCRA section 304 are found in 40 CFR Part 355, Subpart C—Emergency Release Notification and describe the information required for the EPCRA emergency notifications. At the present time, EPA has not adopted conversion factors from which to derive quantities of common hazardous substances from numbers of particular species of farm animals. One purpose of the air monitoring study is to develop estimating methodologies. In the meantime, when reports are submitted pursuant to EPCRA section 304 for animal waste from farms, the Agency expects reports to reflect good faith estimates from reporting entities. In addition, EPA intends to issue guidance to assist those farms that are required to submit reports under EPCRA section 304 with continuous release reporting, as provided in 40 CFR 355, Subpart C—Emergency Release Notification.

C. Definitions

The Agency believes it is important to provide clarity with respect to the scope of the reporting exemption. Therefore, the Agency is providing definitions for *animal waste* and *farm* that only pertain to regulations promulgated pursuant to CERCLA section 103 and EPCRA section 304, specifically 40 CFR 302.3. and 40 CFR 355.61. These definitions are not promulgated to apply for any other purpose.

i. Animal Waste

Animal Waste—means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil, and other materials typically found with animal waste.

We sought comment on our proposed definition for *animal waste*, and whether an alternative definition may be more appropriate. A few commenters asked that we clarify that compost includes composted manure and manure-based compost. EPA agrees that the definition of *animal waste* does include such compost and to lend further clarity to the definition, we made a slight change. Other comments on our proposed definition for *animal waste*, along with our responses are addressed below in section III.G.v.1 of this preamble and in the response to comment document available in the docket (EPA–HQ–SFUND–2007–0469) to this rule.

ii. Farm

The Agency is limiting the reporting exemption to animal waste that is generated on farms, and is using a specific definition for *farm* for this administrative reporting exemption. For the purpose of this administrative reporting exemption only, EPA defines farm by using the same definition as that found in the National Agricultural Statistics Service (NASS) Census of Agriculture, and adopting it.

Farm—means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

[2] The docket for EPA–HQ–SFUND–2007–0469 can be accessed through *www.regulations.gov.*

[3] Animals that reside primarily outside of an enclosed structure (*i.e.*, a barn or a feed lot) and graze on pastures are not stabled or confined. Animals that are not stabled or confined at concentrated animal feeding operations are not counted toward the threshold. Any emissions to the air of hazardous substances from the waste of such animals while they are not stabled or confined are not counted towards the calculation of a reportable quantity at a farm that is above the threshold and subject to reporting, unless such waste is consolidated into a storage unit.

We sought comment on our proposed definition for a *farm*, and whether an alternative definition may be more appropriate. Based on the comments received, we concluded that the proposed definition for *farm* was not consistent with other Agency uses for the term; that is, we realized that the definition proposed had deviated from the NASS definition, as well as the definition used by the Agency in its Spill Prevention, Control and Countermeasure (SPCC) rule. As a result, the definition for this rule has now been modified. Other comments on our proposed definition for *farm*, along with our responses are addressed below in section III.G.v.2 of this preamble and in the response to comment document available in the docket (EPA–HQ–SFUND–2007–0469) to this rule.

D. What Is Not Included Within the Scope of This Rule?

As noted previously, the administrative reporting exemption from the CERCLA section 103 notification requirements is limited in scope to those releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms and in the case of Section 304 of EPCRA, only those releases of hazardous substances to the air from animal waste at farms that are below the thresholds in 40 CFR 355.31(g) are exempt. EPA is not exempting from the CERCLA section 103 or EPCRA section 304 notification requirements releases of hazardous substances from animal waste that meet or exceed the RQ to any other environmental media or at any other facilities other than farms (*i.e.*, meat processing plants, slaughter houses, tanneries). Thus, notifications must still be submitted if, for example, there was a release of any hazardous substances that meet or exceed the RQ from animal waste into water (*e.g.*, a lagoon burst) or if there was a release of any hazardous substances that meets or exceeds the RQ from animal waste into the air or water at a slaughter house or meat processing plant. Likewise, EPA is not exempting from the CERCLA section 103 or EPCRA section 304 notification requirements any release of hazardous substances to the air that meets or exceeds the RQ from any source other than animal waste at farms. Thus, for example, EPA is not proposing to exempt ammonia releases from ammonia storage tanks at farms.

The Agency believes that in these situations, the release of hazardous substances that meets or exceeds the RQ should continue to be reported because it is less clear that they will not result in a response action from Federal, State or local governments. That is, such notifications would alert the government to a situation that could pose serious environmental consequences if not immediately addressed.

Finally, it should be noted that no CERCLA or EPCRA statutory requirements, other than the emergency hazardous substance notification requirements under CERCLA section 103 and EPCRA section 304, are included within this rule. The rule also does not limit the Agency's authority under CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of CERCLA and EPCRA to address releases of hazardous substances from animal waste at farms.

E. What Is EPA's Rationale for This Administrative Reporting Exemption?

EPA's rationale for this administrative reporting exemption is based on the purpose of notifying the NRC, and SERCs and LEPCs when a hazardous substance is released, and then the likelihood that a response to that notification would be taken by any government agency.

Upon receipt of a notification from the NRC, EPA determines whether a response is appropriate. See 40 CFR 300.130(c). If it is determined that a response is appropriate, the NCP regulations describe the roles and responsibilities for responding to the release. Thus, EPA considered whether the Agency would ever take a response action, as a result of such notification, for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms. Based on our experience, the Agency believes that Federal on-scene coordinators are unlikely to respond to such notifications. Specifically, to date, EPA has not initiated a response to any NRC notifications of ammonia, hydrogen sulfide, or any other hazardous substances released to the air where animal waste at farms is the source of that release. Moreover, we can not foresee a situation where the Agency would initiate a response action as a result of such notification. Under this rule, however, EPA retains its authority to respond to citizen complaints or requests for assistance from State or local government agencies to investigate releases of hazardous substances from animal waste at farms and respond if appropriate. Furthermore, the Agency does not need to receive such notifications in order to enforce applicable Clean Water Act (CWA), Clean Air Act (CAA), Resource Conservation and Recover Act (RCRA), and/or other applicable CERCLA and EPCRA regulations at farms. EPA retains the enforcement authority to address threats to human health and the environment.

Several States and localities also indicated that such response actions are unlikely to be taken as a result of a notification of releases of hazardous substances from animal waste at farms. Specifically, EPA received 13 comment letters from State and/or local emergency response agencies in response to our proposed rule, as well as comments from 10 state agricultural departments that agreed with the proposal to not require such notifications.[4] These commenters all affirmed EPA's belief that a response to a notification of air emissions of hazardous substances from animal wastes is highly unlikely. In fact, while we also received comment letters from government officials and others, including environmental groups, that the proposed rule is not appropriate due to potential harmful effects of air pollution emanating from animal feeding operations, we received no comments from any government official suggesting a response action should or would be taken.

The Agency did receive comments expressing a concern that air emissions of hazardous substances from animal waste at the largest animal feeding operations may pose a risk and therefore State and local governments and the public should continue to receive reports of such emissions. CERCLA and EPCRA do not require release reports under section 103 of CERCLA and 304 of EPCRA, respectively, to be made publicly available. However, section 324 of EPCRA does require the LEPC and the SERC to make publicly available each follow-up emergency notice provided under section 304(c).

Based on these comments, the Agency has bifurcated the final rule and is promulgating an administrative reporting exemption in order to maintain the EPCRA section 304 reporting requirements for the largest farms, that is, those farms that meet or exceed the thresholds described in section III.B.ii, above. For this rule, the threshold that will trigger reporting requirements is the same as the numbers of animals specified in the categories regulated by the NPDES program for

[4] The Agency also received 23 comment letters from State and/or local emergency response agencies in response to the December 2005 **Federal Register** notice that acknowledged receipt of the rulemaking petition from the National Chicken Council, the National Turkey Federation, and the U.S. Poultry and Egg Association which also agreed that such notifications were not necessary.

large CAFOs. Comments regarding the elimination of the reporting requirements are discussed below in section III.G.i.

F. What Are the Economic Impacts of This Administrative Reporting Exemption?

This administrative reporting exemption will reduce the costs to farms that release hazardous substances to the air that meet or exceed their RQ from animal waste. Entities that are expected to experience a reduction in burden and cost include both the farms that are no longer required to report those releases, as well as the Federal government. The economic analysis completed for this rule is available in the docket for this rulemaking and is based on the underlying economic analyses that were completed for the regulations that established the notification requirements. We estimate that this final rule will reduce burden on farms associated with making notifications under CERCLA section 103 and EPRCRA section 304 by approximately 1,290,000 hours over the ten-year period beginning in 2009 and associated costs by approximately $60,800,000 over the same period. We estimate that this rule will also reduce burden on government (including Federal, State and local governments) for receipt and processing of the notifications under CERCLA section 103 and EPCRA section 304 by approximately 161,000 hours over the ten-year period beginning in 2009 and associated costs by approximately $8,110,000 over the same period. In evaluating the potential burden and cost savings to those farms that would no longer be required to make notifications under CERCLA section 103 and EPCRA section 304 and for the government entities that are no longer required to receive and process such notifications, we used the same universe as used in the 2008 CAFO Rule (see 73 FR 70417, Nov. 20, 2008).

G. Response to Comments

The Agency received comments on: (1) The elimination of the reporting requirement; (2) the risk, harm, and exposure related to air emissions from animal waste at farms; and (3) the Agency's statutory authority to issue this rulemaking. Some comments also indicated a misunderstanding of the proposed rule. Lastly, the Agency sought specific comments in four areas. *Those were:* (1) Definitions (animal waste and farm); (2) whether it is appropriate to expand the reporting exemption to other facilities where animal waste is generated (*i.e.*, zoos and circuses); (3) whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air from animal waste at farms; and (4) if so, what an appropriate response would be. The following is our response to those substantive comments received. Comments not addressed in this preamble are addressed in the response to comment document that can be found in the Agency's docket for this rule (EPA–HQ–SFUND–2007–0469).

i. Comments Regarding Elimination of Reporting Requirement

We received mixed comments on whether it is appropriate for the Agency to eliminate the notification requirements under CERCLA section 103 and EPCRA section 304 for hazardous substances released to the air at farms where the source of those hazardous substances is animal waste.

Many commenters expressed general support for the proposed elimination of the reporting requirements under CERCLA section 103 and EPCRA section 304. Many of these commenters, including some local emergency response agencies, stated that reporting emissions of hazardous substances to the air that meet or exceed their RQ from animal waste is of little value as it is common knowledge that agricultural operations release ammonia on an ongoing basis and receipt of such notifications could prove to be a hindrance in performing their mission by overwhelming the system with notifications that will not be responded to. Many commenters supporting the elimination of the reporting requirements, particularly commenters representing the agricultural community, also stated that emissions reporting is costly and could put them out of business should they have to adhere to such a regulation. Moreover, these same commenters defended the proposal by pointing out that information about the location and emissions of CAFOs is already publicly available. For example, one could readily determine the number of laying hens there are in a particular county through county specific data published by the U.S. Department of Agriculture's (USDA's) National Agricultural Statistical Service. According to these commenters, CERCLA/EPCRA reporting does not add in any meaningful way to this knowledge base.

On the other hand, the Agency received many comments that were opposed to the elimination of the notification requirements under CERCLA section 103 and EPCRA section 304. Many commenters opposed the proposed elimination of these reporting requirements on the grounds that reports provide good documentation, even if the content is not reviewed and no response is appropriate. Several commenters stated that reporting information about emissions enables citizens to hold companies and local governments accountable in terms of how toxic chemicals are managed and even allows agencies to identify a facility's proximity to schools where children may be at higher risk of adverse health effects due to exposure.

In addition, many commenters asserted that the proposed rule interferes with the public's right to know about large releases of toxic chemicals. Others stated that factory farms should not be protected from the laws that affect all other industries. Several commenters asserted that CAFOs are not family farms, arguing that they are industries that produce high amounts of pollutants and should be treated as such.

Finally, a commenter suggested that farms should be exempt from the monitoring and reporting of pollutant releases until measuring and testing procedures become more accurate and that the exemptions should apply until there are more feasible monitoring practices enacted. The commenter argued that it was unfair to require such reporting when the science surrounding ammonia releases is uncertain.

The Agency appreciates the perspectives of both sides of the reporting issue. We understand that the regulated community and some SERCs and LEPCs believe that, in general, the release reports are unnecessary, burdensome, and would not likely result in ''new'' information regarding emissions from farms. The Agency agrees. However, many commenters also argued that reporting, especially for large CAFOs, is important. Therefore, we have adopted a final rule that seeks to address both concerns. As such, farms would be exempt from reporting under CERCLA section 103 for the reporting of air releases of hazardous substances from animal waste to the NRC; but, at the same time, those farms that exceed the threshold established in 40 CFR 355.31(g), and described above in section III.B.ii of this preamble, will still be required to notify the community emergency coordinator for the LEPC for any area likely to be affected by the release and to the SERC of any State likely to be affected by the release under EPCRA section 304(b). We believe the threshold is appropriate to continue to make available information regarding large CAFOs sought by commenters. In accordance with 40 CFR 355.31(h), farms that have animals that

are not stabled or confined are also exempt from reporting under EPCRA section 304. For the purposes of this rule, EPA considers animals (*i.e.*, cattle) that reside primarily outside of an enclosed structure (*i.e.*, a barn) and graze on pastures not to be stabled or confined.

In addition, after completion of the Air Monitoring Study and the development and publication of emission estimating methodologies, the Agency intends to review the results and consider if the threshold for the EPCRA exemption is appropriate.

ii. Comments Regarding Risk, Harm, and Exposure

EPA's rationale for the proposed rule is based on the purpose of notifying the NRC, and SERCs and LEPCs when a hazardous substance is released, and then the likelihood that a response to that release would be taken by any government agency. The comments that cited risk, harm, and exposure were used to either support or oppose the proposed rule.

In supporting the proposed rule, many commenters provided general statements to the effect that emissions from CAFOs pose no threat to public health or the environment. Many other commenters also argued that there is no evidence or studies that emissions pose any public health risks or have environmental impacts that would warrant emergency release reports from farms to the Federal level.

In opposing the proposed rule, a number of commenters submitted studies to support their conclusion that emissions from some farms pose levels of risk, harm, and exposure that should be taken into consideration by the Agency. Several commenters specifically cited a 2002 study entitled, ''Iowa Concentrated Animal Feeding Operations Air Quality Study,'' conducted by Iowa State University and the University of Iowa Study Group.[5]

Several commenters suggested delaying any decisions on finalizing the proposal until the Agency's air monitoring study is complete. These commenters argued that EPA may find that these airborne contaminants are more dangerous to human health than thought. Many of the commenters who opposed the proposed rule also provided information pertaining to the health impacts associated with CAFOs. Some provided anecdotal evidence, while others cited published literature drawing a causal link. Additional information regarding the anecdotal evidence and published literature is provided in the response to comment document available in the docket (HQ–EPA–SFUND–2007–0469) to this rule. Finally, a number of commenters suggested that the adverse health effects that have been demonstrated should be sufficient to continue to mandate CERCLA and EPCRA reporting of ''toxic air emissions'' and step up enforcement, as well.

EPA appreciates the information provided by commenters, especially those who submitted study information indicating the potential health issues associated with the emissions from animal waste at farms. We would first note that a number of the studies or information provided addressed risk or health issues for workers on the farm; reporting under section 304 of EPCRA addresses releases that are off-site of the facility. In addition, as we noted previously, EPA is currently overseeing a comprehensive study of CAFO air emissions (air monitoring study) that is being conducted by an independent, non-profit organization. The purpose of the air monitoring study is to develop emissions estimating methodologies for all animal agricultural operations. Over 2,600 agreements, representing over 14,000 farms, signed up for the study. The monitoring study, which began in the spring of 2007, includes 25 representative sites (lagoons or barns) on 21 different farms in ten states (NC, NY, IA, WI, CA, KY, TX, WA, IN, and OK). The sites will be monitored for a period of two years, allowing the Agency to account for emissions variability by season, and for the effect of any seasonal operational changes (such as pumping out lagoons), that could have an effect on emission levels. At the conclusion of the air monitoring study, EPA will use the data along with any other relevant, available data to develop emissions estimating methodologies. The air monitoring study results will be publicly available upon completion of the study. In addition, EPA will publish the emissions estimating methodologies based on these results, within 18 months of the study's conclusion. The notification requirements under CERCLA section 103 would not provide the type of data required in order to draw the same conclusions that the more comprehensive air monitoring study can provide. This rule does not address how air emissions from CAFOs should be controlled.

As we have discussed, EPA believes that a response to a notification about an air release of a hazardous substance from animal waste at a farm is unlikely and impracticable. We are therefore exempting those notifications from CERCLA section 103 notification requirements and to a limited extent EPCRA section 304 emergency notification requirements. As discussed above, EPA does recognize that the public may have a separate use for the notifications, and therefore, the reporting exemption under Section 304 of EPCRA is limited to farms that fall below the threshold discussed in III.B.ii. Moreover, EPA is not limiting any of its response authorities in this rule (should a State or local agency request assistance), nor are we limiting any of our other authorities under CERCLA and EPCRA.

iii. Comments Regarding the Agency's Statutory Authority To Issue This Rulemaking

A number of commenters challenged EPA's legal authority to grant these exemptions by stating that CERCLA and EPCRA do not give EPA the authority to grant reporting exemptions. Another commenter argues that EPA may not rest its basis for the exemption solely on evidence that a Federal response to animal waste releases is unlikely.

EPA disagrees with the commenters that challenge our authority to provide administrative reporting exemptions. First, we would note that EPA has on two other occasions exercised its authority to extend administrative reporting exemptions to certain well-defined release scenarios. Specifically, on March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that granted exemptions for releases of naturally occurring radionuclides. The rule entitled, Administrative Reporting Exemptions for Certain Radionuclide Releases (''Radionuclide ARE''), granted exemptions for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461). Moreover, on October 4, 2006, the Agency issued a final rule (see 71 FR 58525) that broadened the existing reporting exemptions to include releases of less than 1,000 pounds of nitrogen oxide (NO) and less than 1,000 pounds of nitrogen dioxide (NO_2) to the air in 24 hours (''NO_X ARE'') that are the result of combustion. The NO and NO_2 exemptions were granted for releases of hazardous substances at levels for which the CAA regulates nitrogen oxides that are considerably higher than ten pounds.

EPA also disagrees that it is barred from basing its exemption on evidence that a Federal response to a notification of a release of hazardous substances to the air from animal waste releases is unlikely. Rather, for this rule, EPA has

[5] This study is available in the Superfund Docket at: EPA–HQ–SFUND–2007–0469–0531.8.

made a determination that these reports are unnecessary because, in most cases, a federal response is impractical and unlikely (*i.e.*, we would not respond to them since there is no reasonable approach for the response). We also believe that because this administrative reporting exemption is narrowly focused to the source (animal waste) and location (at farms) of the hazardous substance emissions, it is appropriate to base our rationale for this rule on the unlikelihood and inappropriateness of a response.

iv. Comments Indicating a Misunderstanding of the Proposed Rule

A number of the commenters seem to misunderstand what the Agency was proposing. For example, commenters expressed general opposition to removing air quality and clean air standards; removing clean air protections; reducing pollution or emission standards; exemptions to clean air standards; allowing farms to emit more pollutants; deregulation of hazardous emissions; and an exemption from the CAA and CWA. This rule would do none of this. Rather, this rule addresses only the notification requirements under CERCLA section 103 and in a limited manner, EPCRA section 304. EPA retains all other authorities under both CERCLA and EPCRA, and the CAA and CWA standards also are unaffected by this action.

v. Comments Regarding Definitions

In order to provide clarity with respect to the scope of the proposed reporting exemption, the Agency proposed definitions for *animal waste* and *farm.* The definitions, as proposed, would be limited in application to the regulations promulgated pursuant to CERCLA section 103 specifically 40 CFR 302.3 and 40 CFR 355.61. We solicited comment on those definitions.

(1) Animal Waste

Because the Agency does not have an existing definition for *animal waste*, EPA proposed to add a definition for *animal waste* to the Code of Federal Regulations. The definition for *animal waste* in the proposed rule was, ''manure (feces, urine, other excrement, and bedding, produced by livestock that has not been composted), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found with animal waste.'' We sought comment from the public on the appropriateness, clarity and completeness of the definition.

In general, the public was generally supportive of our proposed definition of *animal waste,* as long as it is understood that this definition is used solely for the purposes of CERCLA and EPCRA reporting; however, there were a few requests for further clarification. In particular, several commenters requested clarification regarding the treatment of compost material, and specifically whether composted manure is included in the definition of *animal waste*. Similarly, other commenters suggested that EPA clarify that manure-based compost is included in the definition of *animal waste.* We have clarified in the discussion in section III.C.i., above, that such composted manure and manure-based compost is included in the definition of *animal waste.* Furthermore, we made a small change to the definition of *animal waste* to help clarify this point.

Several other commenters submitted alternative definitions. For example, to reflect the need for controlling emissions of dangerous and toxic emissions, a commenter suggested that *animal waste* be defined as ''manure (livestock produced feces, urine, other excrement, and bedding that has not been composted), digestive emissions, and urea, which emit dangerous and/or toxic gases in any quantity. This definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found in animal waste.'' Another commenter suggested an alternate definition which would define *animal waste* as ''all constituents and byproducts of the decomposition of manure (feces, urine, other excrement, and bedding, produced by livestock or poultry that has not been composted), digestive emissions, and urea.'' This suggested definition would also include ''animal waste when mixed or commingled with water, bedding, compost, feed, soil and other materials typically found with animal waste.'' Still another commenter suggested the following definition for *animal waste,* ''manure (feces, urine, or other excrement produced by livestock, and including bedding), and any other livestock digestive emissions, regardless of how stored, handled, composted or otherwise stockpiled. The definition includes animal waste used in biogas production or other treatment processes, or when mixed or commingled with bedding, compost, feed, soil, and other materials typically found with animal waste.''

While the Agency appreciates the suggestions provided by the commenters, we believe that the proposed definition of *animal waste* is broad enough to serve the purpose of defining the source of hazardous substances emitted from farms for this administrative reporting exemption, with the one clarification noted above. The definitions proposed by the commenters do not offer additional clarity and in the case of ''animal waste used in biogas production or other treatment processes,'' suggest a broader use of manure that would extend to facilities other than farms, and thus, beyond the scope of the final rule.

(2) Farm

EPA proposed a definition for *farm* by slightly modifying the definition found in the National Agricultural Statistics Service (NASS) Census of Agriculture, as well as included Federal and State research farms that utilize farm animals subject to the conditions experienced on other farms (*e.g.*, poultry, swine, dairy, and livestock research farms). However, in the proposal, we incorrectly stated that the proposed definition was used by USDA. Thus, the proposed definition for *farm* was ''(a) any place whose operation is agricultural and from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. Operations receiving $1,000 or more in Federal government payments are counted as farms, even if they have no sales and otherwise lack the potential to have $1,000 or more in sales; or, (b) a Federal or state poultry, swine, dairy or livestock research farm.'' The purpose of specifying that Federal and State research farms that utilize farm animals subject to the conditions experienced on other farms was to respond to concerns that Federal and State research farms were included in the exemption. The Agency sought comment on the proposed definition, and whether an alternative definition may be more appropriate.

Commenters generally expressed support for the definition of *farm* because they understood it to be the definition used by USDA and because it promotes consistency in definitions between agencies; however, one commenter pointed out that the proposed definition is inconsistent with the definition of *farm* used by EPA in its SPCC rule (see 71 FR 77266, December 26, 2006) and therefore the Agency has two differing definitions that could place a hardship on the regulated community and gives the impression that the Agency is picking and choosing definitions without considering the regulatory implications of its decisions. The Agency agrees with this commenter and thus, EPA has decided to use for this rule the same

definition of *farm* as the definition used in the SPCC rule. This definition is also now the same definition found in the NASS Census of Agriculture. Although not specifically stated in the definition, this definition is broad and includes Federal or State poultry, swine, dairy or livestock research farms that were included in the proposed definition.

Another definition suggested by a commenter was to expand the definition to include ''[any] operation that produces eggs, poultry, swine, dairy, or other livestock in any amount,'' as well as all production areas and land application areas. Another commenter suggested that the definition be expanded to include non-Federal or State research facilities. EPA disagrees with the commenters that suggested an expanded definition of farm. We believe that the definition in this rule encompasses the universe of operations that the commenters are suggesting without adding confusion to the regulated facilities, especially in light of the SPCC regulations.

vi. Comments Regarding Other Facilities

The Agency is aware that animal waste is also generated at other facilities, such as zoos and circuses. Because the focus of the proposal was on animal waste generated or found at farms, EPA did not propose to expand the reporting exemption beyond such facilities. However, because the potential for release to the air of hazardous substances from animal waste at other such facilities may present the same issues that are presented by animal waste at farms, we did specifically request comment on whether the administrative reporting exemption should be expanded to include other types of facilities that also generate animal waste, and if so, what other types of facilities should be included in the reporting exemption.

There was general support by the commenters for including within the exemption other types of facilities (besides farms) that produce animal waste. That is, while commenters generally agreed that the rule should stay narrowly focused, they also argued that other types of facilities that produce animal waste should also be included within the exemption. Several other commenters stated that because the generation of animal waste is a normal biological process, all animals' waste should be administratively excluded from reporting.

EPA appreciates the commenters' arguments that all animals' waste should be excluded; however, we have decided to limit the final rule to animal waste generated or produced at farms, and not include other types of facilities, because the Agency has not looked sufficiently at these other types of facilities to determine the likelihood that the Agency would take a response action, if there was such a release to the air of hazardous substances that meet or exceed their RQ from animal waste.

vii. Comments Regarding Possible Situations That Would Necessitate a Response

EPA specifically sought comment on whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air that meet or exceeds the RQ from animal waste at farms, and if so, what an appropriate response would be to such notifications. Several commenters responded that there are no circumstances where a manure-related release of emissions would trigger an emergency response.

On the other hand, there were some commenters that offered scenarios that described the importance of receiving the notifications. Specifically, one commenter noted that extreme weather fluctuations and various pit pumping techniques may cause emissions to exceed reportable quantities. Such fluctuations (*e.g.*, differences in temperature, rainfall frequency and intensity, wind speed, topography and soils) could impact the amount of air emissions released from farms. Another commenter cited a 2004 study entitled, Concentrated Animal Feeding Operations: Health Risks from Air Pollution Institute for Agriculture and Trade Policy,[6] which noted that ''when pits are agitated for pumping, some or all of these gases are rapidly released from the manure and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock.''

With respect to responses, one commenter stated that responses may be needed to protect children who live in nearby homes and communities from elevated levels of airborne ammonia and/or the fine particulates that result from the ammonia releases. The commenter suggests that adequate monitoring will provide facility operators with sufficient warning to take remedial actions that will reduce ammonia formation and release before regulatory thresholds are exceeded.

Finally, one commenter stated that EPA has not examined such situations that may arise when maintaining feeding operations and that the Agency has not proven that emergency personnel would not benefit from continuous release reports of hazardous substances from these operations when attempting to save lives or prevent injury quickly in the future.

From a CERCLA section 104 response perspective, based on EPA's experience, the Agency would rarely respond to such scenarios. In any event, we retain our response authorities and would assist State and local officials in their response, if requested. State or local agencies (*i.e.*, SERCs and LEPCs) also may require information for emergency planning purposes under section 303(d) of EPCRA and make this information available to the public under section 324 of EPCRA.

IV. Statutory and Regulatory Reviews

A. Executive Order 12866 (Regulatory Planning and Review)

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

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Rather, this final rule represents a reduction in burden for both industry and the government by administratively exempting the reporting requirement for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms from the CERCLA section 103 notification requirements and to a limited extent, the EPCRA section 304 emergency notification requirements.

However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulation 40 CFR 302 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0046, EPA ICR number 1049.11 for 40 CFR 302.6 (Episodic releases of oil and hazardous substances), OMB control number 2050–0086, EPA ICR number 1445.07 for 40 CFR 302.8 (Continuous release reporting requirements) (pending approval) and OMB control

[6] This document is available on line at: *http://www.healthobservatory.org/library.cfm?refID=37388.*

number 2050–0092, EPA ICR number 1395.06 for 40 CFR 355 (Emergency planning and notification). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

We estimate that this final rule will reduce burden on farms associated with the notification requirements under CERCLA section 103 and EPCRA section 304 by approximately 1,290,000 hours over the ten year period beginning in 2009 and associated costs by approximately $60,800,000 over the same period. We estimate that this rule will also reduce burden on government (including Federal, State and local governments) for receipt and processing of the notifications under CERCLA section 103 and EPCRA section 304 by approximately 161,000 hours over the ten year period beginning in 2009 and associated costs by approximately $8,110,000 over the same period. In evaluating the potential burden and cost savings to those farms that would no longer be required to make notifications under CERCLA section 103 and EPCRA section 304 and for the government entities that are no longer required to receive and process such notifications, we used the same universe as used in the 2008 CAFO Rule (see 73 FR 70417, Nov. 20, 2008).

C. Regulatory Flexibility Act

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

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

Under the statutory and regulatory analyses of the Regulatory Flexibility Act for the proposed rule, we concluded that EPA expects the net reporting and recordkeeping burden associated with reporting air releases of hazardous substances that meet or exceed their RQ from animal waste at farms under CERCLA section 103 and EPCRA section 304 to decrease. We stated that this reduction in burden will be realized by businesses of all sizes. Although we concluded that the rule will relieve regulatory burden for all affected small entities as the statute requires, EPA requested comment on the potential impacts of the proposed rule on small entities and on issues related to such impacts.

One commenter explicitly concurred with EPA's analysis and conclusion that the proposed rule will provide relief from regulatory burden for small entities, stating that: ''Small farms should not be affected even if the reporting requirements stay in place because these farms do not generally have a large enough herd of animals to reach the requisite levels of toxins.'' EPA appreciates the commenter's perspective that small farms would probably not be affected by the reporting requirements, even if we did not issue this administrative reporting exemption.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any additional requirements on small entities. Rather, this rulemaking will relieve regulatory burden because we are eliminating the reporting requirement for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms under the CERCLA section 103 notification requirements and for those entities below the large CAFO threshold of animal species, as defined under the NPDES program regulations, under the EPCRA section 304 notification requirements. We expect the net reporting and recordkeeping burden associated with reporting air releases of hazardous substances from animal waste at farms under CERCLA section 103 and EPCRA section 304 to decrease. This reduction in burden will be realized by both small and large businesses. We have therefore concluded that this final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. That is, the final rule imposes no enforceable duty on any State, local or tribal governments or the private sector; rather, this final rule will result in burden reduction in the receipt of notifications under section 103 of CERCLA and for those entities below the large CAFO threshold of animal species, as defined under the NPDES program regulations, under section 304 of EPCRA notification requirements of the release to the air of hazardous substances, primarily ammonia and hydrogen sulfide, that meet or exceed their RQ from animal waste at farms.

Additionally, EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule reduces regulatory burden and the private sector is not expected to incur costs exceeding $100 million. Thus, the final rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132 (Federalism)

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

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no State and local government bodies that incur direct compliance costs by this final rule. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance

costs on them. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045 (Protection of Children From Environmental Health & Safety Risks)

EPA interprets EO 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 EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule will reduce the burden associated with the notification of releases to air of hazardous substances that meet or exceed their RQ from animal waste at farms.

I. National Technology Transfer Advancement Act

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

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As discussed in the Background section of the preamble for this final rule, the requirement to notify the government under CERCLA section 103 or EPCRA section 304 does not require the notifying entity to take any specific action to address the release. Therefore, because EPA has determined that a response action would be unlikely, EPA does not believe that exempting these releases from CERCLA section 103 notification requirements or to a limited extent EPCRA section 304 emergency notification requirements will have a disproportionately high and adverse human health or environmental effect on minority or low-income populations, especially since the Agency is not limiting any of its other authorities under CERCLA, such as CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of CERCLA or EPCRA. The Agency also retains its authority to apply existing statutory provisions in its efforts to prevent minority and or low-income communities from being subject to disproportionately high and adverse impacts and environmental effects. We therefore have determined that this final rule does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing 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 January 20, 2009.

List of Subjects

40 CFR Part 302

Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 355

Air pollution control, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: December 12, 2008.

Stephen L. Johnson,

Administrator.

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

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 1. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 9602, 9603, 9604; 33 U.S.C. 1321 and 1361.

■ 2. Section 302.3 is amended by adding in alphabetical order the definitions of ''Animal waste'' and ''Farm'' to read as follows:

§ 302.3 Definitions.

* * * * *

Animal Waste means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other typical materials found with animal waste.

* * * * *

Farm means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

* * * * *

■ 3. Section 302.6 is amended by adding paragraph (e)(3) to read as follows:

§ 302.6 Notification requirements.

* * * * *

(e) * * *

(3) Releases to the air of any hazardous substance from animal waste at farms.

PART 355—EMERGENCY PLANNING AND NOTIFICATION

■ 4. The authority citation for part 355 continues to read as follows:

Authority: 42 U.S.C. 11002, 11003, 11004, 11045, 11047, 11048 and 11049.

■ 5. Section 355.31 is amended by adding paragraphs (g) and (h) to read as follows:

§ 355.31 What types of releases are exempt from the emergency release notification requirements of this subpart?

* * * * *

(g) Any release to the air of a hazardous substance from animal waste at farms that stable or confine fewer than the numbers of animal specified in any of the following categories.

(1) 700 mature dairy cows, whether milked or dry.

(2) 1,000 veal calves.

(3) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.

(4) 2,500 swine each weighing 55 pounds or more.

(5) 10,000 swine each weighing less than 55 pounds.

(6) 500 horses.

(7) 10,000 sheep or lambs.

(8) 55,000 turkeys.

(9) 30,000 laying hens or broilers, if the farm uses a liquid manure handling system.

(10) 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system.

(11) 82,000 laying hens, if the farm uses other than a liquid manure handling system.

(12) 30,000 ducks (if the farm uses other than a liquid manure handling system).

(13) 5,000 ducks (if the farm uses a liquid manure handling system).

(h) Any release to the air of a hazardous substance from animal waste at farms from animals that are not stabled or otherwise confined.

■ 6. Section 355.61 is amended by adding in alphabetical order the definitions of ''Animal waste'' and ''Farm'' to read as follows:

§ 355.61 How are key words in this part defined?

Animal Waste means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other typical materials found with animal waste.

* * * * *

Farm means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

* * * * *

[FR Doc. E8–30003 Filed 12–17–08; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 144

[ASPE:LTCI–F]

RIN 0991–AB44

State Long-Term Care Partnership Program: Reporting Requirements for Insurers

AGENCY: Office of the Assistant Secretary for Planning and Evaluation (OASPE), HHS.

ACTION: Final rule.

SUMMARY: This final rule sets forth reporting requirements for private insurers that issue qualified long-term care insurance policies in States participating in the State Long-Term Care Partnership Program established under the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171). Section 6021 of the DRA requires that the Secretary of Health and Human Services (the Secretary) specify a set of reporting requirements and collect data from insurers on qualified long-term care insurance policies issued under the program and the subsequent use of the benefits under these policies. Under a State Long-Term Care Partnership Program, an amount equal to the benefits received under the long-term care insurance policy is disregarded in determining the assets of an individual for purposes of Medicaid eligibility and estate recovery.

DATES: *Effective Date:* This final rule is effective on April 17, 2009.

ADDRESSES: *Electronic Access:* This **Federal Register** document is also available from the **Federal Register** online database through *GPO Access,* a service of the U.S. Government Printing Office. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents' home page address is *http://www.gpoaccess.gov/,* by using local WAIS client software, or by telnet to swais.access.gpo.gov, then login as guest (no password required). Dial-in users should use communications software and modem to call (202) 512–1661; type swais, then login as guest (no password required).

FOR FURTHER INFORMATION, CONTACT: Hunter McKay, (202) 205–8999.

SUPPLEMENTARY INFORMATION:

I. Issuance of a Proposed Rule

On May 23, 2008 (73 FR 30030), the Department of Health and Human Services (the Department) published in the **Federal Register** a proposed rule with a 60-day comment period that described the reporting requirements that we proposed to require of all insurers that issue qualified long-term care insurance policies under the State Long-Term Care Partnership Program. We received three timely pieces of correspondence in response to the proposed rule. Each piece of correspondence addressed multiple issues relating to the provisions of the proposed rule. We summarize these public comments and present the Department's responses to them under the applicable subject-area headings below. In addition, we have posted, for reviewers' convenience, all of the public comments received on the following Web site: *http://www.regulations.gov.*

II. Scope of the Proposed Rule and This Final Rule

The proposed rule and this final rule describe the reporting requirements that the Department is requiring of all insurers that issue long-term care insurance policies under a State Long-Term Care Partnership Program for a State with as Medicaid State plan amendment approved after May 14, 1993. We point out that neither the proposed rule nor this final rule requires participating insurers to report data from States with a Partnership Medicaid State plan amendment approved as of May 14, 1993. In addition to the promulgation of the proposed rule and this final rule, the Department anticipates taking other actions to further the implementation of the Long-Term Care Partnership Program. One such action is publication of a separate **Federal Register** notice containing Partnership State Reciprocity Standards. These standards outline an agreement whereby States can provide Medicaid asset disregards for

Partnership policies purchased in other States.

Comment: One commenter suggested that language be added in the final rule to make clear that insurers are not required by the regulation to report Partnership data to the Department for States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

Response: We have added language above and in other applicable sections of this final rule, as the commenter suggested, to make clear the nonapplicability of the reporting requirements for submission of Partnership data by insurers in States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

III. Background

A. Historical Overview of State Long-Term Care Partnership Programs

1. Initial Development of Programs

In the late 1980's, a number of State Medicaid programs began to work with private insurance companies to create a bridge between Medicaid and insurance for long-term care. The goal of these collaborations was to create private insurance policies that were more affordable and provide better financial protection to consumers against large liabilities for long-term care costs than the policies generally available at that time. The result of these collaborations was the establishment of the State Long-Term Care Partnership Program that provided for expanded access to Medicaid by allowing applicants who use long-term care insurance policies to have higher assets and still be eligible for Medicaid, as long as they meet all other Medicaid eligibility criteria. The first four States that implemented Partnership programs, in 1993 (California, Connecticut, Indiana, New York), used two different methods for determining the amount of assets a participant was allowed to keep. Three States allowed participants to keep an amount equivalent to the amount paid by the insurance policy on his or her behalf (known as the ''dollar-for-dollar approach''). The other State required the purchase of a more comprehensive policy and, in exchange, allowed participants to keep all of their assets (known as the ''total assets approach''). Over time, one State combined these models to create a hybrid approach in which participants purchasing and using a policy that would cover fewer than 4 years of benefits would be allowed to keep one dollar for every dollar of paid benefits and those participants purchasing and using a policy that would cover 4 or more years of benefits would be allowed to keep all of their assets. These State partnership programs provided an incentive for insurers to offer affordable, high-quality benefits and for consumers to protect themselves against the high cost of long-term care through the purchase of insurance policies that can be used in conjunction with benefits provided under Medicaid.

As part of the implementation process, each of the four States that initially implemented Partnership programs in 1993 outlined a set of data reporting requirements for participating insurers. The data that were to be collected were intended to allow each State to monitor program activities and evaluate the impact of the Partnership Program on Medicaid long-term care expenditures. The insurers who participated in these partnerships recommended, as part of the design of the data collection requirements, that the participating States use a unified set of reporting requirements to streamline the reporting burden on the participating insurers. The participating insurers believed that if each State designed its own reporting requirements, the administrative costs for the program would be prohibitive. The four States agreed with the participating insurers and adopted a uniform set of reporting criteria.

The four initial States launched their Partnership programs using existing State authority through amendments to their State Medicaid plans (Partnership Medicaid State plan amendments). Each State requested a change in the treatment of assets in the Medicaid financial eligibility test. No other Federal authority was necessary at that time to operate the programs.

Comment: One commenter suggested that language be added to the Background section of the final rule to make clear that consumers who take advantage of the Partnership Program must also meet all other Medicaid eligibility requirements. Two commenters suggested that the discussion of the amount of asset protection offered under the original Partnership Programs be expanded in the final rule to reflect the differences between the ''dollar-for-dollar model'' and the ''total assets model.''

Response: We have added language above in this final rule, as the commenters suggested, to specify that consumers who take advantage of the Partnership Program must also meet all other Medicaid eligibility requirements and to explain the differences between the ''dollar-for-dollar model'' and the ''total assets model.''

Comment: One commenter suggested that language indicating that the regulations do not require insurers to report Partnership data to the Department for States with a Partnership Medicaid State plan amendment approved as of May 14, 1993, be added to the section of the final rule discussing the agreement reached by the original four States pertaining to a unified data reporting structure.

Response: The section in which the commenter is requesting a change relates to the history of the Partnership programs and is not an appropriate place to discuss the scope of the new regulations. However, we have incorporated the language in section II. (Scope) of this final rule, as well as in other applicable sections, to address the nonapplicability of the reporting requirements for Partnership data for States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

2. Omnibus Budget Reconciliation Act of 1993

The Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), Public Law 103–66, contained language that changed the conditions under which Medicaid State plan amendments relating to asset disregards for private long-term care insurance could be approved. OBRA 1993 allowed California, Connecticut, Indiana, and New York, as well as Iowa and Massachusetts, to continue their initial Long-Term Care Partnership Programs. However, OBRA 1993 specified a set of requirements for any additional States that chose to operate a Partnership Program. Any State, other than the initial four partnership States, that sought a Medicaid State plan amendment on or after May 14, 1993, was required to abide by the following additional conditions:

a. Estate Recovery

States establishing Long-Term Care Partnership Programs on or after May 14, 1993, were required to recover from the estates of Medicaid recipients in States with partnership agreements expenses incurred for the provision of long-term health care under Medicaid. Assets that were disregarded in the initial financial eligibility process were also exempt from estate recovery in the initial four States with Partnership Programs. States establishing new Partnership Programs were only allowed to disregard assets in the initial eligibility process but not in the estate recovery process. After a Medicaid recipient who had a long-term care insurance policy issued under a State

Long-Term Partnership Program died, the State was required to recover an amount equivalent to what Medicaid spent on his or her behalf from the deceased recipient's estate, including any protected assets under the State Long-Term Care Partnership Program.

b. No Waiver of Estate Recovery

States establishing Long-Term Care Partnership Programs on or after May 14, 1993, were precluded from waiving the estate recovery requirement for Medicaid recipients who had obtained long-term care insurance policies under a State Long-Term Care Partnership Program.

c. Expanded Definition of Estate

States establishing Long-Term Care Partnership Program on or after May 14, 1993, were also required to use a specific definition of ''estate'' for recovery purposes when recovery of Medicaid expenditures was against the estates of Medicaid recipients who had obtained long-term care insurance policies issued under a State Long-Term Care Partnership Program. This definition was more expansive than the definition that was generally used by States.

While OBRA 1993 did not forbid additional States from attempting to establish new Long-Term Care Partnership Programs under the new conditions, the impact was essentially the same as a ban. A few States tried unsuccessfully to launch partnership programs under the new conditions. Other interested States passed enabling legislation with contingency language that allowed the State to proceed if the OBRA 1993 partnership provisions were repealed. No subsequent Federal legislation related to the Long-Term Care Partnership Programs was enacted until the Deficit Reduction Act of 2005 (DRA) Public Law 109–171. As discussed in detail under section II.A.3. of this proposed rule and under section III.A.3. of this final rule, the DRA included provisions that allow States to offer specific asset disregards for Medicaid eligibility purposes under a new set of conditions.

3. Deficit Reduction Act of 2005

Section 6021(a)(1) of the DRA amended section 1917(b)(1)(C)(i) of the Act and added new sections 1917(b)1)(C)(iii) through (vi) to the Act that provide for an expansion of the State Long-Term Care Insurance Partnership Program through a new set of conditions. These conditions pertain to States with Partnership Medicaid State plan amendments approved after May 14, 1993. Under this provision, States may establish ''qualified State long-term care insurance partnerships'', defined in the Act as an approved Medicaid State plan amendment under Title XIX of the Act that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if certain requirements specified in sections 1917(b)(1)(C)(iii)(I) through (VII) of the Act are met. In other words, States establishing new Partnership programs must offer a dollar of asset disregard for every dollar paid out under a long-term care insurance policy issued under that State's long-term care partnership program.

Section 1917(b)(1)(C)(iii)(II) of the Act provides that the insurance policy must be a qualified long-term care insurance policy as defined in section 7702B(b) of the Internal Revenue Code of 1986, that is issued not earlier than the effective date of the State plan amendment. (If an individual has an existing long-term care insurance policy that does not qualify as a qualified partnership policy due to the issue date of the policy, and that policy is exchanged for another policy, the State insurance commissioner or other State authority must determine the issue date for the policy that is received in exchange. Under this provision, a long-term care insurance policy includes a certificate issued under a group insurance contract.)

Among other requirements specified in the statute for qualified long-term care insurance partnerships—

- The long-term care insurance policy must (1) be issued to an insured individual who is a resident of the State in which coverage first became effective under the policy (sections 1917(b)(1)(C)(iii)(I) of the Act); (2) be certified by the State insurance commissioner or other appropriate authority that the policy meets specific provisions of the National Association of Insurance Commissioners (NAIC) October 2000 Model Regulation and Model Act (sections 1917(b)(1)(C)(iii)(III) and 1917(b)(5)(B) of the Act); and (3) include certain protections against inflation on an annual basis (section 1917(b)(1)(C)(iii)(IV) of the Act).
- The State Medicaid agency must provide information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care (section 1917(b)(1)(C)(iii)(V) of the Act).
- Issuers of long-term care insurance policies under a State qualified long-term care insurance partnership must provide regular reports to the Secretary, in accordance with regulations of the Secretary, that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of State long-term care insurance partnerships (section 1917(b)(1)(C)(iii)(VI) of the Act). Section 1917(b)(1)(C)(v) of the Act provides that the regulations required under section 1917(b)(1)(C)(iii)(VI) of the Act shall be promulgated after consultation with the NAIC, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data to be reported and the frequency with which such reports are to be made. In addition, the Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.
- The State may not impose any requirement affecting the terms of benefits of a policy under the partnership program unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership (section 1917(b)(1)(C)(iii)(VII) of the Act).

Section 1917(b)(1)(C)(iv) of the Act provides that a State that had a State plan amendment approved as of May 14, 1993, satisfies the requirements of the statute under clause (II) and may continue operating as originally implemented if the Secretary determines that the State Medicaid plan amendment provides for consumer protection standards that are no less stringent than the consumer protection standards that applied under such a State plan amendment as of December 31, 2005.

Comment: One commenter requested that the language that describes the impact of the DRA of 2005 be modified in the final rule to clearly indicate that the conditions set forth in sections 6021(a) through (c) of the DRA of 2005 pertain only to States with Partnership

Medicaid State plan amendments approved after May 14, 1993. One commenter suggested that the description of the ''grandfathered'' States also make clear that the regulations do not pertain to States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

Response: We have added language above and in other applicable sections in this final rule, to make these clarifications, as suggested by the commenters.

B. Implementing Regulations

Currently, there are no Federal regulations directly related to State operation of State Long-Term Care Partnership Programs. In 2006, the Department provided guidance to States, through a letter to Medicaid Directors, on the implementation of State long-term care partnership programs under the DRA. In areas in which the program coordinates benefits with Medicaid coverage of long-term care, the existing Medicaid regulations at 42 CFR Chapter IV, Subchapter C, are applicable. In 2006, States were provided with guidance on the implementation of State Long-Term Care Partnership Programs under the DRA of 2005.

To implement section 1917(b)(1)(C)(iii)(VI) and 1917(b)(1)(C)(v) of the Act, as directed by the statute, in the May 23, 2008 proposed rule (73 FR 30033), we proposed to set forth in regulations the requirements for reporting information and data on qualified long-term care insurance policies issued under State Long-Term Care Partnership Programs under an approved State plan amendment. In this final rule, we are adopting the regulations as final with some technical changes, as discussed below.

C. States Currently Operating Long-Term Care Partnership Programs

California, Connecticut, Indiana, Iowa, Massachusetts, and New York had approved State Long-Term Partnership Programs under an approved State plan amendment as of May 14, 1993. They were ''grandfathered'' as satisfying the statutorily imposed requirements when, pursuant to section 1917(b)(1)(C)(iv) of the Act, the Secretary determined that the State plan amendments of these States provide protection no less stringent than that applied under their State plan amendments as of December 31, 2005.

At the time we issued the proposed rule, we stated that, as of December 2007, seven other States offered State Long-Term Care Partnership policies for sale under the DRA provisions: Florida, Idaho, Kansas, Minnesota, Nebraska, South Dakota, and Virginia. Nine States had approved State plan amendments for qualified State Long-Term Care Partnership Programs although policies had not yet been issued pursuant to those programs: Colorado, Florida, Georgia, Iowa, Minnesota, Missouri, North Dakota, Nevada, Ohio, and Oregon. Four States had submitted State plan amendments for which approval is pending: Arizona, New Hampshire, Oklahoma, and Pennsylvania. Ten other States were in the process of developing Partnership Programs: Illinois, Maine, Maryland, Michigan, Montana, New Jersey, Rhode Island, Texas, Vermont, and Wisconsin.

As of August 2008, Partnership policies are still for sale in the four States that first implemented a Partnership program, as well as in 13 additional States. Nine States have approved Medicaid State plan amendments, although policies are not yet for sale. Three other States have Medicaid State plan amendments pending approval from the Centers for Medicare and Medicaid, HHS.

IV. Provisions of the Proposed Rule and This Final Rule

A. Legislative Authority

As stated earlier, the DRA of 2005 requires insurers participating in State long-term care partnership programs to provide regular reports to the Secretary in a manner in accordance with regulations of the Secretary. The reports must include notification regarding when benefits provided under the policy have been paid and the amount of the benefits paid, notification regarding when the policy otherwise terminates, and any other information as the Secretary determines may be appropriate to the administration of State long-term care insurance partnerships. Section 1917(b)(1)(C)(v) of the Act provides that the regulations required under section 1917(b)(1)(C)(iii)(VI) of the Act must be promulgated after consultation with the NAIC, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and must specify the type and format of the data to be reported and the frequency with which the reports are to be made. In addition, the Secretary, as appropriate, must provide copies of the reports provided in accordance with that clause to the State involved.

B. Collaboration With States, Insurers, Insurance Regulators, and Consumers in the Development of Reporting Requirements

In accordance with section 1917(b)(1)(C)(v) of the Act, as added by the DRA of 2005, as we discussed in the proposed rule, we have consulted with numerous stakeholders in the development of the reporting requirements presented in this rule. In addition to one-on-one consultations with stakeholders representing States, insurers, consumers, and regulators, we have established a Technical Expert Panel to provide a forum for the exchange of ideas, perspectives, and expertise regarding the specification of individual data items. The Technical Expert Panel consists of approximately 25 members representing insurers, States, consumer organizations, the NAIC, the Federal Government, and the policy research community. The panel members were selected in January 2007, from responses to invitations sent by HHS along with an initial draft of the reporting requirements. We held numerous meetings and teleconferences with the panel members to discuss and further develop the draft reporting requirements and to obtain further input on partnership implementation. The reporting requirements presented in the proposed rule and finalized in this final rule represent the product of this ongoing stakeholder input process. We plan to continue ongoing work with the Technical Expert Panel.

C. Incorporation of Reporting Requirements in the Code of Federal Regulations

In the proposed rule, the Department proposed to establish under Title 45, Part 144 of the Code of Federal Regulations a new Subpart B to incorporate the requirements for the reporting of data by insurers on qualified long-term care insurance policies issued under State Long-Term Care Partnership Programs that are established under an approved Medicaid State plan amendment. Specifically—

Proposed § 144.200, which contained the basis for the regulations.

Proposed § 144.202, which included the definitions used throughout the subpart.

Proposed § 144.204, which specified the applicability of the regulations under the subpart.

Proposed § 144.206, which specified the requirements for reporting of long-term care partnership program data and the frequency with which insurers must report the data.

Proposed § 144.208, which specified the deadlines for submission of reports.

Proposed § 144.210, which specified the format and manner in which the data are to be reported.

Proposed § 144.212, which specified the confidentiality of information requirements that will be applied.

Proposed § 144.214, which specified the action that the Secretary will take if an insurer fails to report the required data by the specified deadlines.

Under proposed § 144.202, Definitions, we included the following definitions:

Partnership qualified policy refers to a qualified long-term insurance policy issued under a qualified State long-term care insurance partnership.

Qualified long-term insurance care policy means an insurance policy that has been determined by a State insurance commissioner to meet the requirements of sections 1917(b)(1)(C)(iii)(I) through (IV) and 1917(b)(5) of the Act. It includes a certificate issued under a group insurance contract.

Qualified State long-term care insurance partnership means an approved Medicaid State plan amendment that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that has been determined by a state insurance commissioner to meet the requirements of section 1917(b)(1)(C)(iii) of the Act [incorrectly cited in the proposed rule as section 1917(b)(a)(C)(iii)]. It includes any Medicaid State plan amendment approved as of May 14, 1993 [incorrectly stated in the proposed rule as May 4, 1993], that meets the requirements of section 1917(b)(1)(C)(iii) of the Act and for which the Secretary determined that the State plan amendments provides for consumer protection standards that are no less stringent than the consumer protection standards that applied under the State plan amendment as of December 31, 2005.

Comment: The commenter suggested that the word ''care'' be inserted into the definition of ''Partnership qualified policy.'' One commenter pointed out that we had reversed the order of two words and therefore incorrectly labeled the definition of ''qualified long-term care insurance policy'' as ''qualified long-term insurance care policy''

Response: We agree with the first commenter's suggestion and have revised the definition of ''Partnership qualified policy'' in this final rule to refer to a qualified long-term care insurance policy issued under a qualified State long-term care insurance partnership. We thank the commenter for bringing to our attention the inadvertent mislabeling of the definition of ''qualified long-term care insurance policy'' and have made the correction in this final rule.

Comment: One commenter suggested that the definition of a ''Qualified State long-term care insurance partnership'' be modified to clarify that the regulations do not require insurers to report Partnership data to the Department for States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

Response: In response to the commenter's suggestions, we have revised the proposed definition for ''Qualified State long-term care insurance partnership'', by removing the last sentence of the definition, to clarify that the regulations do not require insurers to report Partnership data to the Department for States with a Partnership Medicaid State plan amendment approved as of May 14, 1993.

After consideration of the public comments received, we are adopting as final proposed §§ 144.200, 144.202, and 144.204, with the following modifications. We have revised the definition of ''Partnership qualified policy'' by adding the word ''care'' in the definition. We have corrected the inadvertent mislabeling of the definition of ''Qualified long-term care insurance policy.'' We have revised the definition of ''Qualified State long-term care partnership'' by removing the last sentence of the proposed definition.

Each of the additional proposed regulatory requirements is discussed in detail in the sections below.

D. Specific Reporting Requirements

As discussed in the proposed rule, in consultation with stakeholders and the Technical Expert Panel, we developed requirements for insurers for reporting data under the State Long-Term Care Partnership Program under two categories: (1) Registry data; and (2) claims data (proposed § 144.206).

We proposed that these two categories would require the submission of data in four distinct file types. Generally, participating long-term care insurers will report under only two of these files. For all four file types, as we proposed, we are requiring insurers to report on only those insured individuals, policyholders, and claimants who have active qualified long-term care insurance partnership policies or certificates. The reporting requirements will not apply to insurance policies or certificates that are not partnership qualified.

Insurer reporting specifications are detailed in an HHS document entitled ''State Long-Term Care Partnership Insurer Reporting Requirements'' which we expect will be available via the Internet at the Web site at: *http://aspe.hhs.gov/daltcp/reports/2008/PartRepReq.pdf* no later than October 1, 2008. (We noted in the proposed rule that we expected that this document would be available by June 1, 2008. However, the release date has been delayed.) We are in the process of developing an integrated database through which insurers will submit these data. As we proposed, we are requiring that data be submitted through a secure Web site that meets all current Health Insurance Portability and Accountability Act requirements for security of personal health information.

1. Registry Data

In the proposed rule (73 FR 30034), we proposed to require insurers to report data, on a semiannual basis, on all insured individuals who have been issued qualified long-term care insurance policies or certificates under qualified State Long-Term Care Partnership Programs; that is, for the 6-month reporting periods of January 1 through June 30 and July 1 through December 31 of each year (proposed § 144.206(b)(1)(ii)). We proposed that the reports must include data on qualified long-term care insurance partnership policies sold on either an individual basis or a group basis, as long as individual-level data are available to the insurer. Under proposed § 144.206(b)(1)(iii), these data would include, but are not limited to, the following:

- Current identifying information on each insured individual.
- The name of the insurance company and the issuing State.
- The effective date and terms of coverage under the policy.
- The coverage period and benefits.
- The annual premium.
- Other information as specified by the Secretary in ''State Long-Term Care Insurance Partnership Insurer Reporting Requirements.''

Comment: One commenter pointed out that we used different terminology in the proposed rule to describe the instruction document we would issue for reporting data.

Response: We thank the commenter for bringing this inconsistency to our attention. In the proposed rule, we inconsistently used the term ''Reporting

Instructions'' when referring to the title of this document; rather, we should have used ''Reporting Requirements.'' Throughout this final rule, we have standardized references to the document containing the detail instructions for insurers on how to report data to the Department under the title ''State Long-Term Care Partnership Insurer Reporting Requirements.''

After consideration of the public comments received, we are adopting as final our proposed § 144.206 with one technical change to the title of the instruction document, as discussed above.

2. Claims Data

In the proposed rule, we proposed to require insurers to report data, for each quarter of the calendar year, on all benefit claims paid for all insured individuals who have been issued qualified long-term care insurance policies or certificates (individual policies or under group coverage plans) under qualified State Long-Term Care Partnership Programs (proposed § 144.206(b)(2)). Under proposed § 144.206(b)(2)(ii), these data would include, but are not limited to, the following:

- Current identifying information on the insured individual.
- The type and cash amount of the benefits paid during the reporting period and lifetime to date.
- Remaining lifetime benefits.
- Other information as specified by the Secretary in ''State Long-Term Care Insurance Partnership Insurer Reporting Requirements.''

We did not receive any public comments on this section other than the notification that we had used different titles for the instruction document discussed above. Therefore, we are adopting as final the proposed provisions of § 144.206 with the technical change noted above.

3. Frequency of Reports and Deadlines for Submission

In the proposed rule, we proposed to require insurers to submit data for different reporting periods, depending upon the file type.

We proposed to require insurers to submit the required registry data to the Secretary on a semiannual basis; that is, for the 6-month reporting period of January 1 through June 30 and July 1 through December 31 of each year under proposed § 144.206(b)(1)(ii). The proposed deadline for submittal of registry data reports was 30 days after the end of the reporting period (proposed § 144.208(b)).

Comment: One commenter stated that the discussion of frequency of reports in the preamble of the proposed rule failed to list the frequency of the reports on insurance claims.

Response: The commenter is correct. Even though we specified the frequency of the reports on insurance claims data in the regulation text under proposed § 144.208(c), we did not include a detailed discussion in the preamble. The description of the submission of the claims data along with a reference to the detailed documentation of the reporting requirements is as follows:

We are requiring insurers to submit the required claims data to the Secretary on a quarterly basis; that is, for the 3-month reporting period of January 1 through March 30, April 1 through June 30, July 1 through September 30, and, October 1 through December 31 of each year under § 144.206(b)(2)(i). The deadline for submittal of claims data reports is 30 days after the end of the reporting period (§ 144.208(c)). Detailed reporting instructions can be found on the Internet at the Web site: *http://aspe.hhs.gov/daltcp/reports/2008/PartRepReq.pdf.*

After consideration of the public comments received, we are adopting as final proposed §§ 144.208(b) and (c) without modification.

4. Transition Provision

For insurers who have issued or exchanged a qualified Partnership policy prior to the effective date of the final regulations we issue, we proposed a transition provision under § 144.208(a). We proposed that the first reports required for these insurers would be the reports that pertain to the reporting period that begins no more than 120 days after the effective date of the final regulations.

We did not receive any public comments on the proposed § 144.208(a). Therefore, we are adopting it as final without modification in this final rule.

5. Format and Manner of Reporting Data

In the proposed rule, we proposed to require that insurers submit the required data in the format and manner specified by the Secretary in the HHS-issued insurer reporting specifications document, ''State Long-Term Care Insurance Partnership Insurer Reporting Requirements'' (proposed § 144.210). As we mentioned earlier, we are in the process of developing an integrated database that would be accessible through a secure Web site, and we plan to issue instructions as to how insurers will access and input the required data into the HHS reporting system.

We did not receive any public comments on the proposed § 144.210. Therefore, we are adopting it as final without modification in this final rule.

6. Use of Submitted Reports

As we discussed in the proposed rule, the overall purpose of the data is twofold: First, to be used in efforts to monitor program performance at both the State and Federal level; and second, to provide data for a longer term evaluation of the effectiveness of the Partnership Program. The Department and the States participating in the State Long-Term Care Partnership Program will use the information provided by insurers in compliance with the reporting requirements for analytical studies and for program monitoring. The data provided by insurers will reflect the combined experience of all State Long-Term Care Partnership Programs in terms of policies sold and benefits used. We plan to use the data to produce reports for Congress and other interested stakeholders on the implementation of the State Long-Term Care Partnership Program. In addition, we plan to use the data to generate individual State-level reports that will be used by the States to track the implementation of the Partnership Program at the State level. The Department may also use the data to examine public policy issues related to long-term care insurance in general as opportunities arise.

HHS does not intend to use the data to determine asset disregard levels for individuals who participate in the State Long-Term Care Partnership Program and eventually apply for Medicaid coverage. We will not collect data on ''point in time'' information regarding the amount of insurance benefits used by claimants, nor exact information on when private insurance benefits may be exhausted, which clearly would depend upon how claimants use benefits to purchase long-term care services. The computation of asset disregard levels and the determination of Medicaid eligibility coverage are matters that will be dealt with among the insurer, the insured individual, and the State Medicaid eligibility office. We expect that when insured individuals exhaust their insurance coverage (or otherwise become eligible for Medicaid prior to the exhaustion of benefits), insurers will provide them with documentation of their participation in the State Long-Term Care Partnership Program and of the amount of benefits that the insured received. This documentation will become part of the entire documentation provided by the insured individual at the time he or she applies for Medicaid.

The Medicaid eligibility office will then determine, based upon the documentation provided by the applicant, the asset disregard level that will be applied.

It is possible that State Medicaid programs may wish to access the collected data for monitoring purposes, to help them anticipate the number of insured individuals who may become eligible for Medicaid asset disregards over a projected time period. For example, through reports provided to each State from the integrated database, States would know how many partnership policyholders are ''in claim'' during any 3-month reporting period. States would also know, approximately, to what extent policyholders who are in claim have utilized the insurance benefits for which they are eligible and the amount of benefits remaining under their policy maximums. However, once an insured individual uses his or her insurance benefits under the policy, his or her eligibility for Medicaid will still depend upon the amount of available assets he or she retains, relative to his or her asset disregard, as well as other Medicaid eligibility criteria. For example, an insured individual may be eligible for an asset disregard of $150,000, but still retains $250,000 in countable assets. In this case, he or she would have to spend down $100,000 of his or her available assets before applying for Medicaid coverage. Thus, in general terms, States will be able to use the data to project future applications for Medicaid (and their potential budgetary impacts) but, at the individual level, the specific financial circumstances of each insured individual would determine his or her eligibility for Medicaid coverage.

Comment: One commenter suggested that the Department consider a broader use of the data to investigate a number of issues related to long-term care insurance in general as well as issues related to the Partnership Program.

Response: The Department will explore using the Partnership data to examine other issues related to long-term care insurance, to the extent possible. We have modified the preamble discussion above to indicate this.

Comment: One commenter suggested that the language included in this section of the preamble of the proposed rule could imply that participants must exhaust their benefits before they can take advantage of the Partnership Program.

Response: The commenter is correct in asserting that exhaustion of benefits is not required by the DRA of 2005. Participants may apply for a Medicaid asset disregard before they have exhausted their insurance benefits. We have modified the preamble language in this final rule to reflect the possibility that someone may apply for Medicaid and seek an asset disregard before they have exhausted their insurance benefits.

E. Additional State-Mandated Reporting Requirements

The DRA of 2005 explicitly states that there is nothing in the statute that prohibits States from imposing additional reporting requirements on insurers participating in the Long-Term Care Partnership Program, beyond the Federal reporting requirements that we proposed in the proposed rule and are finalizing in this final rule. This regulation does not require insurers to report Partnership data to the Department for States with a Partnership Medicaid State plan amendment as May 14, 1993. However, we believe that the information that will be made available to the Secretary and to the States participating in the Long-Term Care Partnership Program through these mandated reporting requirements will be sufficient to meet the policy analysis and program monitoring needs of the States. We, as well as the stakeholders participating in the development of these reporting requirements, attempted to achieve a proper balance between the legitimate needs of the Federal Government and State governments to monitor the implementation and operation of the State Long-Term Care Partnership Program, and the desire not to impose undue cost burdens on participating insurers, to the point where they may consider it not economically beneficial to participate in the Partnership Program.

Comment: One commenter suggested that the discussion of State-mandated reporting in the final rule be revised to clarify that nothing in the regulation prohibits any State (including grandfathered States) from requiring data from participating Partnership insurers. The commenter further suggested that the section describe the motivations of States for requiring State-specific data. The commenter also suggested that all references to costs of data collection on the part of insurers be deleted. The commenter stated that the costs of reporting are ''often minimal or nonexistent.''

Response: We are not modifying the language in this section as the commenter suggested. The balance between the Government's need for data and the cost burden on participating insurers is, in our view, a real issue, especially given the varying size of different participating States. Finding a balance between the need for data and the cost burden was part of the charge given to the stakeholder group mandated by the DRA. We believe the discussion of the costs of data collection in this section is appropriate and that its presence does not diminish States' ability to negotiate for State-specific data.

F. Confidentiality of Information

In the proposed rule, we proposed to provide in the regulations that the data collected and reported under the requirements of the regulations would be subject to the confidentiality of information requirements specified in regulations under 42 CFR Part 401, Subpart B, and 45 CFR Part 5, Subpart F and any other applicable confidentiality statute or regulation (proposed § 144.212).

We did not receive any public comments on this section. Therefore, we are adopting as final the proposed § 144.212 without modification in this final rule.

G. Actions for Noncompliance With Reporting Requirements

In the proposed rule, we proposed under § 144.214 that if an insurer of a qualified long-term care insurance policy does not submit the required reports by the due dates specified in the new subpart B of 45 CFR Part 144, the Secretary notifies the appropriate State insurance commissioner within 45 days after the deadline for submission of the information and data specified in § 144.208.

We did not receive any comments on this proposed section. Therefore, we are adopting as final the proposed § 144.214 without modification.

H. Provision of Reports to Partnership States

Section 1917(b)(1)(C)(v) of the Act provides that the Secretary, as appropriate, must provide copies of the reports provided by insurers to the State involved. We plan to make reports containing the reported data available to States in a timely and efficient manner.

V. Collection of Information Requirements

The Department of Health and Human Services has determined that this notice of proposed rulemaking contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520). In compliance with the requirement of section 3506(c)(2)(A) of the PRA , the Office of the Secretary

(OS), Department of Health and Human Services, published in the May 23, 2008, proposed rule the following summary of a proposed information collection request for public comment. Interested persons were invited to send comments regarding the burden estimate or any other aspect of the collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Individuals were given the opportunity to request and obtain copies of the supporting statement and any related forms for the proposed paperwork collections described below. Written comments and recommendations for the proposed information collections were due within 60 days of publication of the proposed rule.

Further, the Department acknowledges that this regulation is covered under the Privacy Act and that this collection of data constitutes a System of Records. The Department is publishing elsewhere in this issue of the **Federal Register** a System of Records Notice for this collection of data.

Title: Partnership for Long Term Care Data Set.

Description: This information collected under the final rule is intended for insurers participating in the State Long-Term Care Partnership Program as authorized by the DRA of 2005. Insurers will provide data in the prescribed format to the Department on Partnership certified long-term care insurance policies for partnership participants in states with Partnership Medicaid state plan amendments approved after May 14, 1993. The requirements include the identity of the policy holder, the type of coverage purchased, and the amount of insurance benefits used. Data from this submission will be provided to State Medicaid agencies to assist in determining the amount of asset protection earned by program participants.

Comment: One commenter brought to our attention two technical errors in the narrative portion of the instruction document and another error in the detailed data element specifications.

Response: We have made the appropriate changes to the instruction document, which is now listed as Version 1.1. This instruction document is available on the Web site at: *http://aspe.hhs.gov/daltcp/reports/2008/PartRepReg.pdf.*

It is estimated that insurers participating in the Partnership Program will be able to provide the necessary reports from data currently within their insurance operations systems. Fulfilling the reporting requirements will require that they write programs to extract the data in the manner specified by the Department. There are no costs to the respondents, other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS AND BURDEN COSTS

CFR Section	Type of respondent	Number of respondents	Number of responses per respondents	Average response per respondent (in hours)	Total burden hours
45 CFR 144.206	Insurers	30	6	45/60	135

We indicated that public comments addressed as a result of the notice in the proposed rule would be taken into account in the formal OMB request for clearance for this data collection. The new information collection provisions in this final rule have been approved by OMB under OMB control number 0990–0333, effective through December 31, 2011.

VI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

B. Executive Order 12866

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

While we have determined that this final rule is not economically significant, it is, however, a significant regulatory action. We estimate that the aggregate cost to participating private insurers of implementing the reporting requirements in this final rule will be approximately $1.5 million.

C. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most insurance companies are not considered to be small entities because they generally have revenues of more than $29 million in any 1 year. (For details, see the Small Business Administration's final rule that sets forth size standards for industries at 65 FR 69432, November 17, 2000.) For purposes of the RFA, all insurance companies are not considered to be small entities. Individuals and States are not included in the definition of a small entity. However, we solicited comments on our estimates and analysis of the impact on insurers of the proposed rule.

There are approximately 100 insurance companies located nationwide that issue long-term care insurance policies. We expect that, of these 100 companies, approximately 30 insurance companies will participate in qualified State Long-Term Care Partnership Programs. Currently, there are 15 to 20 companies operating in States that are selling or have issued qualified long-term care insurance policies under the State Long-Term Care Partnership Programs. As of December 2007, approximately 300,000 policies have been sold. We believe this represents approximately 80 percent of the policies that might be sold when the Partnership Programs are established nationwide. We anticipate that the number of insurance companies selling qualified long-term care insurance

partnership policies might increase by about 10 as more States obtain approved State plan amendments to operate State Long-Term Care Partnership Programs.

As we stated earlier, insurers participating in the original four Partnership Programs have been reporting data on policies sold and benefits used in the program for more than a decade. The reporting requirements in this final rule were designed to take advantage of data already available in insurer data sets. Insurers will not be asked to collect new data, but simply to recode existing data into a common format for submission to the Secretary. It is estimated that participating insurers will have to make a one-time investment to produce the computer programs necessary to compile the reports. Should the reporting requirement change in the future, there will also be a cost to make the necessary changes. We are estimating that the programming will require 400 hours of labor on average (this number will vary widely by company depending on the type of systems used) to create the necessary changes. We also estimate an average cost per hour of programming time of $125. The cost per company is estimated at $50,000 and the total estimate for all companies is estimated at $1.5 million.

Subsequently, there will be a much smaller investment to run the quarterly and semi-annually reports. The data submissions were designed to be primarily snapshots of data elements in the insurers' files with very little tabulation or summary reporting. We note that all of the currently participating insurers participated in the development of the reporting requirements in this final rule and have given their consensus to the requirements.

D. Small Rural Hospitals

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any proposed rule (and subsequent final rule) that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. This final rule does not affect small rural hospitals.

E. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $120 million. This final rule will not mandate any requirements for State, local, or tribal governments. However, it will affect private sector costs to insurance companies who sell qualified long-term care insurance partnership policies. We note that participation by insurers in the Partnership Program is voluntary. We have also determined that the costs of reporting the required data are not significant.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this final rule will not have a substantial effect on State and local governments.

List of Subjects in 45 CFR Part 144

Health care, Health insurance, Reporting and recordkeeping.

■ For the reasons stated in the preamble of this final rule, we are amending 45 CFR Subtitle A, Subchapter B, Part 144 as set forth below:

Subchapter B—Requirements Relating to Health Care Access

PART 144—REQUIREMENTS RELATING TO HEALTH INSURANCE COVERAGE

■ 1. The authority citation for Part 144 is revised to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, 300gg–92 as amended by HIPAA (Pub. L. 104–191, 110 Stat. 1936), MHPA (Pub. L. 104–204, 110 Stat. 2944, as amended by Pub. L. 107–116, 115 Stat. 2177), NMHPA (Pub. L. 104–204, 110 Stat. 2935), WHCRA (Pub. L. 105–227, 112 Stat. 2681–436)) and section 103(c)(4) of HIPAA; and secs. 1102 and 1917(b)(1)(C)(iii)(VI) of the Social Security Act (42 U.S.C. 1302 and 1396p(b)(1)(C)(iii)(VI)).

■ 2. A new Subpart B is added to read as follows:

Subpart B—Qualified State Long-Term Care Insurance Partnerships: Reporting Requirements for Insurers

Sec.
144.200 Basis.
144.202 Definitions.
144.204 Applicability of regulations.
144.206 Reporting requirements.
144.208 Deadlines for submission of reports.
144.210 Form and manner of reports.
144.212 Confidentiality of information.
144.214 Notifications of noncompliance with reporting requirements.

Subpart B—Qualified State Long-Term Care Insurance Partnerships: Reporting Requirements for Insurers

§ 144.200 Basis.

This subpart implements—

(a) Section 1917(b)(1)(C) (iii)(VI) of the Social Security Act, (Act) which requires the issuer of a long-term care insurance policy issued under a qualified State long-term care insurance partnership to provide specified regular reports to the Secretary.

(b) Section 1917(b)(1)(C)(v) of the Act, which specifies that the regulations of the Secretary under section 1917(b)(1)(C)(iii)(VI) of the Act shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data to be reported and the frequency with which such reports are to be made. This section of the statute also provides that the Secretary provide copies of the reports to the States involved.

§ 144.202 Definitions.

As used in this Subpart—

Partnership qualified policy refers to a qualified long-term care insurance policy issued under a qualified State long-term care insurance partnership.

Qualified long-term care insurance policy means an insurance policy that has been determined by a State insurance commissioner to meet the requirements of sections 1917(b)(1)(C)(iii)(I) through (IV) and 1917(b)(5) of the Act. It includes a certificate issued under a group insurance contract.

Qualified State long-term care insurance partnership means an approved Medicaid State plan amendment that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that has been determined by a State insurance commissioner to meet the requirements of section 1917(b)(1)(C)(iii) of the Act.

§ 144.204 Applicability of regulations.

The regulations contained in this subpart for reporting data apply only to those insurers that have issued qualified

long-term care insurance policies to individuals under a qualified State long-term care insurance partnership. They do not apply to the reporting of data by insurers for States with a Medicaid State plan amendment that established a long-term care partnership on or before May 14, 1993.

§ 144.206 Reporting requirements.

(a) *General requirement.* Any insurer that sells a qualified long-term care insurance policy under a qualified State long-term care insurance partnership must submit, in accordance with the requirements of this section, data on insured individuals, policyholders, and claimants who have active partnership qualified policies or certificates for a reporting period.

(b) *Specific requirements.* Insurers of qualified long-term care insurance policies must submit the following data to the Secretary by the deadlines specified in paragraph (c) of this section:

(1) *Registry of active individual and group partnership qualified policies or certificates.* (i) Insurers must submit data on—

(A) Any insured individual who held an active partnership qualified policy or certificate at any point during a reporting period, even if the policy or certificate was subsequently cancelled, lost partnership qualified status, or otherwise terminated during the reporting period; and

(B) All active group long-term care partnership qualified insurance policies, even if the identity of the individual policy/certificate holder is unavailable.

(ii) The data required under paragraph (b)(1)(i) of this section must cover a 6-month reporting period of January through June 30 or July 1 through December 31 of each year; and

(iii) The data must include, but are not limited to—

(A) Current identifying information on the insured individual;

(B) The name of the insurance company and issuing State;

(C) The effective date and terms of coverage under the policy.

(D) The annual premium.

(E) The coverage period.

(F) Other information, as specified by the Secretary in ''State Long-Term Care Partnership Insurer Reporting Requirements.''

(2) *Claims paid under partnership qualified policies or certificates.* Insurers must submit data on all partnership qualified policies or certificates for which the insurer paid at least one claim during the reporting period. This includes data for employer-paid core plans and buy-up plans without individual insured data. The data must—

(i) Cover a quarterly reporting period of 3 months;

(ii) Include, but are not limited to—

(A) Current identifying information on the insured individual;

(B) The type and cash amount of the benefits paid during the reporting period and lifetime to date;

(C) Remaining lifetime benefits;

(D) Other information, as specified by the Secretary in ''State Long-Term Care Partnership Insurer Reporting Requirements.''

§ 144.208 Deadlines for submission of reports.

(a) Transition provision for insurers who have issued or exchanged a qualified partnership policy prior to the effective date of these regulations.

The first reports required for these insurers will be the reports that pertain to the reporting period that begins no more than 120 days after the effective date of the final regulations.

(b) All reports on the registry of qualified long-term care insurance policies issued to individuals or individuals under group coverage specified in § 144.206(b)(1)(ii) must be submitted within 30 days of the end of the 6-month reporting period.

(c) All reports on the claims paid under qualified long-term care insurance policies issued to individual and individuals under group coverage specified in § 144.206(b)(2)(i) must be submitted within 30 days of the end of the 3-month quarterly reporting period.

§ 144.210 Form and manner of reports.

All reports specified in § 144.206 must be submitted in the form and manner specified by the Secretary.

§ 144.212 Confidentiality of information.

Data collected and reported under the requirements of this subpart are subject to the confidentiality of information requirements specified in regulations under 42 CFR Part 401, Subpart B, and 45 CFR Part 5, Subpart F.

§ 144.214 Notifications of noncompliance with reporting requirements.

If an insurer of a qualified long-term care insurance policy does not submit the required reports by the due dates specified in this subpart, the Secretary notifies the appropriate State insurance commissioner within 45 days after the deadline for submission of the information and data specified in § 144.208.

Dated: August 15, 2008.

Mary M. McGeein,

Principal Deputy Assistant Secretary for Planning and Evaluation.

Dated: August 21, 2008.

Michael O. Leavitt,

Secretary.

Editorial Note: This document was received in the Office of the Federal Register on November 24, 2008.

[FR Doc. E8–28388 Filed 12–17–08; 8:45 am]

BILLING CODE 4154–05–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212

RIN 0750–AG15

Defense Federal Acquisition Regulation Supplement; Payment Protections for Subcontractors and Suppliers—Deletion of Duplicative Text (DFARS Case 2008–D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update the list of laws inapplicable to contracts and subcontracts for the acquisition of commercial items. The rule removes a law addressing payment protections for subcontractors and suppliers from the DFARS list, since this law has been added to the FAR list of laws inapplicable to contracts and subcontracts for the acquisition of commercial items.

DATES: *Effective Date:* December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Angie Sawyer, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–8384; facsimile 703–602–7887. Please cite DFARS Case 2008–D021.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 12.503 and 12.504 list the laws that are inapplicable to Executive agency contracts and subcontracts for the acquisition of commercial items. The DFARS supplements the FAR listing with those laws unique to DoD at 212.503 and 212.504.

This final rule removes Section 806 of Public Law 102–190, Payment Protections for Subcontractors and Suppliers, from the lists at DFARS 212.503 and 212.504, since this law was added to the lists at FAR 12.503 and 12.504 in the final rule published at 73 FR 54007 on September 17, 2008. This rule also amends DFARS 212.504 to remove the paragraphs that were designated as ''Reserved.''

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D021.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 212

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 212 is amended as follows:

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 1. The authority citation for 48 CFR Part 212 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

212.503 [Amended]

■ 2. Section 212.503 is amended by removing paragraph (a)(i) and redesignating paragraphs (a)(ii) through (xi) as paragraphs (a)(i) through (x) respectively.

212.504 [Amended]

■ 3. Section 212.504 is amended as follows:

■ a. By removing paragraphs (a)(i) and (ii) and (a)(xix) through (xxi);

■ b. By redesignating paragraphs (a)(iii) through (xviii) as paragraphs (a)(i) through (xvi) respectively; and

■ c. By redesignating paragraphs (a)(xxii) and (xxiii) as paragraphs (a)(xvii) and (xviii) respectively.

[FR Doc. E8–29993 Filed 12–17–08; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

RIN 0750–AG13

Defense Federal Acquisition Regulation Supplement; Para-Aramid Fibers and Yarns Manufactured in a Qualifying Country (DFARS Case 2008–D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a determination made by the Under Secretary of Defense for Acquisition, Technology, and Logistics with regard to the acquisition of items containing para-aramid fibers and yarns manufactured in a foreign country. The determination authorizes DoD to acquire articles containing para-aramid fibers and yarns manufactured in foreign countries that have entered into a defense memorandum of understanding with the United States.

DATES: *Effective date:* December 18, 2008.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before February 17, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D024, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2008–D024 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

10 U.S.C. 2533a restricts DoD procurement of foreign synthetic fabric or coated synthetic fabric, including textile fibers and yarns for use in such fabrics. Section 807 of the National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105–261) provides authority for DoD to waive the restriction at 10 U.S.C. 2533a with regard to para-aramid fibers and yarns. On February 12, 1999, the Under Secretary of Defense for Acquisition and Technology waived the restriction at 10 U.S.C. 2533a for para-aramid fibers and yarns manufactured in the Netherlands. On August 15, 2008, the Under Secretary of Defense for Acquisition, Technology, and Logistics expanded the existing waiver to permit the acquisition of para-aramid fibers and yarns manufactured in any qualifying country listed in DFARS 225.872–1.

This interim rule amends DFARS text addressing the acquisition of para-aramid fibers and yarns to implement the Under Secretary's August 15, 2008 determination. In addition, the rule clarifies the definition of ''qualifying country'' at DFARS 225.003 and 252.225–7012 by including a list of the qualifying countries within the definition instead of referring to the list at DFARS 225.872–1.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because small entities normally are not involved in the production of para-aramid fibers and yarns. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D024.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements the determination made by the Under Secretary of Defense for Acquisition, Technology, and Logistics on August 15, 2008, that procuring articles that contain only domestic para-aramid fibers and yarns would result in sole-source contracts or subcontracts for such fibers and yarns; such sole-source contracts or subcontracts would not be in the best interest of the Government, except as specifically justified and approved consistent with 10 U.S.C. 2304; and all qualifying countries listed at DFARS 225.872–1 permit the United States firms that manufacture para-aramid fibers and yarns to compete with foreign firms for the sale of para-aramid fibers and yarns in that country. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 225 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

■ 2. Section 225.003 is amended by revising paragraph (9) to read as follows:

225.003 Definitions.

* * * * *

(9) *Qualifying country* means a country with a memorandum of understanding or international agreement with the United States. The following are qualifying countries:

Australia
Austria
Belgium
Canada
Denmark
Egypt
Finland
France
Germany
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

* * * * *

■ 3. Section 225.7002–2 is amended by revising paragraph (o)(2) to read as follows:

225.7002–2 Exceptions.

* * * * *

(o) * * *

(2) The fibers and yarns are para-aramid fibers and yarns manufactured in a qualifying country.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212–7001 [Amended]

■ 4. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read ''(DEC 2008)''; and

■ b. In paragraph (b)(5) by removing ''(MAR 2008)'' and adding in its place ''(DEC 2008)''.

■ 5. Section 252.225–7012 is amended as follows:

■ a. By revising the clause date;

■ b. By redesignating paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5) respectively;

■ c. By adding a new paragraph (a)(3); and

■ d. By revising paragraphs (c)(5) and (c)(6)(ii) to read as follows:

252.225–7012 Preference for certain domestic commodities.

* * * * *

Preference for Certain Domestic Commodities (DEC 2008)

(a) * * *

(3) *Qualifying country* means a country with a memorandum of understanding or international agreement with the United States. The following are qualifying countries:

Australia
Austria
Belgium
Canada
Denmark
Egypt
Finland
France
Germany
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

* * * * *

(c) * * *

(5) To chemical warfare protective clothing produced in a qualifying country; or

(6) * * *

(ii) The fibers and yarns are para-aramid fibers and yarns manufactured in a qualifying country.

* * * * *

[FR Doc. E8–29994 Filed 12–17–08; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to update contact information in a contract clause and to make minor editorial corrections.

DATES: *Effective Date:* December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0311; facsimile 703–602–7887.

SUPPLEMENTARY INFORMATION: This final rule amends DFARS text as follows:

○ *252.203–7001.* Updates a phone number and adds a Web link.

○ *252.211–7007.* Corrects punctuation.

List of Subjects in 48 CFR Part 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR Part 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

252.203–7001 [Amended]

■ 2. Section 252.203–7001 is amended as follows:

■ a. By revising the clause date to read ''(DEC 2008)''; and

■ b. In paragraph (h) by removing ''(301) 809–4904'' and adding in its place ''301–937–1542; *www.ojp.usdoj.gov/BJA/grant/DPFC.html*''.

252.211–7007 [Amended]

■ 3. Section 252.211–7007 is amended as follows:

■ a. In paragraph (d)(5) by adding an ending parenthesis before the period; and

■ b. In paragraph (d)(10)(vi) by removing the ending parenthesis before the period.

[FR Doc. E8–29992 Filed 12–17–08; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–XM15

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; inseason retention limit adjustment.

SUMMARY: NMFS has determined that the Atlantic tunas General category daily Atlantic bluefin tuna (BFT) retention limit should be adjusted for the January 2009 time period, based on consideration of the determination criteria regarding inseason adjustments.

DATES: Effective January 1, 2009, through January 31, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson–Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the Consolidated Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP) (71 FR 58058, October 2, 2006).

The 2009 BFT fishing year, which is managed on a calendar year basis and subject to an annual calendar year quota, begins January 1, 2009. Starting on January 1, 2009, the General category daily retention limit (§ 635.23(a)(2)), is scheduled to revert back to the default retention limit of one large medium or giant BFT (measuring 73 inches (185 cm) CFL) or greater per vessel per day/trip. This scheduled retention limit applies to General category permitted vessels and HMS Charter/Headboat category permitted vessels (when fishing commercially for BFT).

Each of the General category time periods (January, June–August, September, October–November, and December) is allocated a portion of the annual General category quota, thereby ensuring extended fishing opportunities in years when catch rates are high and quota is available. In August, NMFS adjusted the General category limit for September through December 2008 from the default level of one large medium or giant BFT to three (thus maintaining a three fish limit for all of the 2008 season). However, NMFS decided not to make an adjustment for January 2009 until after the 2009 western Atlantic BFT Total Allowable Catch (TAC) and resulting U.S. quota were set at the November 2008 ICCAT meeting (73 FR 50885, August 29, 2008).

The 2008 ICCAT recommendation reduced the TAC (currently 2,100 mt) to 1,900 mt for 2009, resulting in a 2009 U.S. quota of 1,034.9 mt. Consistent with the allocation scheme established in the Consolidated HMS FMP, the baseline General category share of the 2009 U.S. quota would be 475.7 mt, and the baseline January 2009 General category subquota would be 25.2 mt.

In order to implement the ICCAT recommendation, NMFS is planning to publish proposed quota specifications in the beginning of 2009 to set BFT quotas for each of the established domestic fishing categories and to set effort controls for the General category and Angling category. In the meantime, the General category BFT fishery remains active into the winter, with substantial landings reported in November and December.

Adjustment of General Category Daily Retention Limits

Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of three per vessel based on consideration of the criteria provided under § 635.27(a)(8), which include: the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made; the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds.

NMFS has considered the set of criteria cited above and their applicability to the General category BFT retention limit for the 2009 fishing year. For example, January 2008 catch rates were high, and under a 3–fish limit, the January subquota was exceeded. Based on these considerations, and the reduced 2009 quota and subquotas, NMFS has determined that the General category retention limit should be adjusted to allow for retention of the anticipated 2009 General category quota, but that an approach more conservative than used for January 2008 is warranted. Therefore, NMFS increases the General category retention limit from the default

limit to two large medium or giant BFT, measuring 73 inches CFL or greater, per vessel per of one day/trip, effective January 1, 2009, through January 31, 2009. Regardless of the duration of a fishing trip, the daily retention limit applies upon landing. For example, whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the daily limit of two fish may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, and applies to those vessel permitted in the General category as well as to those HMS Charter/Headboat permitted vessels fishing commercially for BFT.

This adjustment is intended to provide a reasonable opportunity to harvest the U.S. landings quota of BFT without exceeding it, while maintaining an equitable distribution of fishing opportunities, to help achieve optimum yield in the General category BFT fishery, to collect a broad range of data for stock monitoring purposes, and to be consistent with the objectives of the Consolidated HMS FMP.

Monitoring and Reporting

NMFS selected the daily retention limit and the duration after examining an array of data as it pertains to the determination criteria. These data included, but were not limited to, current and previous catch and effort rates, quota availability, previous public comments on inseason management measures, stock status, etc. NMFS will continue to monitor the BFT fishery closely through the mandatory dealer landing reports, which NMFS requires to be submitted within 24 hours of a dealer receiving BFT. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional retention limit adjustments are necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas.

Closures or subsequent adjustments to the daily retention limits, if any, will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872–8862 or (978) 281–9260, or access the internet at *www.hmspermits.gov*, for updates on quota monitoring and retention limit adjustments.

Classification

The Assistant Administrator for NMFS (AA), finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the Consolidated HMS FMP provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Affording prior notice and opportunity for public comment to implement these retention limits is impracticable as it would preclude NMFS from acting promptly to allow harvest of BFT that are available on the fishing grounds. Analysis of available data shows that the General category BFT retention limits may be increased with minimal risks of exceeding the ICCAT–allocated quota.

Delays in increasing these retention limits would adversely affect those General and Charter/Headboat category vessels that would otherwise have an opportunity to harvest more than the default retention limit of one BFT per day and may exacerbate the problem of low catch rates and quota rollovers. Limited opportunities to harvest the respective quotas may have negative social and economic impacts to U.S. fishermen that either depend upon catching the available quota within the time periods designated in the Consolidated HMS FMP. Adjustment to the retention limit needs to be effective January 1, 2009, to minimize any unnecessary disruption in fishing patterns and for the impacted sectors to benefit from the adjustments so as to not preclude fishing opportunities from fishermen who only have access to the fishery during this time period.

Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, and because this action relieves a restriction (i.e., the default retention limit is one fish per vessel/trip but this action increases that limit and allows retention of more fish), there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.23(a)(4) and (b)(3) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 15, 2008.

Alan D. Risenhoover,

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

[FR Doc. E8–30109 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 244

Thursday, December 18, 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 39

[Docket No. FAA–2008–1318; Directorate Identifier 2008–NM–155–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

* * * * ** *

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion. * * *

* * * * *

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

DATES: We must receive comments on this proposed AD by January 20, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Dan Parrillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–171, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1318; Directorate Identifier 2008–NM–155–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On January 3, 2008, we issued AD 2008–01–04, Amendment 39–15329 (73 FR 1964, January 11, 2008), which superseded AD 2007–17–07, Amendment 39–15165 (72 FR 46555, August 21, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2008–01–04, we received a report that the AD was not effective in reducing the number of flap failures on Model CL–600–2B19 airplanes. Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2007–10R1, dated August 18, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

* * * * *

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion. * * *

* * * * *

This proposed AD would supersede AD 2008–01–04 and would retain the requirements of that AD, *i.e.*, revising the airplane flight manual (AFM) to incorporate a temporary revision into the AFM, adding operational procedures into the AFM, training flight crewmembers and operational control/dispatch personnel on the operational procedures, and doing corrective maintenance actions.

This proposed AD would also add corrective maintenance actions that include a pressure test of the flexible drive-shaft and corrective actions (which include replacing any flexible drive-shaft that exhibits leakage (any sign of bubbles within one minute during the pressure test in water) with a serviceable flexible drive-shaft), and a low temperature torque test of the flap actuators and corrective actions (which include installing a serviceable actuator if torque test results are not satisfactory).

This proposed AD would also require revising the AFM to incorporate a new temporary revision (TR) into the AFM. The TR adds maximum flaps operating speed data and clarifies maximum flaps extended speeds. This proposed AD would also modify the Operational Limitations and the annual simulator training for ''Flap Zero Landing'' events.

In addition, this proposed AD also would require certain maintenance actions (including checking flap system components and repairing or replacing components of the flap system) following a flap fail event and installing

a cockpit placard that specifies new flap operating limitations. This proposed AD would also allow installing modified flap actuators, which would terminate certain sections of the operational procedures.

This proposed AD also re-identifies the airplanes affected by paragraph (g)(3) of the existing AD. The accumulated time on the actuators specified in paragraphs (g)(3)(i) and (g)(3)(ii) of this AD has been extended from ''2,000 flight hours'' to ''5,000 flight cycles.'' This proposed AD would also require repetitive low temperature torque tests of the flap actuators.

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

Relevant Service Information

Bombardier has issued the following service information:

- Service Bulletin 601R–11–090, dated August 15, 2008;
- Service Bulletin 601R–27–150, dated July 12, 2007;
- Service Bulletin 601R–27–151, Revision B, dated June 12, 2008;
- Canadair Regional Jet TR RJ/165–1, dated August 7, 2008, to the Canadair Regional Jet Airplane Flight Manual CSP A–012; and
- Canadair Regional Jet TR 05–035, dated July 13, 2007, to the Canadair Regional Jet Aircraft Maintenance Manual; and Section 27–50–00, Revision 38, dated January 10, 2008, of the Canadair Regional Jet Fault Isolation Manual.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Clarification of Part Number Reference

In paragraph (g)(3) of AD 2008–01–04, we referred only to the vendor part numbers 852D100–19/–21, 853D100–19/–20, and 854D100–19/–20. In paragraph (g)(3) of this proposed AD, we have added the corresponding Bombardier part numbers 601R93101–19/–21, 601R93103–19/–20, and 601R93104–19/–20.

Method of Compliance With AD 2006–12–21

Installing flap actuators in accordance with paragraph (h)(5) of the proposed AD is acceptable for compliance with the installation of Number 3 and Number 4 flap actuators required by paragraph (h) of AD 2006–12–21, Amendment 39–14647 (71 FR 34793, June 16, 2006), for that actuator only. The remaining requirements of paragraph (h) of AD 2006–12–21 remain in effect.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 684 products of U.S. registry. We also estimate that it would take about 18 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost a negligible amount per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $984,960, or $1,440 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15329 (73 FR 1964, January 11, 2008) and adding the following new AD:

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2008–1318; Directorate Identifier 2008–NM–155–AD.

Comments Due Date

(a) We must receive comments by January 20, 2009.

Affected ADs

(b) The proposed AD supersedes AD 2008–01–04, Amendment 39–15329.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 7990 and 8000 and subsequent.

Subject

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

Reason

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

* * * * *

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion. * * *

* * * * *

This AD supersedes AD 2008–01–04 and retains the requirements of that AD, *i.e.*, revising the airplane flight manual (AFM) to incorporate a temporary revision into the AFM, adding operational procedures into the AFM, training flight crewmembers and operational control/dispatch personnel on the operational procedures, and doing corrective maintenance actions. This AD also adds corrective maintenance actions that include a pressure test of the flexible drive-shaft and corrective actions, and a low temperature torque test of the flap actuators and corrective actions. This AD also requires revising the AFM to incorporate a new temporary revision (TR) into the AFM. The TR adds maximum flaps operating speed data and clarifies maximum flaps extended speeds. This AD also modifies the Operational Limitations and the annual simulator training for ''Flap Zero Landing'' events. In addition, this AD also requires certain maintenance actions following a flap fail event and installing a cockpit placard that specifies new flap operating limitations. This AD also allows installing modified flap actuators, which would terminate certain sections of the operational procedures. This AD also requires repetitive low temperature torque tests of the flap actuators.

Requirements of AD 2007–17–07, Amendment 39–15165: Actions and Compliance

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

(1) Part I. Airplane Flight Manual (AFM) Change: Within 30 days after September 5, 2007 (the effective date of AD 2007–17–07), revise the Canadair Regional Jet Airplane Flight Manual CSP A–012, by incorporating the information in Canadair Regional Jet Temporary Revision (TR) RJ/165, dated July 6, 2007, into the AFM. Accomplishing the requirements of paragraph (h)(1) of this AD terminates the requirements of this paragraph and the AFM revision required by this paragraph may be removed from the AFM.

Note 1: The actions required by paragraph (f)(1) of this AD may be done by inserting a copy of Canadair Regional Jet TR RJ/165, dated July 6, 2007, into the Canadair Regional Jet Airplane Flight Manual CSP A–012. When this TR has been included in general revisions of the AFM, the general revisions may be inserted in the AFM.

(2) Part II. Operational Procedures: Within 30 days after September 5, 2007, revise the Limitations Section of the Canadair Regional Jet Airplane Flight Manual CSP A–012, to include the following statement. This may be done by inserting a copy of paragraph (f)(2) of this AD in the AFM. Accomplishing the requirements of paragraph (h)(2) of this AD terminates the requirements of this paragraph and the AFM revision required by this paragraph may be removed from the AFM.

''1. Flap Extended Diversion

Upon arrival at the destination airport, an approach shall not be commenced, nor shall the flaps be extended beyond the 0 degree position, unless one of the following conditions exists:

a. When conducting a precision approach, the reported visibility (or RVR) is confirmed to be at or above the visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this visibility until after landing; or

b. When conducting a non-precision approach, the reported ceiling and visibility (or RVR) are confirmed to be at or above the ceiling and visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this ceiling and visibility until after landing; or

c. An emergency or abnormal situation occurs that requires landing at the nearest suitable airport; or

d. The fuel remaining is sufficient to conduct the approach, execute a missed approach, divert to a suitable airport with the flaps extended to the landing position, conduct an approach at the airport and land with 1000 lb (454 kg) of fuel remaining.

Note 1: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended missed approach, climb, diversion and approach fuel consumption.

Note 2: Terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route.

Note 3: For the purpose of this AD, a ''suitable airport'' is an airport that has at least one usable runway, served by an instrument approach if operating under Instrument Flight Rules (IFR), and the airport is equipped as per the applicable regulations and standards for marking and lighting. The existing and forecast weather for this airport shall be at or above landing minima for the approach in use.

2. Flap Failure After Takeoff

When a takeoff alternate is filed, terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route to that alternate, or other suitable airport. The fuel at departure shall be sufficient to divert to the takeoff alternate or other suitable airport with the flaps extended to the takeoff position, conduct an approach and land with 1000 lb (454 kg) of fuel remaining.

Note: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended, climb, diversion and approach fuel consumption.

3. Flap Zero Landing

Operations where all useable runways at the destination and alternate airports are forecast to be wet or contaminated (as defined in the AFM) are prohibited during the cold weather season (December to March inclusive in the northern hemisphere) unless one of the following conditions exists:

a. The flap actuators have been verified serviceable in accordance with Part C (Low Temperature Torque Test of the Flap Actuators) of SB 601R–27–150, July 12, 2007, or

b. The flight is conducted at a cruise altitude where the SAT is −60 deg C or warmer. If the SAT in flight is colder than −60 deg C, descent to warmer air shall be initiated within 10 minutes, or

c. The Landing Distance Available on a useable runway at the destination airport is at least equal to the actual landing distance required for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions, or

d. The Landing Distance Available on a useable runway at the filed alternate airport, or other suitable airport is at least equal to the actual landing distance for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

Note 1: If the forecast destination weather is less than 200 feet above DH or MDA, or less than 1 mile (1500 meters) above the authorized landing visibility (or equivalent RVR), as applied to the usable runway at the destination airport, condition 3.a., 3.b., or 3.d. above must be satisfied.

Note 2: When conducting No Alternate IFR (NAIFR) operations, condition 3.a., 3.b., or 3.c. above must be satisfied.''

(3) Part III. Training: As of 30 days after September 5, 2007, no affected airplane may be operated unless the flight crewmembers of that airplane and the operational control/dispatch personnel for that airplane have received training that is acceptable to the Principal Operations Inspector (POI) on the operational procedures required by paragraph (f)(2) of this AD. Accomplishing the requirements of paragraph (h)(3)(i) of this AD terminates the requirements of this paragraph.

(4) Part IV. Maintenance Actions: Within 120 days after September 5, 2007, do the cleaning and lubrication of the flexible shafts, installation of metallic seals in the flexible drive-shafts, and all applicable related investigative and corrective actions by doing all the applicable actions specified

in ''PART A'' of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–150, dated July 12, 2007; except if torque test results are not satisfactory, before further flight, install a serviceable actuator in accordance with the service bulletin or, if no serviceable actuators are available, contact the Manager, New York Aircraft Certification Office, FAA, for corrective action. Do all applicable related investigative and corrective actions before further flight.

Requirements of AD 2008–01–04: Actions and Compliance With Revised Affected Airplanes for Paragraph (g)(3)

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

(1) As of November 30, 2008, no affected airplane may be operated unless the flight crewmembers of that airplane have received simulator training on reduced or zero flap landing that is acceptable to the POI. Thereafter, this training must be done during the normal simulator training cycle, at intervals not to exceed 12 months. Accomplishing the requirements of paragraph (h)(3)(ii) of this AD terminates the requirements of this paragraph.

(2) Within 24 months or 4,000 flight hours after February 15, 2008 (the effective date of AD 2008–01–04), whichever occurs first: Do a pressure test of the flexible drive-shaft, and do all applicable corrective actions, by doing all the applicable actions specified in ''PART B'' of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–150, dated July 12, 2007. Do all applicable corrective actions before further flight.

(3) For airplanes having flap actuators, part numbers (P/Ns), 852D100–19/–21, 853D100–19/–20, and 854D100–19/–20 (Bombardier P/Ns 601R93101–19/–21, 601R93103–19/–20, and 601R93104–19/–20), specified in paragraphs (g)(3)(i) and (g)(3)(ii) of this AD: Within 24 months after February 15, 2008, do a low temperature torque test of the flap actuators, and do all applicable corrective actions, by doing all the applicable actions specified in ''PART C'' of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–150, dated July 12, 2007. Do all applicable corrective actions before further flight.

(i) Airplanes having actuators that have not been repaired and that have accumulated more than 5,000 flight cycles since new.

(ii) Airplanes having actuators that have been repaired and that have accumulated more than 5,000 flight cycles on the inboard pinion shaft seals, P/Ns 853SC177–1/–2.

New Requirements of This AD: Actions and Compliance

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

(1) Part I. New AFM Change: Within 30 days after the effective date of this AD, revise the Canadair Regional Jet Airplane Flight Manual (AFM) CSP A–012, by incorporating the information in Canadair Regional Jet Temporary Revision (TR) RJ/165–1, dated August 7, 2008, into the airplane flight manual. Accomplishing this action terminates the requirements of paragraph (f)(1) of this AD and after this action has been done, the AFM revision required by paragraph (f)(1) of this AD may be removed from the AFM.

Note 2: The actions required by paragraph (h)(1) of this AD may be done by inserting a copy of Canadair Regional Jet TR RJ/165–1, dated August 7, 2008, into the Canadair Regional Jet AFM CSP A–012. When this TR has been included in general revisions of the AFM, the general revisions may be inserted in the AFM.

(2) Part II. New Operational Procedures: Within 30 days after the effective date of this AD, revise the Limitations Section of the Canadair Regional Jet AFM CSP A–012, to include the following statement. This may be done by inserting a copy of paragraph (h)(2) of this AD into the AFM. Accomplishing this action terminates the requirements of paragraph (f)(2) of this AD and after this action has been done, the AFM revision required by paragraph (f)(2) of this AD may be removed from the AFM.

''1. Flap Extended Diversion

Upon arrival at the destination airport, an approach shall not be commenced, nor shall the flaps be extended beyond the 0 degree position, unless one of the following conditions exists:

a. When conducting a precision approach, the reported visibility (or RVR) is confirmed to be at or above the visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this visibility until after landing; or

b. When conducting a non-precision approach, the reported ceiling and visibility (or RVR) are confirmed to be at or above the ceiling and visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this ceiling and visibility until after landing; or

c. An emergency or abnormal situation occurs that requires landing at the nearest suitable airport; or

d. The fuel remaining is sufficient to conduct the approach, execute a missed approach, divert to a suitable airport with the flaps extended to the landing position, conduct an approach at the airport and land with 1000 lb (454 kg) of fuel remaining.

Note 1: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended missed approach, climb, diversion and approach fuel consumption.

Note 2: Terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route.

Note 3: For the purpose of this AD, a ''suitable airport'' is an airport that has at least one usable runway, served by an instrument approach if operating under Instrument Flight Rules (IFR), and the airport is equipped as per the applicable regulations and standards for marking and lighting. The existing and forecast weather for this airport shall be at or above landing minima for the approach in use.

2. Flap Failure After Takeoff

When a takeoff alternate is filed, terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route to that alternate, or other suitable airport. The fuel at departure shall be sufficient to divert to the takeoff alternate or other suitable airport with the flaps extended to the takeoff position, conduct an approach and land with 1000 lb (454 kg) of fuel remaining.

Note: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended, climb, diversion and approach fuel consumption.

3. Flap Zero Landing

Operations where all useable runways at the destination and alternate airports are forecast to be wet or contaminated (as defined in the AFM) are prohibited during the cold weather season (December to March inclusive in the northern hemisphere) unless one of the following four conditions (a. through d.) exists:

a. Each installed flap actuator meets one of the following three conditions:

(i) Actuators have less than 5000 flight cycles (FC) since new or overhaul and/or the actuators have been verified serviceable in accordance with Part C (Low Temperature Torque Test of the Flap Actuators) of Bombardier Service Bulletin (SB) 601R–27–150, issued July 12, 2007, or

(ii) Actuators have P/N 601R93101–19/–21 (Vendor P/N 852D100–19/–21), P/N 601R93103–19/–20 (Vendor P/N 853D100–19/–20), or P/N 601R93104–19/–20 (Vendor P/N 854D100–19/–20), and have less than 5000 FC since repair (where it can be shown that the actuator inboard pinion seals, Eaton P/Ns 853SC177–1 and –2, were replaced), or

(iii) Actuators have P/N 601R93101–23/–25 (Vendor P/N 852D100–23/–25) installed at all inboard flap positions, P/N 601R93103–23/–24 (Vendor P/N 853D100–23/–24) installed at outboard flap No.3 position, and P/N 601R93104–23/–24 (Vendor P/N 854D100–23/–24) installed at outboard flap No.4 position.

b. Pre-dispatch forecast ground temperature at the time of arrival at destination airport is above −25 deg C, utilizing a reliable weather forecast service acceptable to the principal operations inspector (POI).

c. The Landing Distance Available on a useable runway at the destination airport is at least equal to the actual landing distance required for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

d. The Landing Distance Available on a useable runway at the filed alternate airport, or other suitable airport is at least equal to the actual landing distance for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

Note 1: If the forecast destination weather is less than 200 feet above DH or MDA, or less than 1 mile (1500 meters) above the authorized landing visibility (or equivalent RVR), as applied to the usable runway at the destination airport, condition 3.a., 3.b., or 3.d. above must be satisfied.

Note 2: When conducting No Alternate IFR (NAIFR) operations, condition 3.a., 3.b., or 3.c. above must be satisfied.''

4. Dispatch Following a Flap Failed Event

If normal flap system operation can be restored after an on-ground system reset, continued revenue operation of that airplane is permitted, provided conditions a., and b., and c. or d., below are satisfied:

a. Prior to dispatch following an on-ground circuit breaker reset, the flaps must be operated for five full extension/retraction cycles by the flight crew with no subsequent failures.

b. Prior to dispatch following an on-ground circuit breaker reset, the thrust reversers, ground spoilers and brake system are verified operational prior to each flight.

c. The Landing Distance Available on a useable runway at the destination airport is at least equal to the actual landing distance required for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

d. The Landing Distance Available on a useable runway at the filed alternate airport, or other suitable airport is at least equal to the actual landing distance for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

Note 1: If the forecast destination weather is less than 200 feet above DH or MDA, or less than 1 mile (1500 meters) above the authorized landing visibility (or equivalent RVR), as applied to the usable runway at the destination airport, condition 4.d. above must be satisfied.

Note 2: When conducting No Alternate IFR (NAIFR) operations, condition 4.c. above must be satisfied.''

(3) Part III. New Training: Do the requirements specified in paragraphs (h)(3)(i) and (h)(3)(ii) of this AD.

(i) As of 30 days after the effective date of this AD, no affected airplane may be operated unless the flight crewmembers of that airplane and the operational control/dispatch personnel for that airplane have received training that is acceptable to the Principal Operations Inspector (POI) on the operational procedures required by paragraph (h)(2) of this AD. Accomplishing this action terminates the requirements specified in paragraph (f)(3) of this AD.

(ii) As of September 30, 2009, no affected airplane may be operated unless the flight crewmembers of that airplane have received simulator training on reduced or zero flap landing that is acceptable to the Principal Operations Inspector (POI). Thereafter, this training must be done during the normal simulator training cycle, at intervals not to exceed 12 months. Accomplishing this action terminates the requirements specified in paragraph (g)(1) of this AD.

(4) Part IV. New Maintenance Action: For airplanes on which the low temperature torque test of the flap actuators is required by paragraph (g)(3) of this AD: Within 12 months after doing the low temperature torque test specified in paragraph (g)(3) of this AD, do a low temperature torque test of the flap actuators, and do all applicable corrective actions specified in Part C of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–150, dated July 12, 2007. Do all applicable corrective actions before further flight. For airplanes identified in paragraphs (h)(4)(i) and (h)(4)(ii) of this AD, repeat the low temperature torque test thereafter at intervals not to exceed 12 months.

(i) Airplanes having actuators that have not been repaired and that have accumulated more than 5,000 flight cycles since new.

(ii) Airplanes having actuators that have been repaired and that have accumulated more than 5,000 flight cycles on the inboard pinion shaft seals, P/Ns 853SC177–1/–2.

(5) Part IV. New Optional Maintenance Action: Installation of actuators having P/N 601R93101–23/–25 (Vendor P/N 852D100–23/–25), P/N 601R93103–23/–24 (Vendor P/N 853D100–23/–24), and P/N 601R93104–23/–24 (Vendor P/N 854D100–23/–24) in accordance with Bombardier Service Bulletin 601R–27–151, Revision B, dated June 12, 2008, terminates the requirements of paragraph ''3. Flap Zero Landing,'' of the statement required by paragraph (h)(2) of this AD. After doing the installation specified in this paragraph, paragraph ''3. Flap Zero Landing,'' specified in paragraph (h)(2) of this AD, may be removed from the limitations section of the AFM.

(6) Part V. Dispatch following a flap fail event: For airplanes on which a flap fail message occurs, prior to further flight, do all applicable maintenance actions in accordance with Section 27–50–00 of the Bombardier CRJ100/200/440 Fault Isolation Manual (FIM) CSP A–009, Revision 38, dated January 10, 2008; except if maintenance actions cannot be done and normal flap system operation can be restored after an on-ground circuit breaker reset operation, then continued revenue operation is permitted without further maintenance action for up to 10 flight cycles, subject to the operating limitations specified by the procedure titled ''4. Dispatch Following a Flap Failed Event,'' specified in paragraph (h)(2) of this AD; except as provided by paragraphs (h)(6)(i) and (h)(6)(ii) of this AD. The circuit breaker reset operation can be performed by the flightcrew when authorized by the operator's maintenance control organization.

(i) Within 10 flight cycles following the initial on-ground circuit breaker reset operation, do the maintenance actions specified in paragraph (h)(6) of this AD.

(ii) If another flap fail event occurs any time after the initial circuit breaker reset operation, do the maintenance actions specified in paragraph (h)(6) of this AD before further flight.

(7) Part V. Operators are required to report all fault data, including flaps electronic control unit (FECU) codes, to Bombardier within 30 days after each failure occurrence, or 30 days after the effective date of this AD, in accordance with Task 05–51–50–980–801 as introduced in the Canadair Regional Jet TR 05–035, dated July 13, 2007, to the Canadair Regional Jet Aircraft Maintenance Manual (AMM).

(8) Part VI. Cockpit Placard: Within 120 days after the effective date of this AD, install a flight compartment placard in accordance with Bombardier Service Bulletin 601R–11–090, dated August 15, 2008.

Method of Compliance With AD 2006–12–21

(i) Installing flap actuators in accordance with paragraph (h)(5) of this AD is acceptable for compliance with the installation of Number 3 and Number 4 flap actuators required by paragraph (h) of AD 2006–12–21, Amendment 39–14647. All other requirements of paragraph (h) of AD 2006–12–21 are still applicable and must be complied with.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows:

(1) The maintenance tasks specified in the first row of the table in ''Part IV. Maintenance Actions'' of the MCAI do not specify a corrective action if an actuator is not serviceable (*i.e.*, torque test results are not satisfactory). However, this AD requires contacting the FAA or installing a serviceable actuator before further flight if torque test results are not satisfactory. (Reference paragraph (f)(4) of this AD.)

(2) Although paragraph 2. of ''Part III. Training'' of the MCAI recommends accomplishing the new training within 1 year, this AD requires accomplishing the training before September 30, 2009, in order to ensure that the actions are completed prior to the onset of cold weather operations.

(3) For the Flaps Zero Landing Requirements of Part II 3.a (i), the MCAI refers to actuators with less than 5,000 flight cycles. We have clarified sub-paragraph 3.a.(i) of paragraph ''3. Flap Zero Landing,'' of the statement specified in paragraph (h)(2) of this AD that the 5,000 flight cycles is since new or overhauled.

(4) For the Flaps Zero Landing requirements of Part II.3 c., the MCAI requires a pre-dispatch forecast ground temperature at the time of arrival at the destination airport to be above −25 deg C. This AD clarifies sub-paragraph 3.b. of paragraph ''3. Flap Zero Landing,'' of the statement specified in paragraph (h)(2) of this AD that the source of the forecast is to be a reliable weather forecast service acceptable to the principal operations inspector.

Other FAA AD Provisions

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

(1)(i) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Parrillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–171, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(ii) AMOCs approved previously in accordance with AD 2008–01–04 are

approved as AMOCs for the corresponding provisions of this AD.

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

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

Related Information

(k) Refer to MCAI Canadian Airworthiness Directive CF–2007–10R1, dated August 18, 2008, and the service information identified in Table 1 of this AD for related information.

TABLE 1—RELATED SERVICE INFORMATION

Service information	Revision level	Date
Bombardier Service Bulletin 601R–27–150	Original	July 12, 2007.
Bombardier Service Bulletin 601R–27–151	B	June 12, 2008.
Bombardier Service Bulletin 601R–11–090	Original	August 15, 2008.
Canadair Regional Jet TR RJ/165 to the Canadair Regional Jet AFM CSP A–012	Original	July 6, 2007.
Canadair Regional Jet TR RJ/165–1 to the Canadair Regional Jet AFM CSP A–012	Original	August 7, 2008.
Canadair Regional Jet TR 05–035 to the Canadair Regional Jet AMM	Original	July 13, 2007.
Section 27–50–00 of the Canadair Regional Jet CRJ100/200/440 FIM	38	January 10, 2008.

Issued in Renton, Washington, on December 11, 2008.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–30037 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1319; Directorate Identifier 2008–CE–071–AD]

RIN 2120–AA64

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

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Cessna Aircraft Company (Cessna) Models 208 and 208B airplanes. This proposed AD would require you to modify the aileron carry-through cable attachment to the aileron upper quadrant with parts of improved design. This proposed AD results from reports of a ''catch'' in the aileron control system when the control yoke is turned. We are proposing this AD to prevent the cable attach fitting on the aileron upper quadrant assembly from rotating and possibly contacting or interfering with the aileron lower quadrant assembly, which could result in limited roll control and reduced handling capabilties.

DATES: We must receive comments on this proposed AD by February 17, 2009.

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

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

For service information identified in this proposed AD, contact Cessna Aircraft Company, P.O. Box 7704, Wichita, Kansas 67277; telephone: (800) 423–7762 or (316) 517–6056; Internet: *http://www.cessna.com*.

FOR FURTHER INFORMATION CONTACT: Ann Johnson, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4105; fax: 316–946–4107; e-mail address: *ann.johnson@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2008–1319; Directorate Identifier 2008–CE–071–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Discussion

We have reports of a ''catch'' in the aileron control system when the control yoke is turned on a Cessna Aircraft Company (Cessna) Model 208 airplane.

The ''catch'' is caused by the cable end fitting, part number (P/N) 2660033, rotating out of its normal position and rubbing against the lower aileron quadrant assembly, P/N 2660032–7.

The reason that the cable end fitting rotates is unknown. Tension on the cable is what has been keeping the fitting flat and preventing rotation.

Cessna Aircraft Company has reconfigured the design of the existing nut on the cable fitting with two jam nuts, a spring washer, and safety wire to prevent rotation of the cable end.

This condition, if not corrected, could result in limited roll control and reduced handling capabilties.

Relevant Service Information

We have reviewed Cessna Caravan Service Bulletin CAB08–6, dated October 27, 2008.

The service information describes procedures for modifying the aileron carry-through cable attachment to the aileron upper quadrant.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition

described previously is likely to exist or develop on other products of the same type design. This proposed AD would require you to modify the aileron carry-through cable attachment to the aileron upper quadrant with parts of improved design.

Costs of Compliance

We estimate that this proposed AD would affect 794 airplanes in the U.S. registry.

We estimate the following costs to do the proposed modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 work-hours × $80 per hour = $160	Not applicable	$160	$127,040

We estimate the following costs to do any necessary repairs and replacements that would be required based on doing the proposed modification. We have no way of determining the number of airplanes that may need these repairs or replacements.

We estimate the following costs to do possible damage repair to the aileron lower quadrant assembly, if necessary:

Labor cost	Parts cost	Total cost per airplane
.5 work-hours × $80 per hour = $40	Not applicable	$40

We estimate the following costs to do possible removal and installation of the aileron lower quadrant assembly, if necessary:

Labor cost	Parts cost	Total cost per airplane
2 work-hours × $80 per hour = $160	Not applicable	$160

We estimate the following costs to do possible removal and installation of the headliner, if necessary:

Labor cost	Parts cost	Total cost per airplane
16 work-hours × $80 per hour = $1,280	Not applicable	$1,280

Warranty credit will be given for parts and labor to the extent specified in the manufacturer's service bulletin.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Cessna Aircraft Company: Docket No. FAA–2008–1319; Directorate Identifier 2008–CE–071–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by February 17, 2009.

Affected ADs

(b) None.

Applicability

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

Model	Serial Nos.
208	20800001 through 20800415 and 20800417 through 20800419.
208B	208B0001 through 208B1081, 208B1083 through 208B1215, 208B1217 through 208B1257, 208B1259 through 208B1305, 208B1307, and 208B1309 through 208B1310.

Unsafe Condition

(d) This AD results from reports of a ''catch'' in the aileron control system when the control yoke is turned. We are issuing this AD to prevent the cable attach fitting on the aileron upper quadrant assembly from rotating and possibly contacting or interfering with the aileron lower quadrant assembly, which could result in limited roll control and reduced handling capabilties.

Compliance

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

Actions	Compliance	Procedures
Modify the aileron carry-through cable attachment to the aileron upper quadrant with parts of improved design.	Within the next 100 hours time-in-service after the effective date of this AD or within the next 6 months after the effective date of this AD, whichever occurs first.	Follow the Accomplishment Instructions in Cessna Caravan Service Bulletin CAB08–6, dated October 27, 2008.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Ann Johnson, Aerospace Engineer, FAA, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4105; fax: 316–946–4107; e-mail address: *ann.johnson@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(g) To get copies of the service information referenced in this AD, contact Cessna Aircraft Company, P.O. Box 7704, Wichita, Kansas 67277; telephone: (800) 423–7762 or (316) 517–6056; Internet: *http://www.cessna.com*. To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov*.

Issued in Kansas City, Missouri, on December 12, 2008.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–30044 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1291; Airspace Docket No. 08–AGL–20]

Proposed Amendment of Class E Airspace; Milwaukee, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace for the Milwaukee, WI, area. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Waukesha County Airport, Waukesha, WI. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Waukesha County Airport. Also, a technical amendment is being made changing the name of John H. Batten Field to John H. Batten Airport.

DATES: 0901 UTC. Comments must be received on or before February 2, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1291/Airspace Docket No. 08–AGL–20, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1291/Airspace Docket No. 08–AGL–20.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace for the Milwaukee, WI, area. Specifically, additional controlled airspace is needed for SIAPs operations at Waukesha County Airport, Waukesha, WI. Also, John H. Batten Field would be changed to John H. Batten Airport. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the 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. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of 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 amend controlled airspace for the Milwaukee, WI area.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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; AIRWAYS; ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL WI E5 Milwaukee, WI [Amended]

Milwaukee, General Mitchell International Airport, WI
(Lat. 42°56′50″ N., long. 87°53′48″ W.)
Racine, John H. Batten Airport, WI
(Lat. 42°45′40″ N., long. 87°48′50″ W.)
Waukesha, Waukesha County Airport, WI
(Lat. 43°02′28″ N., long. 88°14′13″ W.)
Milwaukee, Lawrence J. Timmerman Airport, WI
(Lat. 43°06′37″ N., long. 88°02′04″ W.)

That airspace extending upward from 700 feet above the surface within a 8.4-mile radius of General Mitchell International Airport, and within an 8.1-mile radius of John H. Batten Airport, and within a 7.5-mile radius of the Waukesha County Airport, and within 2 miles each side of the 282° bearing from the Waukesha County Airport extending from the 7.5-mile radius to 10.5 miles west of the Waukesha County Airport, and within an 8.9-mile radius of Lawrence J. Timmerman Airport.

* * * * *

Issued in Fort Worth, TX on December 10, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–30023 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1211; Airspace Docket No. 08–AGL–13]

Proposed Amendment of Class E Airspace; Medford, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace at Medford, WI. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Taylor County Airport, Medford, WI. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Taylor County Airport.

DATE: 0901 UTC. Comments must be received on or before February 2, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1211/Airspace Docket No. 08–AGL–13, at the beginning of your comments. You

may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1211/Airspace Docket No. 08–AGL–13.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace for SIAPs operations at Taylor County Airport, Medford, WI. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the 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. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of 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 amend controlled airspace at Taylor County Airport, Medford, WI.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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; AIRWAYS; ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL WI E5 Medford, WI [Amended]

Medford, Taylor County Airport, WI
(Lat. 45°06′04″ N., long. 90°18′12″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Taylor County Airport, and within 2.7 miles each side of the 162° bearing from the airport extending from the 6.8-mile radius to 7 miles southeast of the airport.

* * * * *

Issued in Fort Worth, TX on December 9, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–30035 Filed 12–17–08; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1104; Airspace Docket No. 08–ACE–2]

Proposed Amendment of Class E Airspace; Sioux City, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace at Sioux City, IA. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Sioux

Gateway Airport/Col. Bud Day Field, Sioux City, IA. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Sioux Gateway Airport/Col. Bud Day Field.

DATES: 0901 UTC. Comments must be received on or before February 2, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1104/Airspace Docket No. 08–ACE–2, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd, Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1104/Airspace Docket No. 08–ACE–2.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by adding additional controlled Class E airspace for SIAPs operations at Sioux Gateway Airport/Col. Bud Day Field, Sioux City, IA. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the 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. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of 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 amend controlled airspace at Sioux City, IA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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; AIRWAYS; ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE IA E5 Sioux City, IA [Amended]

Sioux City, Sioux Gateway Airport/Col. Bud Day Field, IA
(Lat. 42°24′09″ N., long. 96°23′04″ W.)
Sioux City VORTAC
(Lat. 42°20′40″ N., long. 96°19′25″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Sioux Gateway Airport/Col. Bud Day Field and within 3 miles each side of the 139° radial of the Sioux City VORTAC extending from the 7-mile radius to 17.8 miles southeast of the VORTAC, and within 3 miles each side of the 319° radial of the Sioux City VORTAC extending from the 7-mile radius to 25.3 miles northwest of the VORTAC, and within 3.8 miles each side of the 316° bearing from Sioux Gateway Airport/Col. Bud Day Field extending from the 7-mile radius to 10.5 miles northwest of the airport, and within 4 miles each side of the 001° bearing from Sioux Gateway Airport/Col. Bud Day

Field extending from the 7-mile radius to 12 miles northwest of the airport.

* * * * *

Issued in Fort Worth, TX on December 10, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–30022 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1185; Airspace Docket No. 08–AGL–11]

Proposed Amendment of Class E Airspace; Columbus, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace at Columbus, OH. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Rickenbacker International Airport, Columbus, OH. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Rickenbacker International Airport.

DATE: 0901 UTC. Comments must be received on or before February 2, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1185/Airspace Docket No. 08–AGL–11, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1185/Airspace Docket No. 08-AGL–11.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace for SIAPs operations at Columbus, OH. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the 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. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of 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 amend controlled airspace at Rickenbacker International Airport, Columbus, OH.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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; AIRWAYS; ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL OH E5 Columbus, OH [Amended]

Columbus, Port Columbus International Airport, OH
(Lat. 39°59′53″ N., long. 82°53′31″ W.)
Columbus, Rickenbacker International Airport, OH
(Lat. 39°48′50″ N., long. 82°55′40″ W.)
Columbus, Ohio State University Airport, OH
(Lat. 40°04′47″ N., long. 83°04′23″ W.)
Columbus, Bolton Field Airport, OH
(Lat. 39°54′04″ N., long. 83°03′13″ W.)
Columbus, Darby Dan Airport, OH
(Lat. 39°56′31″ N., long. 83°12′18″ W.)
Lancaster, Fairfield County Airport, OH
(Lat. 39°45′20″ N., long. 82°39′26″ W.)
Don Scott NDB
(Lat. 40°04′49″ N., long. 83°04′44″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Port Columbus International Airport, and within a 7-mile radius of Rickenbacker International Airport and within 4 miles either side of the 045° bearing from Rickenbacker International Airport extending from the 7-mile radius area to 12.5 miles northeast of the airport, and within a 6.5-mile radius of the Ohio State University Airport, and within 3 miles either side of the 091° bearing from the Don Scott NDB extending from the 6.5-mile radius area to 9.8 miles east of the NDB, and within a 7.4-mile radius of Bolton Field Airport, and within a 6.4-mile radius of Fairfield County Airport, and within a 6.5-mile radius of Darby Dan Airport, excluding that airspace within the London, OH, Class E airspace area.

* * * * *

Issued in Fort Worth, TX on December 9, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–30036 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1108; Airspace Docket No. 08–AWP–11]

Proposed Modification of Class E Airspace; Reno, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to modify the existing Class E airspace at Reno/Tahoe International Airport, Reno, NV. Additional controlled airspace is necessary to accommodate aircraft using the Localizer (LOC) Z Runway 16R approach at Reno/Tahoe International Airport, Reno, NV. The FAA is proposing this action to enhance the safety and management of aircraft operations at Reno/Tahoe International Airport, Reno, NV.

DATES: Comments must be received on or before February 2, 2009.

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–2008–1108; Airspace Docket No. 08–AWP–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Area, 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 2008–1108 and Airspace Docket No. 08–AWP–11) 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://www.regulations.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–2008–1108 and Airspace Docket No. 08–AWP–11''. 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 NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

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 by modifying Class E airspace at Reno/Tahoe International Airport, Reno, NV. Additional controlled airspace is necessary to allow aircraft to complete a procedure turn while using the LOC Z Runway 16R approach at Reno/Tahoe International Airport, Reno, NV. This modification will also include a name change from LOC 2 Runway 16R approach to LOC Z Runway 16R approach at Reno/Tahoe International Airport, Reno, NV. This action would enhance the safety and management of aircraft operations at Reno/Tahoe International Airport, Reno, NV.

Class E airspace designations are published in paragraph 6005 of FAA

Order 7400.9S, signed October 3, 2008, and effective October 31, 2008, 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 FAA's 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 establishes additional controlled airspace at Reno/Tahoe International Airport, Reno, NV.

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 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP NV E5 Reno, NV [Modify]

Reno/Tahoe International Airport, NV
(Lat. 39°29′57″ N., long. 119°46′06″ W.)
Mustang VORTAC
(Lat. 39°29′57″ N., long. 119°46′05″ W.)

That airspace extending upward from 700 feet above the surface beginning at lat. 40°00′20″ N., long. 120°00′04″ W., thence clockwise via the 32.0-mile radius of the Reno/Tahoe International Airport to lat. 40°01′31″ N. long. 119°40′01″ W.; to lat. 39°49′35″ N. long. 119°34′05″ W.; thence clockwise via the 21.7-mile radius to lat. 39°25′12″ N. long. 119°18′45″ W.; to lat. 39°13′00″ W. long. 119°47′04″ W.; to lat. 39°08′20″ N. long. 119°47′04″ W.; to lat. 39°10′20″ N. long. 120°00′04″ W., to the point of beginning. That airspace extending upward from 1,200 feet above the surface within a 39.1-mile radius of the Mustang VORTAC excluding the area east of long. 119°00′04″ W., and west of long. 120°19′04″ W., and that airspace northwest of the Reno/Tahoe International Airport extending from the 39.1-mile radius bounded on the northeast by the southwest edge of V–452 and on the west by long. 120°19′04″ W. That airspace extending upward from 13,100 feet MSL beginning at lat. 38°54′56″ N., long. 119°22′47″ W., thence clockwise via the 39.1-mile radius to the eastern edge of V–165, thence southbound along the eastern edge of V–165 to the northern edge of V–244, thence eastbound to lat. 38°04′00″ N., long. 119°15′24″ W.; to the point of beginning. That airspace extending upward from 12,300 feet MSL beginning at lat. 38°52′20″ N., long. 119°35′44″ W.; to lat. 38°52′20″ N., long. 119°47′54″ W.; to lat. 38°28′00″ N., long. 119°52′44″ W.; to lat. 38°01′30″ N., long. 119°51′34″ W.; to lat. 38°01′00″ N., long. 119°38′04″ W.; to lat. 38°27′30″ N., long. 119°33′44″ W., to the point of beginning.

* * * * *

Issued in Seattle, Washington, on December 1, 2008.

Kevin Nolan,

Acting Manager, Operations Support Group, Western Service Area.

[FR Doc. E8–30017 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 4

RIN 1024–AD72

Vehicles and Traffic Safety

AGENCY: National Park Service, Interior.

ACTION: Proposed Rule.

SUMMARY: This rule proposes to amend current regulations for designating bicycle use on National Park Service (NPS) lands. The proposed rule authorizes park superintendents to open existing trails to bicycle use within park units in accordance with appropriate park plans and compliance documents under the National Environmental Policy Act (NEPA), the National Historic Preservation Act, the NPS Organic Act, and the park's enabling legislation, and other applicable law. The proposed rule continues to require promulgation of a special regulation to build a new trail for bicycle use outside developed areas, or to open an existing trail to bicycle use if such action triggers one of the existing regulatory criteria requiring rulemaking in Section 1.5 of Title 36 of the Code of Federal Regulations.

DATES: Comments must be received by February 17, 2009.

ADDRESSES: You may submit comments, identified by the number 1024–AD72, by any of the following methods:

—Federal rulemaking portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

—Mail: National Park Service, Attn. Regulations Program Manager, 1849 C St., NW., MS–3122, Washington, DC 20240.

All submissions received must include the agency name and RIN 1024–AD72. For additional information see ''Public Participation'' under **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Philip Selleck, Regulations Program Manager, 1849 C St., NW., Washington, DC 20240, (202) 208–4206.

SUPPLEMENTARY INFORMATION:

Background

Current regulations provide for the use of bicycles on park roads, parking areas and routes designated for bicycle use. A special regulation, specific to the individual park, must be adopted if bicycles are to be used in areas outside developed areas and special use zones. The NPS promulgated the current bicycle use regulation in 1987 and adopted the special regulation

requirement as a way of ensuring maximum public input on decisions to allow bicycle use outside developed areas.

Promulgation of special regulations requires various types of analyses and approval by the NPS Director and the Assistant Secretary for Fish and Wildlife and Parks, a process that takes more than two years on average. The proposed rule achieves a primary benefit of the special regulations process, notice and public comment, while eliminating the other steps of rulemaking deemed unnecessary in certain circumstances for designating areas for bicycle use.

For existing trails, the proposed rule provides for public notice and participation but does not require the promulgation of special regulations unless the trail designation has the type of significant effect that triggers rulemaking under the NPS' general regulation governing public use in units of the National Park System (*see* 36 CFR 1.5(b)). The NPS would continue to require the promulgation of special regulations for bicycle trails outside developed areas involving new trail construction.

As a general matter, the proposed rule provides park superintendents with a more efficient and effective way to determine whether opening existing trails to bicycles would be appropriate in the park unit they manage. The NPS Management Policies emphasize that ''(t)he Service must ensure that [park] uses are appropriate to the park in which they occur,'' and establish a process for determining whether a particular use is appropriate in a park unit. *See* NPS Management Policies 2006, p. 97 and ¶ 8.1.2.

Whether or not bicycle use is an appropriate activity in a unit of the National Park System should be considered through an individual park planning process that involves environmental compliance and input from the public. In addition, any particular trail use should be considered as part of a comprehensive plan for trail use in a park area. Parks that don't currently address bicycle use in existing planning documents could accomplish this comprehensive plan as either a specific plan for bicycle use in the park or as part of another plan, such as a recreation use plan.

The planning process can help determine, for example, if opportunities for bicycling will offer the potential to increase overall visitation, generate new youth interest in parks, or expand appreciation for our national parks. Proper planning with public participation also provides the opportunity to consider a range of alternatives to avoid or minimize impacts on natural, historic and cultural resources and reduce conflicts with other user groups. No matter what type of planning is conducted, ''(i)n its role as steward of park resources, the National Park Service must ensure that park uses that are allowed would not cause impairment of, or unacceptable impacts on, park resources and values.'' NPS Management Policies 2006 ¶ 1.5.

In addition to the park planning activities described above, the intent of the proposed rule is to take advantage of the public outreach aspects of the NEPA process. The proposed rule does this by requiring, at a minimum, preparation of an Environmental Assessment (EA) for any decision to open existing hiking or horse trails to bicycles. In other words, the proposed rule precludes use of any applicable ''categorical exclusions'' from NEPA analysis for opening trails to bicycle use. Further, the proposed rule requires a minimum of 30 days for public comment on EAs on bicycle use. The proposed rule also requires that the notice requesting public comment be published in the **Federal Register**, in addition to any other manner of notice used by the park, consistent with the public participation objectives set out in the Management Policies. ''Where there is strong public interest in a particular use, opportunities for civic engagement and cooperative conservation should be factored into the decision-making process.'' NPS Management Policies 2006 ¶ 1.4.3.1. By adopting these requirements, the proposed rule would meet the broad public participation objectives of the NPS without the requirement for a special regulation.

In addition, the proposed rule requires **Federal Register** notice of the superintendent's determination that bicycle use is consistent with the protection of the park area's natural, scenic and aesthetic values, safety considerations and management objectives and will not disturb wildlife or park resources. If the determination itself is not published in full, then the notice should include information on where to view the determination, or how to obtain a copy of the determination. This **Federal Register** notice must provide the public a 30-day period to give the public an opportunity to consider and comment on the determination prior to action by the park to open any trails for bicycle use. This comment period would be particularly important when there is a period of time between the public comment period for the EA or EIS and the decision to designate a trail for bicycle use. It would allow for public comment on the decision to implement the earlier planning process. However, if there is significant change or new information since the completion of the planning and NEPA documents, then the NPS will have to consider the need to supplement or revise the documents.

An area of particular concern for park managers involves the designation of ''new trails'' in park areas. In the 1987 rulemaking on bicycle use, NPS decided to limit the authority of the superintendent to designate bicycle use without notice and comment rulemaking to designations within developed areas of the park, ''which are land management and use categories established pursuant to a park area's Statement for Management and General Management Plan. Developed areas include lands within development and historic zones; these areas are generally impacted to a certain degree by structures, facilities or other improvements which reflect the fact the primary purpose or management objective for the use these lands is other than the preservation of their natural resources.'' 52 FR 10670, 10681 (Apr. 2, 1987). There is a similar definition for developed areas found in the NPS general regulations at 36 CFR 1.4.

In contrast, the 1987 rulemaking described the designation process outside of developed areas:

> The NPS has determined that the designation of a bicycle route outside of such developed areas, in areas whose primary purpose and land uses are related more to the preservation of natural resources and values, would have a much greater potential to result in adverse resource impacts or visitor use conflicts. This paragraph therefore provides for a much more stringent decision-making process for such a proposal by requiring a formal rulemaking. Such a process will provide for a thorough review of all environmental and visitor use considerations and assure the superintendent of having had the benefit of public review and comment before making a decision on any proposed designation. 52 FR at 10681.

The proposed rule continues this approach for new trails designated outside developed areas in any unit of the National Park System, i.e. special regulations would still be required for the construction of new bicycle trails outside developed areas.

The proposed rule would not affect other existing statutory or regulatory protections for the preservation and enhancement of park resources and visitor experiences. For example, the proposed rule would not affect the statutory ban on bicycles in wilderness areas. In addition, special regulations would still be required when an action to open existing trails to bicycles would

result in the degree of change or controversy described in 36 CFR 1.5(b).

A new section has been added to address the issue of bicycle use on administrative roads. The proposed rule clarifies that administrative roads that are closed to motor vehicle use by park visitors are also closed to bicycle use unless designated open by the superintendent. The superintendent may find it necessary to impose certain limits or restrictions on the use in order to provide for safety considerations, to avoid visitor use conflicts, or to protect park resources and values. The proposed rule also clarifies that the superintendent has authority to close any area designated as open for bicycle use, not just park roads and parking areas.

Finally, the proposed rule eliminates the term ''special use zone'' because this term is no longer used in NPS planning documents and as a result has created confusion in interpreting its meaning within the context of this regulation. For purposes of park planning the term ''special use zone'' meant ''non-federal lands within the exterior boundaries of a park area * * * used for non-park purposes but over which the NPS exerts some degree of administrative control.'' 52 FR at 10681. For example, the NPS has authority to enter into a written agreement with a landowner within the boundaries of a park area to administer the non-federal lands for public recreation purposes. Because the NPS no longer uses the term ''special use zones'' for planning purposes, and NPS regulations now make clear to which lands its regulations apply (*see* 36 CFR 1.2), the proposed rule deletes the term ''special use zones.''

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and is not subject to review by the Office of Management and Budget (OMB) under Executive Order 12866.

(1) This rule would not have an effect of $100 million or more on the economy. It would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this document would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the report titled, ''Benefit-Cost/Unfunded Mandates Act Analysis Small business and Regulatory Flexibility Act Analysis'' (U.S. Department of the Interior, Office of Policy Analysis, Office of the Secretary).

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not require the preparation of a federalism assessment.

Civil Justice Reform (Executive Order 12988)

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Paperwork Reduction Act

This regulation does not require an information collection under the Paperwork Reduction Act.

National Environmental Policy Act

The NPS is performing the NEPA analysis for this rule concurrently with the process of accepting comments

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government to Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects.

Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Public Participation

You may submit comments online at: *http://www.regulations.gov*. Follow the instructions for submitting comments. You may also mail or hand deliver comments to: Mail: National Park Service, Attn. Regulations Program Manager, 1849 C St., NW., MS–3122, Washington, DC 20240.

Public Availability of Comments

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

List of Subjects in 36 CFR Part 4

National Parks.

For the reasons stated in the preamble we propose to amend 36 CFR Part 4 as follows:

PART 4—VEHICLES AND TRAFFIC SAFETY

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

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

2. Section 4.30 is revised to read as follows:

§ 4.30 Bicycles

(a) *Park roads.* The use of a bicycle is permitted on park roads and in parking areas that are otherwise open for motor vehicle use by the general public.

(b) *Existing trails.* Except when rulemaking publication in the **Federal Register** is required by § 1.5(b) of this Chapter, a hiking or horse trail that currently exists on the ground and does not require any construction or significant modification to accommodate bicycles may be designated for bicycle use only if:

(1) The park has or will complete a park planning document addressing bicycle use on existing trails in the park; and

(2) The park has completed either an environmental assessment (EA) or an environmental impact statement (EIS) evaluating bicycle use. In addition to the requirements otherwise applicable to the preparation of an EA or EIS, the park will publish a notice in the **Federal Register** providing the public at least thirty (30) days for review and comment on an EA issued under this section; and

(3) A written determination is signed by the superintendent stating that the addition of bicycle use on existing hiking or horse trails is consistent with the protection of the park area's natural, scenic and aesthetic values, safety considerations and management objectives and will not disturb wildlife or park resources. The park will publish in the **Federal Register** a notice of the determination and provide at least thirty (30) days for public review and comment before implementing that decision for bicycle use.

(c) *New Trails.* Trails that do not exist on the ground, and therefore would require trail construction activities (such as clearing brush, cutting trees, excavation, or surface treatment), may be developed and designated for bicycle use only after:

(1) The park has completed the requirements set forth in paragraphs (b)(1) and (2) of this section; and

(2)(i) For new trails located outside of a park's developed areas, as identified in the relevant park plan, the park has promulgated a special regulation authorizing bicycle use; or

(ii) For new trails located within a park's developed areas, as identified in the relevant park plan, the park has completed the requirements set forth in paragraph (b)(3) of this section.

(d) *Administrative roads.* Administrative roads closed to motor vehicle use by the public, but open to motor vehicles use for administrative purposes, may be designated for bicycle use by the superintendent pursuant to the criteria and procedures of §§ 1.5 and 1.7 of this chapter.

(e) *Closures.* A superintendent may close any park roads, parking areas, administrative roads, existing trails, or new trails to bicycle use pursuant to the criteria and procedures of §§ 1.5 and 1.7 of this chapter.

Dated: December 9, 2008.

Lyle Laverty,

Assistant Secretary, Fish and Wildlife and Parks.

[FR Doc. E8–29892 Filed 12–17–08; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R6–ES–2008–0122; MO 9221050083–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Change the Listing Status of the Canada Lynx

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to revise the listing of the Canada lynx (*Lynx canadensis*) as threatened under the Endangered Species Act of 1973, as amended (Act), to include New Mexico. We find that the petition presents substantial scientific or commercial information indicating that changing the listing status of the contiguous United States Distinct Population Segment of Canada lynx to include New Mexico may be warranted. Therefore, with the publication of this notice, we are initiating a further review in response to the petition, and we will issue a 12-month finding to determine if the petitioned action is warranted. To ensure that our review is comprehensive, we are soliciting feedback from the public regarding this species.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before February 17, 2009.

ADDRESSES: You may submit information by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R6–ES–2008–0088; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information provided to us at *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov.* Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Montana Ecological Services Field Office, 585 Shepard Way, Helena, MT 59601. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Mark Wilson, Field Supervisor, Montana Ecological Services Field Office (see **ADDRESSES** section), telephone 406–449–5225. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information to indicate that listing a species may be warranted, or in this case, to revise the listing of a species, we are required to promptly commence further review. To ensure that the review is complete and based on the best available scientific and commercial information, we are soliciting information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the lynx. We are seeking information regarding the species' historical and current status and distribution, its

biology and ecology, and threats to the species and its habitat.

Please note that submissions merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations shall be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the review, we will issue the 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act (16 U.S.C. 1533(b)(3)(B)).

You may submit your information concerning this 90-day finding by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Finally, we may not consider comments that we do not receive by the date specified in the **DATES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and materials we receive, as well as supporting documentation we used in preparing this 90-day finding, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Endangered Species Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We must base this finding on information contained in the petition and supporting information readily available in our files at the time of the petition review. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for ''substantial information'' in the Code of Federal Regulations (CFR) regarding a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that the petition presented substantial information, we are required to promptly commence a review of the status of the species.

We received a petition from Forest Guardians and six other organizations, dated August 1, 2007, requesting that we revise the listing status of the contiguous United States Distinct Population Segment of Canada lynx (lynx) (*Lynx canadensis*) to include the mountains of north-central New Mexico. We acknowledged receipt of the petition in a letter dated August 24, 2007. In that letter we advised the petitioners that we could not address their petition at that time because existing court orders and settlement agreements for other listing actions required nearly all of our listing funding. We also concluded that emergency listing of the lynx in New Mexico was not warranted.

We received a 60-day notice of intent to sue from Forest Guardians on January 24, 2008, and on April 17, 2008, (the newly-named) WildEarth Guardians *et al.* filed a complaint against the Service in the U.S. District Court in the District of Columbia for failing to make a 90-day finding on their August 1, 2007, petition. We anticipate that completion of this finding will moot the litigation filed in the U.S. District Court.

In making this finding, we relied on information provided by the petitioners, as well as information readily available in our files. We evaluated the information in accordance with 50 CFR 424.14(b). Our process for making this 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial scientific and commercial information'' threshold.

Regulatory History

For more information on previous Federal actions concerning the lynx, refer to the final listing rule published in the **Federal Register** on March 24, 2000 (65 FR 16052), and the clarifications of findings published in the **Federal Register** on July 3, 2003 (68 FR 40075), and January 10, 2007 (72 FR 1186). The final listing rule designated lynx as threatened in the contiguous United States as a Distinct Population Segment (DPS), including the States of Colorado, Idaho, Maine, Michigan, Minnesota, Montana, New Hampshire, New York, Oregon, Utah, Vermont, Washington, Wisconsin, and Wyoming. The 2003 clarification addressed listing status, issues related to the DPS determinations, threats, and definitions of resident populations and dispersers. The 2007 clarification addressed whether any significant portion of the range of the lynx exists in the contiguous United States.

The final rule designating critical habitat for lynx published in the **Federal Register** on November 9, 2006 (71 FR 66008). On July 20, 2007, the Service announced that we would review the November 9, 2006, final rule after questions were raised about the integrity of scientific information used and whether the decision made was consistent with the appropriate legal standards. Based on our review of the final critical habitat designation, we determined that it was necessary to revise critical habitat. On January 15, 2007, the U.S. District Court for the District of Columbia issued an order stating the Service's deadline for a proposed rule for revised critical habitat was February 15, 2008, and for a final rule for revised critical habitat was February 15, 2009. We published a proposed rule to revise critical habitat for the lynx in the **Federal Register** on February 28, 2008 (73 FR 10860).

The special rule developed under section 4(d) of the Act (65 FR 16084, March 24, 2000) defines section 9 prohibitions to lynx, as provided for under 50 CFR 17.31. The special rule applies general take prohibitions for threatened wildlife to the wild population of lynx in the contiguous United States, and addresses captive lynx, and Convention on International Trade in Endangered Species (CITES) export requirements.

Species Information

Canada lynx are medium-sized cats, generally measuring 30 to 35 inches (75 to 90 centimeters) long and weighing 18 to 23 pounds (8 to 10.5 kilograms) (Quinn and Parker 1987, Table 1). They have large, well-furred feet and long legs for traversing snow; tufts on the ears; and short, black-tipped tails.

Lynx are highly specialized predators of snowshoe hare (*Lepus americanus*) (McCord and Cardoza 1982, p. 744; Quinn and Parker 1987, pp. 684–685; Aubry *et al.* 2000, pp. 375–378). Lynx and snowshoe hares are strongly associated with what is broadly described as boreal forest (Bittner and Rongstad 1982, p. 154; McCord and Cardoza 1982, p. 743; Quinn and Parker 1987, p. 684; Agee 2000, p. 39; Aubry *et al.* 2000, pp. 378–382; Hodges 2000a, pp. 136–140 and 2000b, pp. 183–191; McKelvey *et al.* 2000b, pp. 211–232). The predominant vegetation of boreal forest is conifer trees, primarily species

of spruce (*Picea* spp.) and fir (*Abies* spp.) (Elliot-Fisk 1988, pp. 34–35, 37–42). In the contiguous United States, the boreal forest types transition to deciduous temperate forest in the Northeast and Great Lakes and to subalpine forest in the west (Agee 2000, pp. 40–41). Lynx habitat can generally be described as moist boreal forests that have cold, snowy winters and a snowshoe hare prey base (Quinn and Parker 1987, p. 684–685; Agee 2000, pp. 39–47; Aubry *et al.* 2000, pp. 373–375; Buskirk *et al.* 2000b, pp. 397–405; Ruggiero *et al.* 2000, pp. 445–447). In mountainous areas, the boreal forests that lynx use are characterized by scattered moist forest types with high hare densities in a matrix of other habitats (*e.g.*, hardwoods, dry forest, non-forest) with low hare densities. In these areas, lynx incorporate the matrix habitat (non-boreal forest habitat elements) into their home ranges and use it for traveling between patches of boreal forest that support high hare densities where most foraging occurs.

Snow conditions also determine the distribution of lynx (Ruggiero *et al.* 2000, pp. 445–449). Lynx are morphologically and physiologically adapted for hunting snowshoe hares and surviving in areas that have cold winters with deep, fluffy snow for extended periods. These adaptations provide lynx a competitive advantage over potential competitors, such as bobcats (*Lynx rufus*) or coyotes (*Canis latrans*) (McCord and Cardoza 1982, p. 748; Buskirk *et al.* 2000a, pp. 86–95; Ruediger *et al.* 2000, p. 1–11; Ruggiero *et al.* 2000, pp. 445, 450). Bobcats and coyotes have a higher foot load (more weight per surface area of foot), which causes them to sink into the snow more than lynx. Therefore, bobcats and coyotes cannot efficiently hunt in fluffy or deep snow and are at a competitive disadvantage to lynx. Long-term snow conditions presumably limit the winter distribution of potential lynx competitors such as bobcats (McCord and Cardoza 1982, p. 748) or coyotes.

Lynx Habitat Requirements

Because of the patchiness and temporal nature of high-quality snowshoe hare habitat, lynx populations require large boreal forest landscapes to ensure that sufficient high quality snowshoe hare habitat is available and to ensure that lynx may move freely among patches of suitable habitat and among subpopulations of lynx. Populations that are composed of a number of discrete subpopulations, connected by dispersal, are called metapopulations (McKelvey *et al.* 2000c, p. 25). Individual lynx maintain large home ranges (reported as generally ranging between 12 to 83 miles^2 (31 to 216 kilometers^2)) (Koehler 1990, p. 847; Aubry *et al.* 2000, pp. 382–386; Squires and Laurion 2000, pp. 342–347; Squires *et al.* 2004b, pp. 13–16, Table 6; Vashon *et al.* 2005a, pp. 7–11). The size of lynx home ranges varies depending on abundance of prey, the animal's gender and age, the season, and the density of lynx populations (Koehler 1990, p. 849; Poole 1994, pp. 612–616; Slough and Mowat 1996, pp. 951, 956; Aubry *et al.* 2000, pp. 382–386; Mowat *et al.* 2000, pp. 276–280; Vashon *et al.* 2005a, pp. 9–10). When densities of snowshoe hares decline, for example, lynx enlarge their home ranges to obtain sufficient amounts of food to survive and reproduce.

In the contiguous United States, the boreal forest landscape is naturally patchy and transitional because it is the southern edge of the distributional range of the boreal forest. This generally limits snowshoe hare populations in the contiguous United States from achieving densities similar to those of the expansive northern boreal forest in Canada (Wolff 1980, pp. 123–128; Buehler and Keith 1982, pp. 24, 28; Koehler 1990, p. 849; Koehler and Aubry 1994, p. 84). Additionally, the presence of more snowshoe hare predators and competitors at southern latitudes may inhibit the potential for high-density hare populations (Wolff 1980, p. 128). As a result, lynx generally occur at relatively low densities in the contiguous United States compared to the high lynx densities that occur in the northern boreal forest of Canada (Aubry *et al.* 2000, pp. 375, 393–394) or the densities of species such as the bobcat, which is a habitat and prey generalist.

Lynx are highly mobile and generally move long distances (greater than 60 miles (100 kilometers)) (Aubry *et al.* 2000, pp. 386–387; Mowat *et al.* 2000, pp. 290–294). Lynx disperse primarily when snowshoe hare populations decline (Ward and Krebs 1985, pp. 2821–2823; O'Donoghue *et al.* 1997, pp. 156, 159; Poole 1997, pp. 499–503). Subadult lynx disperse even when prey is abundant (Poole 1997, pp. 502–503), presumably to establish new home ranges. Lynx also make exploratory movements outside their home ranges (Aubry *et al.* 2000, p. 386; Squires *et al.* 2001, pp. 18–26).

The boreal forest landscape is naturally dynamic. Forest stands within the landscape change as they undergo succession after natural or human-caused disturbances such as fire, insect epidemics, wind, ice, disease, and forest management (Elliot-Fisk 1988, pp. 47–48; Agee 2000, pp. 47–69). As a result, lynx habitat within the boreal forest landscape is typically patchy because the boreal forest contains stands of differing ages and conditions, some of which are suitable as lynx foraging or denning habitat (or will become suitable in the future due to forest succession) and some of which serve as travel routes for lynx moving between foraging and denning habitat (McKelvey *et al.* 2000a, pp. 427–434; Hoving *et al.* 2004, pp. 290–292).

Snowshoe hares comprise a majority of the lynx diet (Nellis *et al.* 1972, pp. 323–325; Brand *et al.* 1976, pp. 422–425; Koehler 1990, p. 848; Apps 2000, pp. 358–359, 363; Aubry *et al.* 2000, pp. 375–378; Mowat *et al.* 2000, pp. 267–268; von Kienast 2003, pp. 37–38; Squires *et al.* 2004b, p. 15, Table 8). When snowshoe hare populations are low, female lynx produce few or no kittens that survive to independence (Nellis *et al.* 1972, pp. 326–328; Brand *et al.* 1976, pp. 420, 427; Brand and Keith 1979, pp. 837–838, 847; Poole 1994, pp. 612–616; Slough and Mowat 1996, pp. 953–958; O'Donoghue *et al.* 1997, pp. 158–159; Aubry *et al.* 2000, pp. 388–389; Mowat *et al.* 2000, pp. 285–287). Lynx prey opportunistically on other small mammals and birds, particularly during lows in snowshoe hare populations, but alternate prey species may not sufficiently compensate for low availability of snowshoe hares, resulting in reduced lynx populations (Brand *et al.* 1976, pp. 422–425; Brand and Keith 1979, pp. 833–834; Koehler 1990, pp. 848–849; Mowat *et al.* 2000, pp. 267–268).

In northern Canada, lynx populations fluctuate in response to the cycling of snowshoe hare populations (Hodges 2000a, pp. 118–123; Mowat *et al.* 2000, pp. 270–272). Although snowshoe hare populations in the northern portion of their range show strong, regular population cycles, these fluctuations are generally much less pronounced in the southern portion of their range in the contiguous United States (Hodges 2000b, pp. 165–173). In the contiguous United States, the degree to which regional local lynx population fluctuations are influenced by local snowshoe hare population dynamics is unclear. However, it is anticipated that because of natural fluctuations in snowshoe hare populations, there will be periods when lynx densities are extremely low.

Because lynx population dynamics, survival, and reproduction are closely tied to snowshoe hare availability, snowshoe hare habitat is a component of lynx habitat. Lynx generally concentrate their foraging and hunting activities in areas where snowshoe hare

populations are high (Koehler *et al.* 1979, p. 442; Ward and Krebs 1985, pp. 2821–2823; Murray *et al.* 1994, p. 1450; O'Donoghue *et al.* 1997, pp. 155, 159–160 and 1998, pp. 178–181). Snowshoe hares are most abundant in forests with dense understories that provide forage, cover to escape from predators, and protection during extreme weather (Wolfe *et al.* 1982, pp. 665–669; Litvaitis *et al.* 1985, pp. 869–872; Hodges 2000a, pp. 136–140 and 2000b, pp. 183–195). Generally, hare densities are higher in regenerating, earlier successional forest stages because they have greater understory structure than mature forests (Buehler and Keith 1982, p. 24; Wolfe *et al.* 1982, pp. 665–669; Koehler 1990, pp. 847–848; Hodges 2000b, pp. 183–195; Homyack 2003, p. 63, 141; Griffin 2004, pp. 84–88). However, snowshoe hares can be abundant in mature forests with dense understories (Griffin 2004, pp. 53–54).

Within the boreal forest, lynx den sites are located where coarse woody debris, such as downed logs and windfalls, provides security and thermal cover for lynx kittens (McCord and Cardoza 1982, pp. 743–744; Koehler 1990, pp. 847–849; Slough 1999, p. 607; Squires and Laurion 2000, pp. 346–347; Organ 2001). The amount of structure (*e.g.*, downed, large, woody debris) appears to be more important than the age of the forest stand for lynx denning habitat (Mowat *et al.* 2000, pp. 10–11).

The 14-State Canada Lynx DPS

Lynx were listed in 2000 within what was determined to be the contiguous United States DPS, which included the known current and historical range of the lynx (68 FR 40080). This range included the States of Colorado, Idaho, Maine, Minnesota, Montana, New Hampshire, New York, and Washington, and also areas that could support dispersers—portions of Michigan, Oregon, Utah, Vermont, Wisconsin, and Wyoming (68 FR 40099). Other areas outside of boreal forest, where dispersing lynx had only been sporadically documented, were not considered to be within the range of the lynx, because they were deemed incapable of supporting lynx; these areas included Connecticut, Indiana, Iowa, Massachusetts, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Dakota, and Virginia (68 FR 40099). New Mexico was not included in this list of States because no lynx occurred there, and no lynx had ever been documented there, even sporadically, and it therefore was not considered in the then current or historical range of the species (68 FR 40083). In addition, no review of potential habitat in New Mexico was conducted; we did not consider lynx recently released into Colorado that strayed into New Mexico as sufficient reason to include New Mexico within the range of lynx because there was no evidence that habitat in New Mexico historically supported lynx (68 FR 40083, July 3, 2003).

In 1998, when the Service proposed to list the lynx in the United States, no wild (or reintroduced) lynx were known to exist in Colorado, which represented the extreme southern edge of the species' range (65 FR 16059, March 24, 2000). Boreal forest habitat in Colorado and southeastern Wyoming, the Southern Rocky Mountain Region, is isolated from boreal forest in Utah and northwestern Wyoming, and is naturally highly fragmented (65 FR 16059, March 24, 2000). It was uncertain whether Colorado had ever supported a small self-sustaining lynx population, or whether historical records were of dispersers that arrived during high population cycles of lynx. Some of these dispersers may have remained for a period of years if hare populations were high enough to support residents and reproduction, but eventually succumbed to a lack of consistent, high quality habitat and food sources.

In 1999, the Colorado Department of Wildlife reintroduced 22 wild lynx from Canada and Alaska into southwestern Colorado (Shenk 2007, p. 20). By 2003, when we clarified the listing rule (68 FR 40076, July 3, 2003), no data indicated that the lynx released could be supported by the habitat available in Colorado. In her 2007 Wildlife Research Report, Shenk continued to conclude that ''what is yet to be determined is whether current conditions in Colorado can support the recruitment necessary to offset annual mortality in order to sustain the population'' (Shenk 2007, p. 18). Colorado was included in the 14-state DPS in 2000, because records indicated that lynx habitat occurred there historically; however, it was not known to sustain lynx populations. No information existed in 2000 when the final rule was published to indicate that lynx existed in New Mexico, that it was ever occupied historically, or that it could sustain lynx, therefore it was not included in the listing rule or special rule concerning lynx in the contiguous 14-State DPS. We now have documentation that lynx reintroduced in Colorado have dispersed in many directions, primarily into New Mexico, Utah, and Wyoming, but also into eight other States (Shenk 2007, pp. 6, 9). No reproduction has been documented in New Mexico or Utah, but one den was found in Wyoming (Shenk 2007, p. 15).

We included an analysis in the final lynx listing rule (68 FR 40081) on whether lynx were both discrete and significant in each of the four regions of the contiguous United States where it exists (the Northeast, Great Lakes, Southern Rocky Mountains, and Northern Rocky Mountains/Cascades). We determined that none of the regions individually constitute significantly unique or unusual ecological setting and, therefore, did not individually meet the DPS criteria. Therefore, the lynx was listed as a single contiguous United States DPS defined by 14 States.

The Petition

The August 1, 2007, petition requests that we ''update and amend the lynx's listing status to include the mountains of north-central New Mexico.'' Their petition presents information with respect to three topic areas: (A) Compliance with the ESA, our 1996 ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act'' (DPS Policy, 61 FR 4722), and the special listing rule and preamble to the final listing rule; (B) use of best scientific and commercial data available; and (C) the necessity for lynx in New Mexico to be listed to ensure the survival and recovery of lynx in the southern Rockies.

The petition seeks modification of the currently listed 14-state DPS in light of the following factors:

1. The petitioners indicate that the Service:

(a) Listed a single contiguous United States DPS;

(b) Determined that, as a Federal agency, it is responsible for coordinating recovery for a species that crosses State boundaries;

(c) Discussed 14 individual States only in the context of describing lynx historical range, and not as a limitation on the species' listing status; and

(d) Developed language in the special listing rule for lynx (50 CFR 17.40(k)) applying prohibitions to all lynx found in the contiguous United States.

2. The petitioners indicate that:

(a) The DPS Policy prohibits the Service from using political boundaries below the international level when listing DPSs;

(b) The Service cannot use the boundary between States to subdivide a single biological population; and

(c) Use of a species' known historical range to define its listing status is inconsistent with the policy because it deems portions of the current range to be markedly separate without actual discreteness analysis.

3. The petitioners present information that the Act authorizes the listing of a species, subspecies, or DPS; the Service listed a United States DPS based on the international boundary with Canada, and no further distinctions (*e.g.*, limiting to specific States) can be made.

4. The petitioners discuss and provide information to support their assessment that the lynx should be listed in New Mexico (Ruediger *et al.* 2000; Frey 2006; Frey 2003; Malaney 2003; Malaney and Frey 2005; BISON 2003; Checklist 2003; and Shenk 2001, 2005a, 2005b, 2006, 2007). The petitioners indicate that the Southern Rockies include high elevation, mountainous habitat that extends into north-central New Mexico. They indicate that, although no known historical occurrence records of lynx in New Mexico exist (Frey 2006, p. 20), we should carefully review the forest zones in New Mexico to ascertain whether suitable habitat exists.

5. The petitioners discuss why the lynx final listing rule is not logical and is contrary to the purpose and goals of the Act that include conserving ecosystems upon which species depend. The petitioners indicate that lynx traveling into New Mexico could be legally shot and hunted, and that this is contrary to the purpose of the Act, which is to provide a means whereby the ecosystems upon which threatened and endangered species depend may be conserved.

Finding

We reviewed the petition, supporting information provided by the petitioners, and information in our files.

We find that the petition presents substantial scientific or commercial information indicating that changing the listing status of Canada lynx to include New Mexico in the threatened contiguous United States Distinct Population Segment may be warranted. Therefore, we will initiate a review of the specific points raised by the petitioners and the best available information, and present our analysis and determination in our 12-month finding.

It is important to note that the ''substantial information'' standard for a 90-day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough review of issues raised in the petition that are substantial, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

References Cited

A complete list of all references cited herein is available upon request from the Montana Ecological Services Field Office (see the **FOR FURTHER INFORMATION CONTACT** section).

Author

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

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 12, 2008.

Rowan W. Gould,

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

[FR Doc. E8–30110 Filed 12–17–08; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 92

[FWS–R7–MB–2008–0099; 91200–1231–9BPP L2]

RIN 1018–AW29

Migratory Bird Subsistence Harvest in Alaska; Harvest Regulations for Migratory Birds in Alaska During the 2009 Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) proposes migratory bird subsistence harvest regulations in Alaska for the 2009 season. The proposed regulations would enable the continuation of customary and traditional subsistence uses of migratory birds in Alaska and prescribe regional information on when and where the harvesting of birds may occur. These proposed regulations were developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives. The rulemaking is necessary because the regulations governing the subsistence harvest of migratory birds in Alaska are subject to annual review. This rulemaking proposes region-specific regulations that would go into effect on April 2, 2009, and expire on August 31, 2009.

DATES: We will accept comments received or postmarked on or before January 20, 2009. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 2, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AW29, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Fred Armstrong, (907) 786–3887, or Donna Dewhurst, (907) 786–3499, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, AK 99503.

SUPPLEMENTARY INFORMATION:

Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by

appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Office of the Alaska Migratory Bird Co-management Council, 1011 E. Tudor Rd., Anchorage, AK 99503, (877) 229–2344.

Why Is This Current Rulemaking Necessary?

This current rulemaking is necessary because, by law, the migratory bird harvest season is closed unless opened by the Secretary of the Interior, and the regulations governing subsistence harvest of migratory birds in Alaska are subject to public review and annual approval. The Alaska Migratory Bird Co-management Council (Co-management Council) held a meeting in April 2008 to develop recommendations for changes effective for the 2009 harvest season. These recommendations were presented to the Service Regulations Committee (SRC) on July 30 and 31, 2008, and were approved.

This rule proposes regulations for the taking of migratory birds for subsistence uses in Alaska during 2009. This rule lists migratory bird season openings and closures by region.

How Do I Find the History of These Regulations?

Background information, including past events leading to this action, accomplishments since the Migratory Bird Treaties with Canada and Mexico were amended, and a history addressing conservation issues can be found in the following **Federal Register** documents:

Date	Federal Register citation
August 16, 2002	67 FR 53511
July 21, 2003	68 FR 43010
April 2, 2004	69 FR 17318
April 8, 2005	70 FR 18244
February 28, 2006	71 FR 10404
April 11, 2007	72 FR 18318
March 14, 2008	73 FR 13788

These documents, which are all final rules setting forth the annual harvest regulations, are available at *http://alaska.fws.gov/ambcc/regulations.htm.*

Who Is Eligible To Hunt Under These Regulations?

Eligibility to harvest under the regulations established in 2003 was limited to permanent residents, regardless of race, in villages located within the Alaska Peninsula, Kodiak Archipelago, the Aleutian Islands and in areas north and west of the Alaska Range (50 CFR 92.5). These geographical restrictions opened the initial subsistence migratory bird harvest to only about 13 percent of Alaska residents. High-population areas such as Anchorage, the Matanuska-Susitna and Fairbanks North Star boroughs, the Kenai Peninsula roaded area, the Gulf of Alaska roaded area, and Southeast Alaska were excluded from the eligible subsistence harvest areas.

Based on petitions requesting inclusion in the harvest, in 2004, we added 13 additional communities based on criteria set forth in 50 CFR 92.5(c). These communities were Gulkana, Gakona, Tazlina, Copper Center, Mentasta Lake, Chitina, Chistochina, Tatitlek, Chenega, Port Graham, Nanwalek, Tyonek, and Hoonah, with a combined population of 2,766. In 2005, we added three additional communities for glaucous-winged gull egg gathering only, based on petitions requesting inclusion. These southeastern communities were Craig, Hydaburg, and Yakutat, with a combined population of 2,459.

In 2007, we enacted the Alaska Department of Fish and Game's request to expand the Fairbanks North Star Borough excluded area to include the Central Interior area. This action excluded the following communities from participation in this harvest: Big Delta/Fort Greely, Healy, McKinley Park/Village and Ferry, with a combined population of 2,812. These removed communities reduced the percentage of the State population included in the subsistence harvest to 13 percent.

How Will the Service Ensure That the Subsistence Harvest Will Not Raise Overall Migratory Bird Harvest or Threaten the Conservation of Endangered and Threatened Species?

We have monitored subsistence harvest for the past 15 years through the use of annual household surveys in the most heavily used subsistence harvest areas, e.g., the Yukon-Kuskokwim Delta. Continuation of this monitoring enables tracking of any major changes or trends in levels of harvest and user participation after legalization of the harvest. The Service has an emergency closure provision (50 CFR 92.21), so that if any significant increases in harvest are documented for one or more species in a region, an emergency closure can be requested and implemented.

The Service will institute emergency harvest closures in 2009 if deemed necessary to prevent an imminent threat to the conservation of Steller's eiders. Steller's eiders are divided into Atlantic and Pacific populations; the Pacific population is further divided into the Russia-breeding population along the Russian eastern arctic coastal plain, and the Alaska-breeding population. In 1997, the Alaska-breeding population of Steller's eiders was listed as threatened based on a substantial decrease in the species' breeding range in Alaska and the resulting increased vulnerability of the remaining Alaska-breeding population to extirpation (62 FR 31748; June 11, 1997).

The Alaska-breeding population of Steller's eiders now nests primarily only on the Alaska Coastal Plain, particularly around Barrow and at very low densities from Wainwright to at least as far east as Prudhoe Bay. A few pairs also apparently remain on the Yukon-Kuskokwim Delta. The apparent reduction in breeding range in Alaska was a major reason for listing the Alaska-breeding population as threatened. Although the cause of the original decline is not known with certainty, current threats to the recovery of Steller's eiders likely include mortality from hunting, exposure to lead shot and other contaminants such as oil, changes in marine habitat, and nest failure and possibly adult mortality from avian and mammalian predators associated with human settlements and development. While we have made progress working to reduce predation, substituting steel shot for lead, and instituting eider conservation outreach programs, mortality from hunting appears to be the greatest current threat.

A computer-based statistical model was developed by scientists to predict the prognosis for recovery or extinction of the Alaska-breeding population of Steller's eider. Although there is uncertainty surrounding the population size, survival rate, and reproductive rate estimates used to develop this model, results indicate that the Alaska-breeding population of Steller's eiders has a very high probability of becoming extirpated within 10 years without immediate concerted actions designed to reduce adult mortality. For years with available harvest survey data, it appears that possibly 10 percent or more of the Alaska-breeding population of Steller's eiders has been lost due to mortality from hunting. Regulatory and collaborative actions focused on this threat will be necessary to ensure that take is reduced in 2009. The Service will institute emergency closures if the Alaska subsistence harvest of migratory birds is deemed to cause an imminent threat to Steller's eiders in a specific geographic area during the spring migration or the summer breeding period.

What Is Proposed for Change in the Region-Specific Regulations for 2009?

Yellow-Billed Loons

At the request of the North Slope Borough Fish and Game Management Committee, the Co-management Council recommended continuing into 2009 the provisions originally established in 2005 to allow subsistence use of yellow-billed loons inadvertently entangled in subsistence fishing (gill) nets on the North Slope. Yellow-billed loons are culturally important for the Inupiat Eskimo of the North Slope for use in traditional dance regalia. A maximum of 20 yellow-billed loons may be caught in 2009 under this provision. The intent of this provision is not to harvest yellow-billed loons, but to allow use of those loons inadvertently entangled during normal subsistence fishing activities. Individual reporting to the North Slope Borough Department of Wildlife is required by the end of each season. The North Slope Borough has asked fishermen, through announcements on the radio and through personal contact, to report inadvertent entanglements of loons to better estimate the level of mortality caused by gill nets. In 2007, 14 yellow-billed loons were reported taken in fishing nets and an additional 2 were released alive. This provision, to allow subsistence possession and use of yellow-billed loons caught in fishing gill nets, is subject to annual review and renewal by the SRC.

Aleutian and Arctic Terns

We are proposing to open a season May 15–June 30 for harvesting Aleutian and arctic tern eggs in the Yakutat Harvest area, from Icy Bay (Icy Cape to Pt. Riou) and the coastal islands bordering the Gulf of Alaska from Pt. Manby southeast to and including Dry Bay. The Yakutat Tlingit Tribe requested this proposal, stating that this regulation would legalize a traditional gathering of tern eggs that has occurred for hundreds of years. The Tlingit refer to the terns as ''sea pigeons'' and gather eggs for sustenance during the salmon fishing season. ''Pigeon eggs'' are considered a highly desired food by many Native households in Yakutat. Harvested eggs are shared extensively throughout the community and especially with local Native elders. The Yakutat Tlingit Tribe has agreed to monitor the harvest of tern eggs and this summer would conduct a recall survey of the spring harvest. The Yakutat Ranger Station, U.S. Forest Service, in cooperation with the Service's Alaska Office of Migratory Bird Management is developing methods for monitoring the Aleutian and arctic tern populations in the Yakutat area. Work on this project is under way.

Steller's Eiders

We are proposing to add local migratory bird hunting restrictions for the four communities of Barrow, Wainwright, Point Lay, and Point Hope along the North Slope of Alaska. These proposed restrictions include instituting shooting hours, an inspection requirement, a road closure, and clarification of a possession restriction. We are proposing these restrictions in response to the recent mortality of Steller's eiders on the North Slope, the loss of nests and eggs during breeding, and mortality likely associated with crippling due to hunting. We are not proposing to authorize incidental take of Steller's eiders.

The Service has concerns that harvest pursuant to regulations from previous subsistence seasons would pose an imminent threat to the threatened Steller's eider. It is estimated that 19 (9–37, 95% Confidence Limits) Steller's eiders were harvested on the North Slope during the 2005 subsistence season; the actual reported take was 9 Steller's eiders (Co-Management Council unpublished data, 2006). In 2008, 27 Steller's eiders were found dead at Barrow between June and August 2008; of these, 74 percent were shot. The number of Steller's eiders killed from Barrow to Point Hope during the spring and summer subsistence hunt during 2004–08 requires the Service to develop and implement new regulations. The Service concludes that the subsistence hunt has resulted in an unknown amount of shooting and disturbance that has caused the direct loss of nests, eggs, young, and adults in breeding years. The Service must attempt to eliminate the take of Steller's eiders resulting from the recognition and continuation of the spring and summer subsistence migratory bird hunting in order to conserve and eventually recover this species.

Of the regulations we are proposing, the shooting hours restriction parallels that found in 50 CFR 20.102. This regulation will help eliminate hunting under poor visibility to improve species identification and reduce the probability of mistaken shooting and crippling of Steller's eiders. We are proposing to require that hunters in the field, when asked, must present their take for species identification to enable the Service to monitor the harvest for take of closed and protected species. Because of the critical status of the Alaska-breeding Steller's eiders (the listed population), we need real-time, reliable information about the take of any Steller's eiders during the subsistence season. We are proposing to clarify, reinforce, and ensure that no person may possess migratory bird species that are not open for subsistence harvest. In Barrow, we are proposing to close a 1-mile buffer zone to migratory bird hunting around specific rural roads to protect birds from harvest and disturbance in the primary nesting area around Barrow. If there had been a 1-mile closed buffer zone for the 2008 breeding period, it would have protected 91 percent of Steller's eider nests documented.

The goal of these proposed restrictions is to eliminate or significantly reduce the potential impact of the subsistence migratory bird hunt to Steller's eiders. In addition to the regulations, the Service is developing and implementing more effective hunter training on eider identification, harvest monitoring, law enforcement, and outreach. In the event that some or all of the conservation measures and regulations are unsuccessful, and the existing harvest is deemed to pose an imminent threat to the conservation of Steller's eiders, we will apply the emergency closure provision provided in 50 CFR 92.21. In addition, as discussed under ''Endangered Species Act Consideration,'' we will consult on these proposed regulations under Section 7 of the Endangered Species Act to ensure that they are not likely to jeopardize the continued existence of Steller's eiders or any other listed species.

Statutory Authority

We derive our authority to issue these regulations from the Migratory Bird Treaty Act of 1918, 16 U.S.C. 712(1), which authorizes the Secretary of the Interior, in accordance with the treaties with Canada, Mexico, Japan, and Russia, to ''issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.''

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial regulatory flexibility analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. The rule legalizes a pre-existing subsistence activity, and the resources harvested will be consumed by the harvesters or persons within their local community.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Will not have an annual effect on the economy of $100 million or more. It will legalize and regulate a traditional subsistence activity. It will not result in a substantial increase in subsistence harvest or a significant change in harvesting patterns. The commodities being regulated under this rule are migratory birds. This rule deals with legalizing the subsistence harvest of migratory birds and, as such, does not involve commodities traded in the marketplace. A small economic benefit from this rule derives from the sale of equipment and ammunition to carry out subsistence hunting. Most, if not all, businesses that sell hunting equipment in rural Alaska would qualify as small businesses. We have no reason to believe that this rule will lead to a disproportionate distribution of benefits.

(b) Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not deal with traded commodities and, therefore, does not have an impact on prices for consumers.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This rule deals with the harvesting of wildlife for personal consumption. It does not regulate the marketplace in any way to generate effects on the economy or the ability of businesses to compete.

Unfunded Mandates Reform Act

We have determined and certified under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, State, or tribal governments or private entities. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act is not required. Participation on regional management bodies and the Co-management Council will require travel expenses for some Alaska Native organizations and local governments. In addition, they will assume some expenses related to coordinating involvement of village councils in the regulatory process. Total coordination and travel expenses for all Alaska Native organizations are estimated to be less than $300,000 per year. In the Notice of Decision (65 FR 16405; March 28, 2000), we identified 12 partner organizations (Alaska Native nonprofits and local governments) to administer the regional programs. The Alaska Department of Fish and Game will also incur expenses for travel to Co-management Council and regional management body meetings. In addition, the State of Alaska will be required to provide technical staff support to each of the regional management bodies and to the Co-management Council. Expenses for the State's involvement may exceed $100,000 per year, but should not exceed $150,000 per year. When funding permits, we make annual grant agreements available to the partner organizations and the Alaska Department of Fish and Game to help offset their expenses.

Takings (Executive Order 12630)

Under the criteria in Executive Order 12630, this rule does not have significant takings implications. This rule is not specific to particular land ownership, but applies to the harvesting of migratory bird resources throughout Alaska. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. We discuss effects of this proposed rule on the State of Alaska in the Executive Order 12866 and Unfunded Mandates Reform Act sections above. We worked with the State of Alaska to develop these proposed regulations. Therefore, a Federalism Assessment is not required.

Civil Justice Reform (Executive Order 12988)

The Department, in promulgating this rule, has determined that it will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Government-to-Government Relations With Native American Tribal Governments

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations With Native American Tribal Governments'' (59 FR 22951), and Executive Order 13175 (65 FR 67249; November 6, 2000), concerning consultation and coordination with Indian Tribal Governments, we have consulted with Alaska tribes and evaluated the rule for possible effects on tribes or trust resources, and have determined that there are no significant effects. The rule will legally recognize the subsistence harvest of migratory birds and their eggs for tribal members,

as well as for other indigenous inhabitants.

Paperwork Reduction Act

This rule has been examined under the Paperwork Reduction Act of 1995 and has been found to contain no information collection requirements. We have, however, received OMB approval of associated voluntary annual household surveys used to determine levels of subsistence take. The OMB control number for the information collection is 1018–0124, which expires on January 31, 2010. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Endangered Species Act Consideration

Prior to issuance of annual spring and summer subsistence regulations, we will consult under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter the Act), to ensure that the 2009 subsistence harvest is not likely to jeopardize the continued existence of any species designated as endangered or threatened, or modify or destroy its critical habitats, and that the regulations are consistent with conservation programs for those species. Consultation under section 7 of the Act for the annual subsistence take regulations may cause us to change these regulations. Our biological opinion resulting from the section 7 consultation is a public document available from the person listed under **FOR FURTHER INFORMATION CONTACT**.

National Environmental Policy Act Consideration

The annual regulations and options were considered in the Environmental Assessment, ''Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the 2009 Spring/Summer Harvest,'' issued December 12, 2008. Copies are available from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Supply, Distribution, or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This is not a significant regulatory action under Executive Order 12866; it would allow only for traditional subsistence harvest and would improve conservation of migratory birds by allowing effective regulation of this harvest. Further, this rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action under Executive Order 13211 and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 92

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Subsistence, Treaties, Wildlife.

For the reasons set out in the preamble, we propose to amend title 50, chapter I, subchapter G, of the Code of Federal Regulations as follows:

PART 92—MIGRATORY BIRD SUBSISTENCE HARVEST IN ALASKA

1. The authority citation for part 92 continues to read as follows:

Authority: 16 U.S.C. 703–712.

Subpart D—Annual Regulations Governing Subsistence Harvest

2. In subpart D, add § 92.31 to read as follows:

§ 92.31 Region-specific regulations.

The 2009 season dates for the eligible subsistence harvest areas are as follows:

(a) *Aleutian/Pribilof Islands Region.*

(1) Northern Unit (Pribilof Islands):

(i) Season: April 2–June 30.

(ii) Closure: July 1–August 31.

(2) Central Unit (Aleut Region's eastern boundary on the Alaska Peninsula westward to and including Unalaska Island):

(i) Season: April 2–June 15 and July 16–August 31.

(ii) Closure: June 16–July 15.

(iii) Special Black Brant Season Closure: August 16–August 31, only in Izembek and Moffet lagoons.

(iv) Special Tundra Swan Closure: All hunting and egg gathering closed in units 9(D) and 10.

(3) Western Unit (Umnak Island west to and including Attu Island):

(i) Season: April 2–July 15 and August 16–August 31.

(ii) Closure: July 16-August 15.

(b) *Yukon/Kuskokwim Delta Region.*

(1) Season: April 2–August 31.

(2) Closure: 30-day closure dates to be announced by the Service's Alaska Regional Director or his designee, after consultation with local subsistence users, field biologists, and the Association of Village Council President's Waterfowl Conservation Committee. This 30-day period will occur between June 1 and August 15 of each year. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(3) Special Black Brant and Cackling Goose Season Hunting Closure: From the period when egg laying begins until young birds are fledged. Closure dates to be announced by the Service's Alaska Regional Director or his designee, after consultation with field biologists and the Association of Village Council President's Waterfowl Conservation Committee. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(c) *Bristol Bay Region.*

(1) Season: April 2–June 14 and July 16–August 31 (general season); April 2–July 15 for seabird egg gathering only.

(2) Closure: June 15–July 15 (general season); July 16–August 31 (seabird egg gathering).

(d) *Bering Strait/Norton Sound Region.*

(1) Stebbins/St. Michael Area (Point Romanof to Canal Point):

(i) Season: April 15–June 14 and July 16–August 31.

(ii) Closure: June 15–July 15.

(2) Remainder of the region:

(i) Season: April 2–June 14 and July 16–August 31 for waterfowl; April 2–July 19 and August 21–August 31 for all other birds.

(ii) Closure: June 15–July 15 for waterfowl; July 20–August 20 for all other birds.

(e) *Kodiak Archipelago Region,* except for the Kodiak Island roaded area, which is closed to the harvesting of migratory birds and their eggs. The closed area consists of all lands and waters (including exposed tidelands) east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton Larson Bay. Waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest.

(1) Season: April 2–June 30 and July 31–August 31 for seabirds; April 2–June 20 and July 22–August 31 for all other birds.

(2) Closure: July 1–July 30 for seabirds; June 21–July 21 for all other birds.

(f) *Northwest Arctic Region.*

(1) Season: April 2–June 9 and August 15–August 31 (hunting in general); waterfowl egg gathering May 20–June 9 only; seabird egg gathering May 20–July 12 only; hunting molting/non-nesting waterfowl July 1–July 31 only.

(2) Closure: June 10–August 14, except for the taking of seabird eggs and molting/non-nesting waterfowl as

provided in paragraph (f)(1) of this section.

(g) *North Slope Region.*

(1) Southern Unit (Southwestern North Slope regional boundary east to Peard Bay, everything west of the longitude line 158°30′W and south of the latitude line 70°45′N to the west bank of the Ikpikpuk River, and everything south of the latitude line 69°45′N between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 2–June 29 and July 30–August 31 for seabirds; April 2–June 19 and July 20–August 31 for all other birds.

(ii) Closure: June 30–July 29 for seabirds; June 20–July 19 for all other birds.

(iii) Special Black Brant Hunting Opening: From June 20–July 5. The open area would consist of the coastline, from mean high water line outward to include open water, from Nokotlek Point east to longitude line 158°30′W. This includes Peard Bay, Kugrua Bay, and Wainwright Inlet, but not the Kuk and Kugrua river drainages.

(2) Northern Unit (At Peard Bay, everything east of the longitude line 158°30′W and north of the latitude line 70°45′N to west bank of the Ikpikpuk River, and everything north of the latitude line 69°45′N between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 6–June 6 and July 7–August 31 for king and common eiders; April 2–June 15 and July 16–August 31 for all other birds.

(ii) Closure: June 7–July 6 for king and common eiders; June 16–July 15 for all other birds.

(iii) Special Hunting Restrictions for Barrow: Migratory bird hunting is not permitted within 1 mile of either side or end of Cakeeater/Gaswell, Nunavak and Freshwater Lake roads and any spur roads.

(3) Eastern Unit (East of eastern bank of the Sagavanirktok River):

(i) Season: April 2–June 19 and July 20–August 31.

(ii) Closure: June 20–July 19.

(4) All Units: yellow-billed loons. Annually, up to 20 yellow-billed loons total for the region may be inadvertently entangled in subsistence fishing nets in the North Slope Region and kept for subsistence use. Individuals must report each yellow-billed loon inadvertently entangled while subsistence gill net fishing to the North Slope Borough Department of Wildlife Management by the end of the season.

(5) North Coastal Zone (Cape Thompson north to Point Hope and east along the Arctic Ocean coastline around Point Barrow to Ross Point, including Iko Bay, and 5 miles inland).

(i) Migratory bird hunting is permitted from one-half hour before sunrise until sunset.

(ii) No person shall at any time, by any means, or in any manner, possess or have in custody any migratory bird or part thereof, taken in violation of subpart C and D of this part.

(iii) Upon request from a Service law enforcement officer, hunters taking, attempting to take, or transporting migratory birds taken during the subsistence harvest season must present them to the officer for species identification.

(h) *Interior Region.*

(1) Season: April 2–June 14 and July 16–August 31; egg gathering May 1–June 14 only.

(2) Closure: June 15–July 15.

(i) *Upper Copper River Region* (Harvest Area: Units 11 and 13) (Eligible communities: Gulkana, Chitina, Tazlina, Copper Center, Gakona, Mentasta Lake, Chistochina and Cantwell).

(1) Season: April 15–May 26 and June 27–August 31.

(2) Closure: May 27–June 26.

(3) The Copper River Basin communities listed above also documented traditional use harvesting birds in Unit 12, making them eligible to hunt in this unit using the seasons specified in paragraph (h) of this section.

(j) Gulf of Alaska Region.

(1) Prince William Sound Area (Harvest area: Unit 6 [D]), (Eligible Chugach communities: Chenega Bay, Tatitlek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(2) Kachemak Bay Area (Harvest area: Unit 15[C] South of a line connecting the tip of Homer Spit to the mouth of Fox River) (Eligible Chugach Communities: Port Graham, Nanwalek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(k) *Cook Inlet* (Harvest area: portions of Unit 16[B] as specified below) (Eligible communities: Tyonek only).

(1) Season: April 2–May 31—That portion of Unit 16(B) south of the Skwentna River and west of the Yentna River, and August 1–31—That portion of Unit 16(B) south of the Beluga River, Beluga Lake, and the Triumvirate Glacier.

(2) Closure: June 1–July 31.

(l) *Southeast Alaska.*

(1) Community of Hoonah (Harvest area: National Forest lands in Icy Strait and Cross Sound, including Middle Pass Rock near the Inian Islands, Table Rock in Cross Sound, and other traditional locations on the coast of Yakobi Island. The land and waters of Glacier Bay National Park remain closed to all subsistence harvesting [50 CFR 100.3].

(i) Season: Glaucous-winged gull egg gathering only: May 15–June 30.

(ii) Closure: July 1–August 31.

(2) Communities of Craig and Hydaburg (Harvest area: Small islands and adjacent shoreline of western Prince of Wales Island from Point Baker to Cape Chacon, but also including Coronation and Warren islands).

(i) Season: Glaucous-winged gull egg gathering only: May 15–June 30.

(ii) Closure: July 1–August 31.

(3) Community of Yakutat (Harvest area: Icy Bay [Icy Cape to Pt. Riou], and coastal lands and islands bordering the Gulf of Alaska from Pt. Manby southeast to Dry Bay).

(i) Season: Glaucous-winged gull, aleutian and arctic tern egg gathering: May 15–June 30.

(ii) Closure: July 1–August 31.

3. In subpart D, add § 92.32 to read as follows:

§ 92.32 Emergency regulations to protect Steller's eiders.

Upon finding that continuation of these subsistence regulations would pose an imminent threat to the conservation of threatened Steller's eiders, the U.S. Fish and Wildlife Service Alaska Regional Director, in consultation with the Co-management Council, will immediately under § 92.21 take action as is necessary to prevent further take. Regulation changes implemented could range from a temporary closure of duck hunting in a small geographic area to large-scale regional or State-wide long-term closures of all subsistence migratory bird hunting. Such closures or temporary suspensions will remain in effect until the Regional Director, in consultation with the Co-management Council, determines that the potential for additional Steller's eiders to be taken no longer exists.

Dated: December 10, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

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Notices

Federal Register

Vol. 73, No. 244

Thursday, December 18, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability: Inviting Applications for the Emerging Markets Program

Announcement Type: New.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.603.

SUMMARY: The Commodity Credit Corporation (CCC) announces that it is inviting proposals for the FY 2009 Emerging Markets Program (EMP). The intended effect of this notice is to solicit additional applications from the private sector and from government agencies for FY 2009. The EMP is administered by personnel of the Foreign Agricultural Service (FAS).

DATES: All proposals must be received by 5 p.m. Eastern Standard Time, January 20, 2009. Applications received after this time will be considered only if funds are still available.

FOR FURTHER INFORMATION CONTACT: Entities wishing to apply for funding should contact the Grants Management Branch, Foreign Agricultural Service, phone: (202) 720–5306, fax: (202) 690–0193, e-mail: *emo@fas.usda.gov*. Information is also available on the Foreign Agricultural Service Web site at *http://www.fas.usda.gov/mos/em-markets/em-markets.asp*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Authority: The EMP is authorized by section 1542(d)(1) of the Food, Agriculture, Conservation and Trade Act of 1990 (The Act), as amended. The EMP regulations appear at 7 CFR part 1486.

1. Purpose. The EMP is designed to assist U.S. entities in developing, maintaining, or expanding exports of U.S. agricultural commodities and products by providing partial funding for technical assistance activities that promote U.S. products in emerging foreign markets. The EMP is intended primarily to support export market development efforts of the private sector, but EMP resources may also be used to assist public organizations.

All U.S. agricultural commodities, except tobacco, are eligible for consideration. Agricultural product(s) should be comprised of at least 50 percent U.S. origin content by weight, exclusive of added water, to be eligible for funding. Proposals that seek support for multiple commodities are also eligible. EMP funding may only be used to support exports of U.S. agricultural commodities and products through generic activities.

2. *Appropriate Activities.* Following are types of project activities that may be funded under the EMP:

—Projects designed specifically to improve market access in emerging foreign markets. Example: Activities intended to mitigate the impact of political or economic events;

—Projects that specifically address various constraints to U.S. exports, including sanitary and phytosanitary issues and other non-tariff barriers. Examples: Seminars on U.S. food safety standards and regulations; and assessing and addressing pest and disease problems that inhibit U.S. exports;

—Short-term training in broad aspects of agriculture and agribusiness trade that will benefit U.S. exporters. Examples: Retail training or transportation and distribution seminars;

—Projects that help foreign governments collect and use market information and develop free trade policies that benefit U.S. exporters as well as the target country or countries. Examples: Agricultural statistical analysis or development of market information systems;

—Assessments and follow-up activities designed to improve country-wide food and business systems or to determine potential use of general export credit guarantees. Examples: Product needs assessments and market analysis;

—Studies of food distribution channels in emerging markets, including infrastructural impediments to U.S. exports. Examples: Grain storage handling and inventory systems; and distribution infrastructure development; and

—Marketing and distribution of value-added products. Example: Market research on the potential for consumer-ready foods or new uses of a product.

EMP funds may not be used to support normal operating costs of individual organizations, nor as a source to recover pre-award costs or prior expenses from previous or ongoing projects. Proposals that counter national strategies or duplicate activities planned or underway by U.S. non-profit agricultural commodity or trade associations (''cooperator'') organizations will not be considered. Other ineligible expenditures include branded product promotions (in-store, restaurant advertising, labeling, etc.); advertising, administrative, and operational expenses for trade shows; Web site development; equipment purchases; and the preparation and printing of brochures, flyers, and posters (except in connection with specific technical assistance activities such as training seminars). For a more complete description of ineligible expenditures, please refer to the EMP regulations.

3. *Eligible Markets.* The Act defines an emerging market as any country that the Secretary of Agriculture determines:

(a) Is taking steps toward a market-oriented economy through the food, agriculture, or rural business sectors of the economy of the country; and

(b) Has the potential to provide a viable and significant market for U.S. agricultural commodities or products of U.S. agricultural commodities.

Because EMP funds are limited and the range of potential emerging market countries is worldwide, consideration will be given to proposals which target countries or regional groups with per capita income less than $11,455 (the current ceiling on upper middle income economies as determined by the World Bank [World Development Indicators; July 2008, *http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS*]) and populations of greater than one million.

Income limits and their calculation can change from year to year with the result that a given country may qualify under the legislative and administrative criteria one year but not the next. Therefore, CCC has not established a

fixed list of ''emerging market'' countries.

A few countries technically qualify as emerging markets but may require a separate determination before funding can be considered because of political sensitivities.

II. Award Information

In general, all qualified proposals received before the application deadline will compete for EMP funding. Priority consideration will be given to proposals that identify and seek to address specific problems or constraints to agricultural exports in emerging markets through technical assistance activities that are intended to expand or maintain U.S. agricultural exports. Priority will also be given to proposals that directly support or address at least one of the goals and objectives in the USDA and FAS Strategic Plans. The applicants' willingness to contribute resources, including cash, or goods and services will be a critical factor in determining which proposals are funded under the EMP. Proposals will also be judged on the potential benefits to the industry represented by the applicant and the degree to which the proposal demonstrates industry support.

The limited funds and the range of eligible emerging markets worldwide generally preclude CCC from approving large budgets for individual projects. While there is no minimum or maximum amount set for EMP-funded projects, most are funded at a level of less than $500,000 and for a duration of approximately one year. Private entities may submit multi-year proposals requesting higher levels of funding that may be considered in the context of a detailed strategic plan of implementation. Funding in such cases is generally limited to three years and provided one year at a time, with commitments beyond the first year subject to interim evaluations and funding availability. Federal government entities are not eligible for multi-year funding.

Funding for successful proposals will be provided through specific agreements. The CCC, through FAS, will be kept informed of the implementation of approved projects through the requirement to provide quarterly progress reports and final performance reports. Changes in the original project time lines and adjustments within project budgets must be approved by FAS.

Note: EMP funds awarded to federal government agencies must be expended or otherwise obligated by close of business, September 30, 2009.

III. Eligibility and Qualification Information

1. Eligible Applicants. Any United States private or Government entity with a demonstrated role or interest in exports of U.S. agricultural commodities or products may apply to the program. Government organizations consist of federal, state, and local agencies. Private organizations include non-profit trade associations, universities, agricultural cooperatives, state regional trade groups (SRTGs), profit-making entities, and consulting businesses. Proposals from research and consulting organizations will be considered if they provide evidence of substantial participation in and financial support by the U.S. industry. For-profit entities are also eligible, but may not use program funds to conduct private business, promote private self-interests, supplement the costs of normal sales activities or promote their own products or services beyond specific uses approved by CCC in a given project.

U.S. market development cooperators and SRTGs may seek funding to address priority, market specific issues and to undertake activities not suitable for funding under other marketing programs, e.g., the Foreign Market Development Cooperator (Cooperator) Program and the Market Access Program (MAP). Foreign organizations, whether government or private, may participate as third parties in activities carried out by U.S. organizations, but are not eligible for funding assistance from the program.

2. Cost Sharing. No private sector proposal will be considered without the element of cost-share from the applicant and/or U.S. partners. The EMP is intended to complement, not supplant, the efforts of the U.S. private sector. There is no minimum or maximum amount of cost-share, though the range in recent successful proposals has been between 35 and 75 percent. The degree of commitment to a proposed project, represented by the amount and type of private funding, is used in determining which proposals will be approved for funding. Cost-share may be actual cash invested or professional time of staff assigned to the project. Proposals for which private industry is willing to commit cash, rather than in-kind contributions such as staff resources, will be given priority consideration.

Cost-sharing is not required for proposals from U.S. Government agencies, but is mandatory for all other eligible entities, even when they may be party to a joint proposal with a U.S. Government agency. Contributions from USDA or other U.S. Government agencies or programs may not be counted toward the stated cost-share requirement. Similarly, contributions from foreign (non-U.S.) organizations may not be counted toward the cost-share requirement, but may be counted in the total cost of the project.

3. Other. Proposals should include a justification for funding assistance from the program—an explanation as to what specifically could not be accomplished without Federal funding assistance and why the participating organization(s) would be unlikely to carry out the project without such assistance. Applicants may submit more than one proposal.

IV. Application and Submission Information

1. Address To Request Application Package. EMP applicants have the opportunity to utilize the Unified Export Strategy (UES) application process, an online system which provides a means for interested applicants to submit a consolidated and strategically coordinated single proposal that incorporates funding requests for any or all of the market development programs administered by FAS.

Organizations are encouraged to submit their application to FAS through the UES application Internet Web site. However, applicants are not required to use the UES format. The Internet-based format reduces paperwork and expedites the FAS processing and review cycle. Applicants planning to use the on-line UES system must contact the Program Policy Staff at (202) 720–4327 to obtain site access information, including a user ID and password. The Internet-based application, including step-by-step instructions for its use, is located at the following URL address: *http://www.fas.usda.gov/cooperators.html.* A Help file is available to assist applicants with the process. Applicants using the online system should also provide by hand delivery, promptly after the deadline for submitting the online application, a printed or e-mailed version of each proposal (using Word or compatible format) to the following address:

Hand Delivery (including FedEx, DHL, UPS, etc.): U.S. Department of Agriculture, Foreign Agricultural Service, Grants Management Branch, Portals Office Building, Suite 400, 1250 Maryland Avenue, SW., Washington, D.C. 20024, or e-mail to *emo@fas.usda.gov*.

Applicants electing not to use the on-line system must submit both (1) two printed copies of their application to the address above and (2) an electronic

version (using Word or a compatible format) to *emo@fas.usda.gov*.

2. Content and Form of Application Submission. To be considered for the EMP, an applicant must submit to the FAS information required by the EMP regulations 7 CFR part 1486. EMP regulations and additional information are available at the following URL address: *http://www.fas.usda.gov/mos/em-markets/em-markets.asp*.

In addition, in accordance with the Office of Management and Budget's issuance of a policy directive (68 FR 38402) regarding the need to identify entities that are receiving government awards, all applicants must submit a Dun and Bradstreet Data Universal Numbering System (DUNS) number. An applicant may request a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711.

Applications should be no longer than ten (10) pages and include the following information:

(a) Date of proposal;

(b) Name of organization submitting proposal;

(c) Organization address, telephone and fax numbers;

(d) Tax ID number;

(e) DUNS number;

(f) Primary contact person;

(g) Full title of proposal;

(h) Target market(s);

(i) Current conditions in the target market(s) affecting the intended commodity or product;

(j) Description of problem(s), i.e., constraint(s), to be addressed by the project, such as inadequate knowledge of the market, insufficient trade contacts, lack of awareness by foreign officials of U.S. products and business practices, impediments (infrastructure, financing, regulatory or other non-tariff barriers), etc.;

(k) Project objectives;

(l) Performance measures: benchmarks for quantifying progress in meeting the objectives;

(m) Rationale: Explanation of the underlying reasons for the project proposal and its approach, the anticipated benefits, and any additional pertinent analysis;

(n) Clear demonstration that successful implementation will benefit a particular industry as a whole, not just the applicant(s);

(o) Explanation as to what specifically could not be accomplished without federal funding assistance and why the participating organization(s) would be unlikely to carry out the project without such assistance;

(p) Specific description of activity/activities to be undertaken;

(q) Timeline(s) for implementation of activity, including start and end dates;

(r) Information on whether similar activities are or have previously been funded with USDA resources in target country or countries (e.g., under MAP and/or Cooperator programs); and

(s) Detailed line item activity budget:

—Cost items should be allocated separately to each participating organization; and

—Expense items constituting a proposed activity's overall budget (e.g., salaries, travel expenses, consultant fees, administrative costs, etc.), with a line item cost for each, should be listed, clearly indicating:

(1) Which items are to be covered by EMP funding;

(2) Which by the participating U.S. organization(s); and

(3) Which by foreign third parties (if applicable).

Cost items for individual consultant fees should show calculation of daily rate and number of days. Cost items for travel expenses should show number of trips, destinations, cost, and objective for each trip. Qualifications of applicant(s) should be included as an attachment.

3. Submission Dates and Times. All applications must be received by 5 p.m. Eastern Standard Time, January 20, 2009 in the Grants Management Branch either electronically or hand delivered. Applications received after this time will be considered only if funds are still available.

4. Funding Restrictions. Certain types of expenses are not eligible for reimbursement by the program, and there are limits on other categories of expenses such as indirect overhead charges, travel expenses, and consulting fees. CCC will also not reimburse unreasonable expenditures or expenditures made prior to approval of a proposal. Full details of the funding restrictions are available in the EMP regulations.

5. Other Submission Requirements and Considerations. All Internet-based applications must be properly submitted by 5 p.m. Eastern Standard Time, January 20, 2009.

All applications on compact disc (using Word or compatible format, with two accompanying paper copies) and any other form of application must be received by 5 p.m. Eastern Standard Time, January 20, 2009, at the following address:

Hand Delivery (including FedEx, DHL, UPS, etc.): U.S. Department of Agriculture, Foreign Agricultural Service, Grants Management Branch, Portals Office Building, Suite 400, 1250 Maryland Avenue, SW., Washington, DC 20024.

V. Application Review Information

1. Criteria. Key criteria used in judging proposals include:

—Appropriateness of the activities for the targeted market(s) and the extent to which the project identifies market barriers, e.g., a fundamental deficiency in the market, and/or a recent change in market conditions;

—Potential of the project to expand U.S. market share, increase U.S. exports or sales, and/or improve awareness of U.S. agricultural commodities and products;

—Quality of the project's performance measures, and the degree to which they relate to the objectives, deliverables, and proposed approach and activities;

—Justification for federal funding;

—Overall cost of the project and the amount of funding provided by the applicant and any partners; and

—Evidence that the organization has the knowledge, expertise, ability, and resources to successfully implement the project, including timeliness and quality of reporting on past EMP activities.

Please see 7 CFR part 1486 for additional evaluation criteria.

2. Review and Selection Process. All applications undergo a multi-phase review within FAS, by appropriate FAS field offices, and as needed, by the private sector Advisory Committee on Emerging Markets to determine the qualifications, quality, appropriateness of projects, and reasonableness of project budgets.

VI. Award Administration Information

1. Award Notices. FAS will notify each applicant in writing of the final disposition of its application. FAS will send an approval letter and project agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of EMP funding and cost-share contribution requirements.

2. Administrative and National Policy Requirements. Interested parties should review the EMP regulations which are available at the following URL address: *http://www.fas.usda.gov/mos/em-markets/em-markets.asp*.

3. Reporting. Quarterly progress reports for all programs one year or longer in duration are required. Projects of less than one year generally require a mid-term progress report. Final performance reports are due 90 days

after completion of each project. Content requirements for both types of reports are contained in the Project Agreement. Final financial reports are also due 90 days after completion of each project as attachments to the final reports.

VII. Agency Contact(s)

For additional information and assistance, contact the Grants Management Branch, Foreign Agricultural Service, U.S. Department of Agriculture, phone: (202) 720–5306, fax: (202) 690–0193, e-mail: *emo@fas.usda.gov*.

Signed at Washington, DC, on this 10th day of December 2008.

Michael W. Yost,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. E8–30071 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2008–0041]

Codex Alimentarius Commission: Meeting of the Codex Committee on Fats and Oils

AGENCY: Office of the Under Secretary for Food Safety, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and the Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), are sponsoring a public meeting on January 26, 2009. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States positions that will be discussed at the 21st Session of the Codex Committee on Fats and Oils (CCFO) of the Codex Alimentarius Commission (Codex), which will be held in Kota Kinabalu, Malaysia, from February 16–20, 2009. The Under Secretary for Food Safety and FDA recognize the importance of providing interested parties the opportunity to obtain background information on the 21st Session of the CCFO and to address items on the agenda.

DATES: The public meeting is scheduled for Wednesday, January 26, 2009, 1–4 p.m.

ADDRESSES: The public meeting will be held in the rear of the cafeteria, South Agriculture Building, USDA, 1400 Independence Avenue, SW., Washington, DC 20250. Documents related to the 21st Session of the CCFO will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp.*

The U.S. Delegate to the 21st Session of the CCFO, Dr. Dennis Keefe of FDA, invites U.S. interested parties to submit their comments electronically to the following e-mail address (*Dennis.Keefe@fda.hhs.gov*).

Registration

There is no need to pre-register for this meeting. To gain admittance to this meeting, individuals must present a photo ID for identification. When arriving for the meeting, please enter the South Agriculture Building through the second wing entrance on C Street, SW.

For Further Information About the 21st Session of the CCFO Contact: Dr. Dennis Keefe, U.S. Delegate to the CCFO, FDA, Center for Food Safety and Applied Nutrition, Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD 20740–3835, Phone: (301) 436–1284, Fax: (301) 436–2972, e-mail: *Dennis.Keefe@fda.hhs.gov.*

For Further Information About the Public Meeting Contact: Amjad Ali, International Issues Analyst, U.S. Codex Office, Food Safety and Inspection Service, Room 4861, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250, Phone: (202) 205–7760, Fax: (202) 720–3157.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius (Codex) was established in 1963 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices are used in trade.

The CCFO was established to elaborate codes, standards and related texts for fats and oils. The Committee is being hosted by Malaysia.

Issues To Be Discussed at the Public Meeting

The following items on the agenda for the 21st Session of the CCFO will be discussed during the public meeting:

- Matters referred to the Committee from the other Codex bodies.
- Draft Amendment to the Standard for Named Vegetable Oils: Inclusion of Rice Bran Oil.
- Draft Amendment to the Standard for Named Vegetable Oils: Amendment to Total Carotenoids in Unbleached Palm Oil.
- Proposed Draft Criteria for Acceptable Previous Cargoes to the Code of Practice for Storage and Transport of Edible Fats and Oils in Bulk.
- Draft List of Acceptable Previous Cargoes at Step 6.
- Proposed Draft List of Acceptable Previous Cargoes at Step 3.
- Consideration of the Linolenic Acid and Campesterol Levels in Section 3.9 of the Standard for Olive Oils and Olive Pomace Oils.
- Consideration of Proposals for Amendments to the Standard for Named Vegetable Oils: Palm Kernel Stearin and Palm Kernel Olein.
- Criteria for the Revision of the Standard for Named Vegetable Oils.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat prior to the meeting. Members of the public may access copies of these documents (see **ADDRESSES**).

Public Meeting

At the January 26, 2009, public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate for the 21st Session of the CCFO, Dr. Dennis Keefe (see **ADDRESSES**). Written comments should state that they relate to activities of the 21st Session of the CCFO.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2008_Notices_Index/*.

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for

industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC on December 12, 2008.

Paulo Almeida,

Associate U.S. Manager for Codex Alimentarius.

[FR Doc. E8–30004 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–DM–P

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 10/30/2008 THROUGH 12/11/2008

Firm	Address	Date accepted for filing	Products
Iceberg Enterprises, LLC	1300 W. Higgins Road, Park Ridge, IL 60068.	10/30/2008	Plastic tables, chairs, cabinets and related office products.
Thorock Metals, Inc.	435 Weber Avenue, Compton, CA	12/9/2008	Alloyed aluminum ingots (RSI, or Recycled Secondary Ingots).
TechniQuip Corp.	5653 Stoneridge Drive, Pleasanton, CA 94588–90223.	12/11/2008	Fiber optic illumination devices and fluorescent ring lights.
Misty Mountain Threadworks, Inc.	718 Burma Road, Banner Elk, NC 28604	12/11/2008	Recreational mountain climbing gear, including waist/body harnesses, boulder pads, slings, chalk bags and tool bags.

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: December 12, 2008.

William P. Kittredge,

Program Officer for TAA.

[FR Doc. E8–30039 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–846

Brake Rotors From the People's Republic of China: Notice of Extension of Time Limit for Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Terre Keaton Stefanova, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone; (202) 482–1766 or (202) 482–1280, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 4, 2008, the Department of Commerce (the Department) published in the **Federal Register** a notice of initiation of the administrative review of the antidumping duty order on brake rotors from the People's Republic of China (PRC) covering the period April 1, 2007, through March 31, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 FR 31813 (June 4, 2008). On June 25, 2008, the Department published a notice of revocation of the antidumping duty order on brake rotors from the PRC effective August 14, 2007 (*see Brake Rotors From the People's Republic of China: Revocation of Antidumping Duty Order Pursuant to Second Five-year (Sunset) Review*, 73 FR 36039 (June 25, 2008)). As a result of the revocation of the order, the period of review (POR) was changed from April 1, 2007, through March 31, 2008, to April 1, 2007, through August 13, 2007 (*see* June 27, 2009 Memorandum to The File titled ''Change in the Period of Review'').

On July 29, 2008, we selected Longkou Haimeng Machinery Co., Ltd (Longkou Haimeng) and Yantai Winhere Auto–Part Manufacturing (Yantai Winhere) as the mandatory respondents

in this administrative review. *See* the July 29, 2008, Memorandum from The Team to James Maeder, Office Director, titled ''2007 Antidumping Duty Administrative Review of Brake Rotors from the People's Republic of China: Selection of Respondents for Individual Review.''

In July and August 2008, several companies, including Longkou Haimeng, timely withdrew their requests for review. We partially rescinded the review with respect to these companies. *See Brake Rotors From the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 53193 (September 15, 2008).

Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination in an administrative review within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. If it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend this deadline to a maximum of 365 days. The deadline for the preliminary results of this review is currently December 31, 2008.

In this review, the interested parties have not submitted publicly available information (PAI) for consideration in valuing the factors of production in the preliminary results. Moreover, we have requested and received documentation from U.S. Customs and Border Protection (CBP) for certain entries made by exporter/producer combinations which are also included in this review to determine whether those entries are non–subject merchandise. Therefore, the Department requires additional time to obtain updated PAI and analyze the entry data from CBP. Thus, it is not practicable to complete this review within the original time limit. Therefore, the Department is partially extending the time limit for completion of the preliminary results from 245 days to 306 days, in accordance with section 751(a)(3)(A) the Act. The preliminary results are now due no later than March 2, 2009. The final results continue to be due 120 days after the publication of the preliminary results.

We are issuing and publishing this notice in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: December 11, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–30111 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–122–840)

Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 10, 2008, the Department of Commerce (Department) published the preliminary results of the administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. *See Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Canada*, 73 FR 39646 (July 10, 2008) (*Preliminary Results*). This review covers the period October 1, 2006, through September 30, 2007, for Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P. (referred to collectively as Ivaco).

EFFECTIVE DATE: December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Steve Bezirganian or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1131 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 10, 2008, the Department published the preliminary results of this administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. *See Preliminary Results*, 73 FR 39646. Ivaco submitted its case brief on August 11, 2008, and petitioners, ISG Georgetown Inc., Gerdau Ameristeel U.S. Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills, submitted their rebuttal brief on August 18, 2008. No hearing was requested. The Department extended the deadline for completion of the final results by 35 days, to December 12, 2008. *See Carbon and Certain Alloy Steel Wire Rod From Canada: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 73 FR 63134 (October 23, 2008).

Period of Review

The period of review is October 1, 2006 through September 30, 2007.

Scope of the Order

The merchandise subject to the order is certain hot–rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above–noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (i.e., products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non–deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in

cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non–deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end–use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope. The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3092, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, 7227.90.6010, and 7227.90.6080 of the HTSUS. 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 case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum from Gary Taverman, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, dated December 11, 2008 (Decision Memorandum), which is hereby adopted by this notice. A list of the issues parties have raised and to which we have responded, all of which are in the Decision Memorandum (and, for the level of trade issue, in a separate proprietary document referenced in the Decision Memorandum), is attached to this notice as an appendix. Parties can find a discussion of all public issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit in room 1117 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have not made any changes to the calculations in our preliminary results.

Final Results of Review

We determine the following weighted–average percentage margin exists for the period October 1, 2006, through September 30, 2007:

Manufacturer/Exporter	Weighted Average Margin
Ivaco Rolling Mills 2004 L.P. / Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.	2.33 percent

Assessment

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b). The Department calculated an assessment rate for each importer of the subject merchandise covered by the review. Upon issuance of the final results of this review, for the importer–specific assessment rate calculated in the final results that is above *de minimis (i.e.*, at or above 0.50 percent), we will issue assessment instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. Pursuant to 19 CFR 356.8(a), the Department intends to issue assessment instructions to CBP 41 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the period of review produced by Ivaco for which Ivaco did not know the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the 8.11 percent all–others rate if there is no company–specific rate for an intermediary involved in the transaction. *See id.*

Cash Deposit Requirements

The Department has revoked this order, effective October 29, 2007. *See Revocation of Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Canada*, 73 FR 44223 (July 30, 2008). Therefore, there is no need to issue new cash deposit instructions for this administrative review.

Notification to 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 Department's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative

protective orders (APOs) of their responsibility concerning the disposition 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 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.This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 11, 2008.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Policy and Negotiations.

Appendix Issues and Decision Memorandum

Comment 1: Level of Trade
Comment 2: Offsetting for U.S. Sales that Exceed Normal Value

[FR Doc. E8–30090 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–588–046)

Polychloroprene Rubber From Japan: Final Results of Changed Circumstances Review and Determination To Revoke Antidumping Duty Finding, in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 29, 2008, the Department of Commerce (the Department) published a notice of initiation and preliminary results of a changed circumstances review with intent to revoke, in part, the antidumping duty (AD) finding on polychloroprene rubber from Japan. *See Polychloroprene Rubber From Japan: Initiation and Preliminary Results of Changed Circumstances Review, and Intent to Revoke Antidumping Duty Finding, in Part*, 73 FR 56548 (September 29, 2008) (*Initiation and Preliminary Results*). On October 27, 2008, the **Federal Register** corrected certain errors it made in publishing the Initiation and Preliminary Results. *See Polychloroprene Rubber From Japan: Initiation and Preliminary Results of Changed Circumstances Review, and Intent to Revoke Antidumping Duty Finding, in Part*, 73 FR 63687 (October 27, 2008) (*Initiation Correction*).

In the *Initiation and Preliminary Results* and *Initiation Correction*, the Department invited interested parties to comment on the *Initiation and Preliminary Results* and no comments were received. Accordingly, we are now revoking this AD finding, in part, with regard to certain polychloroprene rubber products from Japan, as described in the ''Scope of Changed Circumstances Review'' section of this notice, based on the fact that domestic parties have expressed no further interest in the relief provided by the AD finding with respect to the imports of such products.

EFFECTIVE DATE: December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Summer Avery, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington DC 20230; telephone: (202) 482–4052.

SUPPLEMENTARY INFORMATION:

Background

On August 4, 2008, the Department received a request on behalf of the petitioner, DuPont Performance Elastomers L.L.C. (DPE),[1] for revocation, in part, of the AD finding on polychloroprene rubber from Japan pursuant to sections 751(b)(1) and 782(h) of the Tariff Act of 1930, as amended (the Act). DPE requested partial revocation of the AD finding with respect to certain polychloroprene rubber products, listed below in the section entitled ''Scope of Changed Circumstances Review.'' In its August 4, 2008 submission, DPE stated that it no longer has any interest in antidumping relief from imports of such polychloroprene rubber from Japan. On September 29, 2008, the Department published a notice of initiation and preliminary results of a changed circumstances review with intent to revoke, in part, the AD finding on polychloroprene rubber from Japan. *See Initiation and Preliminary Results*. In preparing the notice for publication, the **Federal Register** made a number of substantive errors during its technical preparation of the *Initiation and Preliminary Results* for publication. On October 27, 2008, the **Federal Register** published corrections of these errors. *See Initiation Correction*. The Department provided interested parties with a deadline to submit written comments no later than 30 days after the date of the *Initiation Correction*. The Department did not receive any comments from interested parties.

Scope of Changed Circumstances Review

The merchandise subject to DPE's request and covered by this changed circumstances review is polychloroprene rubber from Japan with aqueous dispersions of 2–chlorobutadiene–1,3 homopolymers, where the polymer content of the dispersion is between 55 weight percent and 61 weight percent and the dispersed homopolymer contains less than 10 weight percent of a tetrahydrofuran–insoluble fraction. This changed circumstances review covers polychloroprene rubber from Japan meeting the specifications as described above. Effective upon publication of these final results of changed circumstances review in the **Federal Register**, the amended scope of the AD finding will read as identified in the ''Scope of the Finding (As Amended By These Final Results of Changed Circumstances)'' section below.

Scope of the Finding (As Amended By These Final Results of Changed Circumstances)

The merchandise covered are shipments of polychloroprene rubber, an oil resistant synthetic rubber also known as polymerized chlorobutadiene or neoprene, currently classifiable under items 4002.41.00, 4002.49.00, and 4003.00.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although HTSUS item numbers are provided for convenience and customs purpose, the Department's written description of the scope remains dispositive.

The following types of polychloroprene rubber from Japan are excluded from the scope: (1) aqueous dispersions of polychloroprenes that are dipolymers of chloroprene and methacrylic acid, where the dispersion has a pH of 8 or lower (this category is limited to aqueous dispersions of these polymers and does *not* include aqueous dispersions of these polychloroprenes that contain comonomers other than methacrylic acid); (2) aqueous dispersions of polychloroprenes that are dipolymers of chloroprene and 2,3–dichlorobutadiene–1,3 modified with xanthogen disulfides, where the

[1] DPE is the sole petitioner in this antidumping proceeding. *See Polychloroprene Rubber From Japan: Final Results of the Expedited Sunset Review of the Antidumping Duty Finding*, 69 FR 64276 (November 4, 2004). DPE has been the sole U.S. producer of polychloroprene rubber since 1998, when Bayer Group closed its polychloroprene rubber plant in Houston, Texas. *See* Polychloroprene Rubber from Japan, Inv. No. AA-1921-129 (Second Review), U.S. ITC Pub. 3786 (June 2005), at 4-5.

dispersion has a solids content of greater than 59 percent (this category is limited to aqueous dispersions of these polymers and does *not* include aqueous dispersions of polychloroprenes that contain comonomers other than 2,3–dichlorobutadiene–1,3); and (3) solid polychloroprenes that are dipolymers of chloroprene and 2,3–dichlorobutadiene–1,3 having a 2,3–dichlorobutadiene–1,3 content of 15 percent or greater (this category is limited to polychloroprenes in solid form and does not include aqueous dispersions).

In addition, the following types of polychloroprene rubber are excluded from the scope: 1) solid polychloroprenes that are dipolymers of chloroprene and methacrylic acid having methacrylic acid comonomer content in the 0.2 percent to 5.0 percent range (this category does not include aqueous chloroprene/methacrylic acid diploymer dispersion products or solvent solutions of chloroprene/methacrylic acid dipolymers),[2] and 2) aqueous dispersions of 2–chlorobutadiene–1,3 homopolymers, where the polymer content of the dispersion is between 55 weight percent and 61 weight percent and the dispersed homopolymer contains less than 10 weight percent of a tetrahydrofuran–insoluble fraction.

Final Results of Review: Partial Revocation of Antidumping Duty Finding

The affirmative statement of no interest by the petitioner concerning certain polychloroprene rubber from Japan, as described herein, constitutes changed circumstances sufficient to warrant revocation of the AD finding in part. Therefore, the Department is revoking, in part, the AD finding on polychloroprene rubber from Japan with regard to products which meet the specifications detailed above, in accordance with sections 751(b) and (d) and 782(h) of the Act and 19 CFR 351.216(d) and 351.222(g). We will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation of entries of certain polychloroprene rubber, meeting the specifications indicated above, entered, or withdrawn from warehouse, for consumption on or after the date of publication in the **Federal Register** of the final results of this changed circumstances review, in accordance with 19 CFR 351.222. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements.

This notice 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 351.306. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

The Department is issuing this changed circumstances review, partial revocation of the AD finding, and this notice in accordance with sections 751(b) and (d), 777(i), and 782(h) of the Act and 19 CFR 351.216(e) and 351.222(g).

Dated: December 11, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–30113 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–DS–S

[2] *See Polychloroprene Rubber from Japan: Final Results of Changed Circumstances Review and Determination to Revoke Antidumping Duty Finding in Part*, 73 FR 64914 (October 31, 2008).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Highly Migratory Species Tournament Registration and Reporting

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and the respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 17, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Randy Blankinship, (727) 824–5399 or *Randy.Blankinship@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Under the authorization of the Magnuson-Stevens Fishery Management and Conservation Act, National Marine Fisheries Service (NMFS) would like to renew its requirement that operators of fishing tournaments involving Highly Migratory Species (HMS), specifically Atlantic tunas, swordfish, billfish, and sharks, provide advance identification of the tournament date(s), location, operator, and target species. Also, after the tournament, provide information on the HMS that are caught, whether they were kept or released, the length and weight of the fish, and other information. Most of the data required for post-tournament reporting are already collected in the course of routine tournament operations. The data collected are needed by NMFS to estimate the total annual catch of these species and to evaluate the impact of tournament fishing in relation to other types of fishing.

II. Method of Collection

Completed paper forms are returned to NMFS, at an address or FAX number designated by NMFS on the forms.

III. Data

OMB Control Number: 0648–0323.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations; not-for-profit institutions.
Estimated Number of Respondents: 300.
Estimated Time per Response: 2 minutes for a registration form; and 20 minutes for a tournament summary report.
Estimated Total Annual Burden Hours: 83.
Estimated Total Annual Cost to Public: $161.20 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information

on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of this information collection; they also will become a matter of public record.

Dated: December 15, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–30089 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM24

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of applications for scientific research permits; request for comments.

SUMMARY: Notice is hereby given that NMFS has received applications for scientific research from Natural Resource Scientists, Incorporated (NRS), in Red Bluff, CA (14077), and from the U.S. Geological Services (USGS) in Sacramento, CA (14150). These permits would affect the federally endangered Sacramento River winter-run Chinook salmon and the threatened Central Valley spring-run Chinook salmon Evolutionarily Significant Units (ESUs), the federally threatened Central Valley steelhead Distinct Population Segment (DPS), and the federally threatened southern Distinct Population of North American green sturgeon (southern DPS of green sturgeon). This document serves to notify the public of the availability of the permit applications for review and comment.

DATES: Written comments on the permit applications must be received no later than 5 p.m. Pacific Standard Time on January 20, 2009.

ADDRESSES: Comments submitted by e-mail must be sent to the following address *FRNpermitsSAC@noaa.gov*. The applications and related documents are available for review by appointment, for permits : Protected Resources Division, NMFS, 650 Capitol Mall, Suite 8–300, Sacramento, CA 95814 (ph: 916–930–3600, fax: 916–930–3629).

FOR FURTHER INFORMATION CONTACT: Shirley Witalis telephone 916–930–3606, or e-mail: *Shirley.Witalis@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531 1543) (ESA), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

This notice is relevant to federally-listed endangered Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*) ESU, threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*) ESU, threatened Central Valley steelhead (*O. mykiss*) DPS, threatened Central California Coast steelhead (*O. mykiss*), and threatened southern DPS of North American green sturgeon (*Acipenser medirostris*).

Applications Received

NRS requests a 2–year permit (14077) for take of juvenile Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and southern DPS of green sturgeon to conduct site-specific research at three irrigation diversion sites off the Sacramento River, California. This research is part of an on-going investigation into developing criteria for prioritizing fish screening projects, and will correlate fish entrainment with the physical, hydraulic, and habitat variables at each diversion site. All fish will be identified as to species/race, enumerated, measured for length, and placed back into the canals; all entrained live fish will be returned to the river. Sampling at each diversion site will be performed daily from April 1 through October 31, 2009, and April 1 through October 31, 2010. NRS requests authorization for an estimated annual non-lethal take of 1,466 juvenile Sacramento River winter-run Chinook salmon, 1,307 Central Valley juvenile spring-run Chinook salmon, and 155 Central Valley juvenile steelhead, for a total of 2,928 salmonids per year. NRS estimates the annual non-lethal take of 184 juvenile southern DPS of green sturgeon. Estimates of take for the two year study are 5,856 salmonids and 368 green sturgeon.

USGS, in co-sponsorship with the California Department of Water Resources, California Bay-Delta Authority, and the U.S. Bureau of Reclamation, requests a 5–year permit (14150) for take of juvenile Sacramento River winter-run Chinook salmon and Central Valley spring-run Chinook salmon associated with researching the mechanisms that control out-migration pathways and survival of endangered juvenile salmon in the Sacramento-San Joaquin Delta, California (Delta) from the interaction between seasonal timescale variations in upstream hydrology and strong tidal forcing effects from water management actions. The goals of the study are two-fold: (1) to determine the factors (channel geometry, velocity structure, and behavior) that control entrainment in the Delta Cross Channel and Georgiana Slough; and (2) to determine routes and survival of out-migrating juvenile salmon throughout the north, west and centralDelta. The primary source of study fish will be 5500 Central Valley late-fall subyearling Chinook salmon (*O. tshawytscha*) from Coleman National Fish Hatchery (CNFH). To investigate differences of behavioral response between hatchery and wild fish, an admixture of 250 juvenile winter-, spring-, fall- and late fall-run Chinook salmon will be collected from

U.S. Fish and Wildlife Service or California Department of Fish and Game rotary screw trap monitoring efforts in the Sacramento River at river mile (RM) 242 and RM 205 and transported directly to a shoreline research location or the California-Nevada Fish Health Center at the CNFH complex and held prior to being transported to shoreline research locations for surgical insertion of acoustic transmitters; a tissue sample will be collected from wild juvenile

salmon for genetic analysis. Shoreline research locations will include: (1) the Tower Bridge in Sacramento, California; and (2) the city of Ryde, California (RM 24); and Georgiana Slough. Hatchery and wild salmon will then be transported and/or released for tracking by acoustic telemetry receivers in place throughout the Delta. Fish capture and transport will begin in mid-October and continue until early February of the following year; all field activities will be completed by March of each sampling season. USGS requests authorization for an estimated take of 100 wild Sacramento River winter-run Chinook salmon and 38 Central Valley spring-run Chinook salmon, including no more than 15 percent unintentional mortality resulting from handling, transporting and holding, tissue-sampling, invasive tagging, and releasing for tracking by hydroacoustic telemetry arrays.

Dated: December 12, 2008.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–30105 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XM29

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a public meeting of the Shrimp Advisory Panel (AP).

DATES: The Shrimp AP meeting is scheduled to begin at 8:30 a.m. on Thursday, January 8, 2009 and end by 2 p.m.

ADDRESSES: The meeting will be held at the Spring Hill Suites, 7922 Mosley Road, Houston, TX 77061.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Interim Executive Director; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Shrimp AP will receive a presentation of the ''Biological Review of the 2008 Texas Closure and Percent Change in Yield'' and consider recommendations for a cooperative closure with Texas in 2009. The Shrimp AP will also receive presentations of the ''Status and Health of the Shrimp Stocks for 2007'', the ''Stock Assessment Report 2007'', ''A Biological Review of the Tortugas Pink Shrimp Fishery Through December 2007'', and a Report on the Number of Moratorium Permits Issued and Preliminary Effort Estimates for 2008. The Shrimp AP may make recommendations regarding these reports.

Although other non-emergency issues not on the agenda may come before the Shrimp AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Shrimp AP will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Copies of the agenda can be obtained by calling (813) 348–1630.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: December 15, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–30092 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XM28

Pacific Fishery Management Council; Public Meetings and Hearings

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

ACTION: Notice of availability of reports; public meetings, and hearings.

SUMMARY: The Pacific Fishery Management Council (Council) has begun its annual preseason management process for the 2009 ocean salmon fisheries. This document announces the availability of Council documents as well as the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April 2009 Council meetings will be published in subsequent **Federal Register** documents prior to the actual meetings.

DATES: Written comments on the salmon management options must be received by March 31, 2009, at 4:30 p.m. Pacific Time.

ADDRESSES: Documents will be available from, and written comments should be sent to, Mr. Donald Hansen, Chairman, Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384, telephone: (503) 820–2280 (voice) or (503) 820–2299 (fax). Comments can also be submitted via e-mail at *PFMC.comments@noaa.gov*. address, or through the internet at the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments, and include the I.D. number in the subject line of the message. For specific meeting and hearing locations, see **SUPPLEMENTARY INFORMATION**.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION:

Schedule for Document Completion and Availability

February 26, 2009: ''Review of 2008 Ocean Salmon Fisheries'' and ''Preseason Report I-Stock Abundance Analysis for 2009 Ocean Salmon Fisheries'' will be mailed to the public and posted on the Council website at *http://www.pcouncil.org*.

March 22, 2009: ''Preseason Report II-Analysis of Proposed Regulatory Options for 2009 Ocean Salmon Fisheries'' and public hearing schedule will be mailed to the public and posted on the Council website at *http://www.pcouncil.org*. The report will include a description of the adopted salmon management options and a summary of their biological and economic impacts.

April 24, 2009: ''Preseason Report III-Analysis of Council-Adopted Ocean

Salmon Management Measures for 2009 Ocean Salmon Fisheries'' will be mailed to the public and posted on the Council website at *http://www.pcouncil.org*.

May 1, 2009: Federal regulations for 2009 ocean salmon regulations will be published in the **Federal Register** and implemented.

Meetings and Hearings

January 20–23, 2009: The Salmon Technical Team (STT) will meet at the Council office in a public work session to draft ''Review of 2008 Ocean Salmon Fisheries'' and to consider any other estimation or methodology issues pertinent to the 2009 ocean salmon fisheries.

February 17–20, 2009: The STT will meet at the Council office in a public work session to draft ''Preseason Report I-Stock Abundance Analysis for 2009 Ocean Salmon Fisheries'' and to consider any other estimation or methodology issues pertinent to the 2009 ocean salmon fisheries.

March 30–31, 2009: Public hearings will be held to receive comments on the proposed ocean salmon fishery management options adopted by the Council. All public hearings begin at 7 p.m. at the following locations:

March 30, 2009: Chateau Westport, Beach Room, 710 W Hancock, Westport, WA 98595, telephone: (360) 268–9101;

March 30, 2009: Red Lion Hotel, Umpqua Room, 1313 N Bayshore Drive, Coos Bay, OR 97420, telephone: (541) 269–4099; and

March 31, 2009: Red Lion Eureka, Evergreen Room, 1929 Fourth Street, Eureka, CA 95501, telephone: (707) 445–0844.

Although non emergency issues not contained in the STT meeting agendas may come before the STT for discussion, those issues may not be the subject of formal STT action during these meetings. STT action will be restricted to those issues specifically listed in this document and to any issues arising after publication of this document requiring emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STT's intent to take final action to address the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 (voice), or (503) 820–2299 (fax) at least 5 days prior to the meeting date.

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

Dated: December 15, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–30091 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM02

Small Takes of Marine Mammals Incidental to Specified Activities; Seabird and Pinniped Research Activities in Central California

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) to PRBO Conservation Science (PRBO) to take small numbers of marine mammals, by Level B behavioral harassment only, incidental to conducting seabird and pinniped research in central California.

DATES: This authorization is effective from December 12, 2008, through December 11, 2009.

ADDRESSES: A copy of the IHA and the application are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by contacting one of the individuals listed here (**FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address and at the Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody or Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713–2289, or Monica DeAngelis, Southwest Regional Office, NMFS, (562) 980–4023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> ..an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except for certain categories of activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS' review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On July 28, 2008, NMFS received an application from PRBO requesting an authorization for the harassment of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina richardsi*), northern elephant seals (*Mirounga angustirostris*), and Steller sea lions (*Eumetopias jubatus*) incidental to

conducting seabird and pinniped research operations on Southeast Farallon Island, Ano Nuevo Island, and Point Reyes National Seashore in central California. A detailed description of the activity is provided in the September 29, 2008, **Federal Register** notice (73 FR 56556), therefore, it is not repeated here.

Comments and Responses

A notice of receipt and request for 30–day public comment on the application and proposed authorization was published on September 29, 2008 (73 FR 56556). During the 30–day public comment period, NMFS received comments from the Marine Mammal Commission (Commission).

Comment: The Commission recommends that any authorization issued specify that, if a mortality or serious injury of a marine mammal occurs that appears to be related to the research, PRBO must suspend research activities while NMFS determines whether steps can be taken to avoid further injuries or mortalities or until NMFS would potentially authorize such taking by regulations promulgated under section 101(a)(5)(A) of the MMPA.

*Response:*NMFS agrees with the Commission that research activities must be suspended immediately if a dead or injured marine mammal is found in the vicinity of the project area and the death or injury of the animal could be attributable to the applicant's activities. This requirement is a condition in the IHA.

Description of the Marine Mammals Potentially Affected by the Activity

The marine mammals most likely to be harassed incidental to conducting seabird research at the proposed research areas on Southeast Farallon Island, Ano Nuevo Island, and Point Reyes National Seashore are primarily California sea lions, northern elephant seals, Pacific harbor seals, and to a lesser extent Steller sea lions.

The marine mammals most likely to be harassed incidental to conducting pinniped research conducted under NMFS Scientific Research Permit (SRP) 373–1868–00 are harbor seals, northern elephant seals, California sea lions, Steller sea lions and northern fur seals. However, directed take of elephant seals, harbor seals, California sea lions, and northern fur seals is authorized by SRP 373–1868–00.

General information of these species can be found in Caretta et al. (2008) and is available at the following URL: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2007.pdf*. Additional information on these species is provided in the September 29, 2008, **Federal Register** notice (73 FR 56556). Refer to these documents for information on these species.

Potential Effects on Marine Mammals

The only anticipated impacts would be temporary disturbances caused by the appearance of researchers near the pinnipeds. Incidental harassment may occur as researchers approach the haul-out sites with vessels, pedestrian approach to bird nesting sites, and during capture and sampling activities of harbor seals and northern elephant seals. The potential disturbance might alter pinniped behavior and may cause animals to flush from the area. Animals may return to the same site once researchers have left or go to an alternate haul out site, which usually occurs within 30 minutes (Allen *et al.*, 1985).

Long-term effects of this disturbance are unlikely, as the activities are not conducted in breeding areas for marine mammals and very few breeding animals will be present in the vicinity of the proposed seabird and pinniped research areas. No research would occur on pinniped rookeries; therefore, mother and pup separation or crushing of pups is not a concern.

Potential Impacts on Habitat

NMFS has designated critical habitat for the Steller sea lion around Southeast Farallon Island and Ano Nuevo Island, extending from these two rookeries to 3,000 feet offshore. Neither the proposed seabird research, nor the proposed pinniped research would result in the physical altering of marine mammal habitat. The proposed action will not impact any habitat on the islands and is not likely to result in the destruction or adverse modification of Steller sea lion critical habitat or to the food sources that they use. This project will have negligible impacts to any haul-out sites, rafting sites, forage sites, or food resources in the action area and therefore is not likely to adversely affect designated critical habitat.

Incidental marine mammal takes will not result in the physical altering of major breeding habitat. No survey or sampling equipment will be left in habitat areas; no toxic chemicals will be present; and all state and federal marine regulations, including those from National Marine Sanctuaries, will be followed in regards to boat emissions.

Potential Impacts to Subsistence Harvest of Marine Mammals

There is no subsistence harvest of marine mammals in the proposed research area; therefore, there will be no impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses.

Number of Marine Mammals Expected to Be Taken

It is estimated that approximately 2,242 California sea lions, 418 harbor seals, 253 northern elephant seals, and 20 Steller sea lions could be potentially affected by Level B behavioral harassment. This estimate is based on previous research experiences, with the same activities conducted in the proposed research area, and on marine mammal research activities in these areas. These incidental harassment take numbers represent approximately one percent of the U.S. stock of California sea lion, 1.2 percent of the California stock of Pacific harbor seal, less than one percent of the California breeding stock of northern elephant seal, and 0.04 percent of the eastern U.S. stock of Steller sea lion. All of the potential takes are expected to be Level B behavioral harassment only. No injury or mortality to pinnipeds is expected or requested.

Mitigation Measures

PRBO researchers would take all possible measures to reduce marine mammal disturbance for the activities described in the Summary of Request and in the **Federal Register** notice of receipt (73 FR 56556, September 29, 2008).

To reduce the potential for disturbance from visual and acoustic stimuli associated with seabird and pinniped research activities, PRBO proposes to undertake the following mitigation measures: (1) abide by the Terms and Conditions of the Biological Opinion's Incidental Take Statement; (2) continue to abide by the Terms and Conditions of Scientific Research Permit 373–1868–00; (3) plan to minimize the potential for disturbance (to the lowest level practicable) near known pinniped haul-outs by boat travel and pedestrian approach during pinniped and seabird research operations; (4) conduct research activities during the planned dates stated in the application; (5) to the extent possible, be careful in the route of approach during beach landings; (6) attempt beach landings on Ano Nuevo Island only after any pinnipeds that might be present on the landing beach have entered the water; (7) select a pathway of approach to research sites that minimizes the number of marine mammals harassed, with the first priority being avoiding the disturbance of Steller sea lions at haul outs; (8) monitor for offshore predators and not approach hauled out Stellar sea lions if

great white sharks or killer whales are seen in the area, and if predators are seen, eastern Steller sea lions must not be disturbed until the area is free of predators; (9) keep voices hushed and bodies low in the visual presence of pinnipeds; (10) conduct seabird observations at North Landing on Southeast Farallon Island within an observation blind to remain shielded from the view of hauled out pinnipeds; (11) crawl slowly towards seabird nesting boxes on Ano Nuevo Island if pinnipeds are within the researchers' field of vision; (12) coordinate visits for seabird and pinniped research to intertidal areas of Southeast Farallon Island to reduce potential take; (13) coordinate all research goals on Ano Nuevo Island to minimize the number of trips to the island and coordinate monitoring schedules so that areas near any pinnipeds would be accessed only once per visit; and (14) the lead biologist will serve as an observer to evaluate incidental take and halt any research activities should the potential for incidental take become too great.

Monitoring

PRBO researchers, and their designees would: (1) record the date, time, and location (or closest point of ingress) of each visit; (2) record marine mammal behavior patterns observed before, during, and after the activities; (3) record the number of Steller sea lions present at each location; (4) if applicable, note the presence of any offshore predators (date, time, number, species).

Reporting

PRBO, and its designees, will submit a draft final report to NMFS within 90 days after the expiration of the IHA and will submit a final report to NMFS within 30 days after receiving comments from NMFS on the draft final report.

National Environmental Policy Act (NEPA)

In 2007, NMFS prepared a draft Environmental Assessment (EA) on the issuance of an IHA to PRBO to take marine mammals by Level B behavioral harassment incidental to conducting seabird research in central California. The draft EA was released for public review and comment along with the application and the proposed IHA (72 FR 41294, July 27, 2007). All comments were addressed in full in the **Federal Register** Notice of Issuance of an IHA for PRBO (72 FR 71121, December 14, 2007). At that time, NMFS determined that conducting the seabird research would not have a significant impact on the quality of the human environment and issued a Finding of No Significant Impact (FONSI).

For this proposed action, PRBO has requested to incidentally harass 20 Steller sea lions, (i.e., 4 more than what was analyzed in the 2007 EA, which expands the scope of the previously analyzed action) during the conduct of pinniped and seabird research. Thus, NMFS has prepared a supplemental EA (SEA) to address new available information regarding the effects of PRBO's seabird and pinniped research activities that may have cumulative impacts to the physical and biological environment. NMFS has issued a FONSI for the SEA regarding PRBO's activities. The analysis in the 2007 EA and 2008 SEA concluded that issuance of an IHA would not significantly affect the quality of the human environment. In addition, all beneficial and adverse impacts of the action have been addressed to reach the conclusion of no significant impacts. Accordingly, preparation of an Environmental Impact Statement for this action is not necessary.

Endangered Species Act (ESA)

NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division conducted a section 7 consultation under the ESA with the NMFS Headquarters' Office of Protected Resources, Endangered Species Division. On November 18, 2008, NMFS issued a Biological Opinion and concluded that the issuance of an IHA is likely to affect, but not likely to jeopardize the continued existence of Steller sea lions. NMFS has also issued an incidental take statement (ITS) for Steller sea lions pursuant to section 7 of the ESA. The ITS contains reasonable and prudent measures for implementing terms and conditions to minimize the effects of this take.

Determinations

For the reasons discussed in this document and in the identified supporting documents, NMFS has determined that the impact of seabird and pinniped research operations on Southeast Farallon Island, Ano Nuevo Island, and Point Reyes National Seashore in central California would result in Level B behavioral harassment only, of small numbers of California sea lions, Pacific harbor seals, northern elephant seals, and Steller sea lions hauled out in the vicinity of the research area; and would have a negligible impact on the affected species. The provision requiring that the activities not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply for this proposed action.

In addition, no take by Level A harassment (injury) or death is anticipated and harassment takes should be at the lowest level practicable due to incorporation of the mitigation measures described in this document.

Authorization

NMFS has issued an IHA to PRBO, and its designees, for the potential harassment of small numbers of California sea lions, harbor seals, northern elephant seals, and Steller sea lions incidental to conducting of seabird and pinniped research on Southeast Farallon Island, Ano Nuevo Island, and Point Reyes National Seashore, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: December 15, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–30108 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–AX32

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the Port of Anchorage Marine Terminal Redevelopment Project

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

ACTION: Notice; receipt of application for rulemaking and subsequent letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the Port of Anchorage (Port) and the U.S. Department of Transportation Maritime Administration (MARAD) for authorization to take marine mammals incidental to the Port's Marine Terminal Redevelopment Project (Project) for the period of July 2009 through July 2014. Pursuant to Marine Mammal Protection Act (MMPA) implementing regulations, NMFS is announcing receipt of the Port's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the Port's application and request.

DATES: Comments and information must be received no later than January 20, 2009.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. The mailbox address for providing email comments is *PR1.0648-AX32@noaa.gov*. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Port's application may be obtained by writing to the address specified above (see **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#application*.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.Summary of Request

Summary of Request

On November 20, 2008, NMFS received an application from the Port and MARAD requesting authorization for the take of four species of marine mammals incidental to construction activities related to Port expansion, over the course of 5 years. According to the application, the existing dock can no longer be widened nor salvaged due to its advanced age and state of disrepair. The dock supporting the three cranes today was completed in 1961 and its projected life expectancy was 25-30 years. Construction necessitates use of impact and vibratory pile drivers to install open cell sheet, 36 inch steal, and H- piles to construct the waterfront bulkhead structure that will facilitate increased dock space and the fendering system. In-water pile driving would occur during spring, summer, and fall months, annually, until the new port is completed. Demolition involving a chipping hammer is the likely method for removing the present dock; however, blasting may also be required.

The new dock face will include 7,430 ft (2,265 m) of vertical sheet pile wharf and 470 ft (143 m) for a dry barge berth; however, the entire sheet pile wall will extend 9,893 ft (3,015 m) parallel to the shore. The completed marine terminal will include seven modern dedicated ship berths; two dedicated barge berths; rail access; modern shore-side facilities; equipment to accommodate cruise passengers, cement bulk, roll on/roll off and load on/load off cargo, containers, general cargo, Stryker Brigade Combat Team deployments, general cargo on barges, and petroleum, oils, and lubricants; and additional land area to support expanding military and commercial operations.

Harassment to marine mammals could occur from in-water pile driving and during demolition of the existing dock. In 2008, NMFS issued the Port and MARAD a one-year Incidental Harassment Authorization (IHA) authorizing harassment of Cook Inlet beluga whales (*Delphinapterus leucas*), harbor porpoises (*Phocoena phocoena*), killer whales (*Orcinus orca*), and harbor seals (*Phoca vitulina*). Included in the conditions are mitigation and monitoring measures. Monitoring reports collected under this IHA will provide valuable marine mammal, specifically beluga whale, presence/absence, temporal, group size and composition, and behavioral data as well as any observed effects from exposure to pile driving noise.

NMFS prepared an *Environmental Assessment on the Issuance of an Incidental Harassment Authorization and Subsequent Rulemaking for Take of Small Numbers of Marine Mammals Incidental to the Port of Anchorage Terminal Redevelopment Project, Anchorage, Alaska* for its issuance of the 2008 IHA, which analyzes and discusses potential impacts on marine mammals and their habitat from the specified activity. In summary, harassment from pile driving associated with the Project may result in short-term, mild to moderate behavioral and physiological responses but will not exceed Level B harassment due to animals' natural reaction to avoid loud sounds and implementation of mitigation measures (e.g., mandatory shut downs). Anticipated behavioral reactions of marine mammals include altered headings, fast swimming, changes in dive, surfacing, respiration, and feeding patterns, and changes in vocalizations. Physiologically, increased stress hormone production may occur. In its analysis for issuance of the IHA, NMFS determined harassment would be limited to Level B, will have a negligible impact on affected marine mammal species or stocks, and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence purposes. To date, monitoring reports have indicated no adverse reactions or abrupt change in behavior of beluga whales to in-water pile driving operations.

Demolition activities will also be subject to monitoring and mitigation measuresthat are likely to be similar to those for pile driving (e.g., establishment of safety zones, shut down procedures, etc.). NMFS intends to prepare a supplemental EA to analyze impacts from demolition and establishment of modified, extended safety and harassment isopleths, as determined from the 2008 acoustic study conducted by the Port.

A detailed description of the Project can be found in the application and the NMFS prepared EA. These documents can be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Port's and MARAD's request (see **ADDRESSES**). All information, suggestions, and comments related to the request and NMFS' development and implementation of regulations governing the incidental taking of marine mammals by the Port will be considered by NMFS in developing, if appropriate, regulations governing the issuance of letters of authorization.

Dated: December 15, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–30107 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Limitation of Duty-free Imports of Apparel Articles Assembled in Haiti under the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE)

December 12, 2008.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Notification of Annual Quantitative Limit on Certain Apparel under HOPE

EFFECTIVE DATE: December 18, 2008.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3651.

SUPPLEMENTARY INFORMATION:

Authority: The Caribbean Basin Recovery Act (''CBERA''), as amended by the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act of 2006 (collectively, ''HOPE''), Title V of the Tax Relief and Health Care Act of 2006 and the Food, Conservation, and Energy Act of 2008 (''HOPE II''); and Presidential Proclamation No. 8114, 72 Fed. Reg. 13655, 13659 (March 22, 2007) (''Proclamation'').

HOPE provides for duty-free treatment for certain apparel articles imported directly from Haiti. Section 213A (b)(1)(B) of HOPE outlines the requirements for certain apparel articles to qualify for duty-free treatment under a ''value-added'' program. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more countries, as described in HOPE, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more countries, as described in HOPE, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. For the period December 20, 2008 through December 19, 2009, the applicable percentage is 50 percent.

For every twelve month period following the effective date of HOPE, duty-free treatment under the value-added program is subject to a quantitative limitation, HOPE provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A (b)(1)(C) of HOPE, as amended by HOPE II, requires that, for the twelve-month period beginning on December 20, 2008, the quantitative limitation for qualifying apparel imported from Haiti under the value-added program will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available.

For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2008 is the 12-month period ending on October 31, 2008. Therefore, for the one-year period beginning on December 20, 2008 and extending through December 19, 2009, the quantity of imports eligible for preferential treatment under the value-added program is 305,093,845 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

These quantities are calculated using the aggregate square meters equivalent of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC.

Janet E. Heinzen,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–30115 Filed 12–17–08; 8:45 am]

BILLING CODE 3510–DS

COMMODITY FUTURES TRADING COMMISSION

Order: (1) Pursuant to Section 4(c) of the Commodity Exchange Act (a) Permitting Eligible Swap Participants To Submit for Clearing and ICE Clear U.S., Inc. and Futures Commission Merchants To Clear Certain Over-The-Counter Agricultural Swaps and (b) Determining Certain Floor Brokers and Traders To Be Eligible Swap Participants; and (2) Pursuant to Section 4d of the Commodity Exchange Act, Permitting Certain Customer Positions in the Foregoing Swaps and Associated Property To Be Commingled With Other Property Held in Segregated Accounts

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: On December 7, 2007, the Commodity Futures Trading Commission (''CFTC'' or ''Commission'') published for public comment requests (a) to permit ICE Clear U.S., Inc. (''ICE Clear'') to clear certain over-the-counter (''OTC'') swap contracts and (b) to determine that certain ICE Futures U.S., Inc. (''ICE Futures'') floor brokers and traders are Eligible Swap Participants (''ESPs'') for the purpose of trading those OTC swaps (''Notice.'').[1] On January 7, 2008, the comment period was extended to February 6, 2008.[2] ICE Clear also filed a request for an order pursuant to Section 4d of the Commodity Exchange Act (''CEA'' or ''Act'') to allow ICE Clear and Futures Commission Merchants (''FCMs'') clearing through ICE Clear to commingle positions in those cleared OTC swap contracts and property supporting those positions with property and positions otherwise required to be held in customer segregated accounts. That request was published on the CFTC's Web site for public comment during the same timeframe with the same comment deadline. The Commission has reviewed the comments made in response to the requests for comment and the entire record in this matter and has determined to issue an order granting the requests.

DATES: *Effective Date:* December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Lois J. Gregory, Special Counsel, 816–960–7719, *lgregory@cftc.gov,* or Robert B. Wasserman, Associate Director, 202–418–5092, *rwasserman@cftc.gov*, Division of Clearing and Intermediary Oversight; or Duane C. Andresen, Senior Special Counsel, 202–418–5492, *dandresen@cftc.gov*, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. The ICE Clear 4(c) Petition

ICE Clear, the clearing organization for ICE Futures, sought to offer ESPs who enter into certain bilateral swap transactions involving coffee, sugar, or cocoa the opportunity to submit them to ICE Clear for clearing. ICE Clear represented that swap transactions in various agricultural products, including coffee, sugar, and cocoa, currently trade in OTC markets exempt from provisions of the CEA pursuant to Part 35 of the Commission's regulations,[3] that these swap agreements are commonly entered

[1] 72 FR 68862 (December 7, 2007).

[2] 73 FR 1205 (January 7, 2008).

[3] 17 CFR Part 35.

into by participants exchanging fixed for floating reference prices, and that participants in these markets include trade houses, commodity lenders, producers, end users, and large speculators.

Part 35 of the Commission's regulations exempts, subject to conditions, swap agreements and eligible persons entering into these agreements from most provisions of the CEA.[4] The term ''swap agreement'' is defined to include, among other types of agreements, ''a * * * commodity swap,''[5] which latter term includes swaps on agricultural products.[6] Part 35 was promulgated pursuant to authority provided to the Commission in Section 4(c) of the Act to exempt certain transactions in order to explicitly permit certain off-exchange derivative transactions, and thus to promote innovation and competition.[7] In the Commodity Futures Modernization Act of 2000,[8] Congress enacted a number of exemptions and exclusions from the CEA for contracts traded outside of Designated Contract Markets (''DCMs''), but none apply to agricultural contracts.[9]

Part 35 requires, *inter alia*, that a swap agreement not be part of a fungible class of agreements that are standardized as to their material economic terms,[10] that the agreement be solely between ESPs,[11] and that the creditworthiness of any party having an interest under the agreement be a material consideration in entering into or negotiating the terms of the agreement.[12] Under the arrangement that ICE Clear seeks to establish, OTC contracts would be submitted for clearing, a process that would extinguish the original OTC contract and replace it with an equivalent number of cash-settled ''cleared-only'' contracts, with the clearinghouse interposed as central counterparty.[13] A cleared-only contract could be offset by another cleared-only contract. Thus, clearing of these OTC contracts would result in contracts that were fungible with other cleared-only contracts with approximately equivalent terms. In addition, due to the clearing guarantee, the creditworthiness of the counterparty would no longer be a consideration. Accordingly, the OTC contracts ICE Clear clears in this fashion would not fulfill all of the conditions of Part 35.

ICE Clear also requested an order under CEA Section 4d so that ICE Clear and its clearing members can hold the cleared-only contracts and property supporting them in the customer segregated account along with exchange-listed futures contracts and associated property, resulting in improved collateral management and other benefits.

II. The ICE Futures Petition

ICE Futures, a U.S. DCM, sought to permit floor traders and floor brokers (collectively, floor members) who are registered with the Commission, when trading for their own accounts, to enter into the OTC swap transactions discussed above. Part 35, however, defines the term ESP to include floor members only as follows: (1) Floor members generally who are other than natural persons or proprietorships; (2) floor members who are natural persons, provided they have total assets exceeding at least $10,000,000; or (3) floor members who are proprietorships, provided they have total assets exceeding at least $10,000,000, or have the obligations under the swap agreement guaranteed or otherwise supported by certain other ESPs, or have a net worth of $1,000,000 and enter into the swap agreement in connection with the conduct of their business or to manage the risk of an asset or liability owned or incurred in the conduct of their business or reasonably likely to be owned or incurred in the conduct of their business.[14] Therefore, ICE Futures petitioned the Commission for an order pursuant to Section 4(c) of the CEA that would permit all ICE Futures floor members who are registered with the Commission, when trading for their own accounts, to be ESPs for the purpose of entering into bilateral swap transactions involving agricultural commodities as described above.

ICE Futures represented that all floor members entering into the swap transactions would be sophisticated and knowledgeable in the relevant products and markets and would be fully capable of evaluating the transactions. Further, because the transaction results in a cleared-only futures contract, floor members would not be subject to counterparty credit risk and would rely on the credit of ICE Clear and their clearing FCMs.

The Commission stated that it anticipated that any Section 4(c) order issued in response to ICE Futures' request would be subject to the following conditions:

(1) The contracts, agreements, or transactions would have to be executed pursuant to the requirements of Part 35, as modified by the order.

(2) The ICE Futures floor member would have to obtain a financial guarantee for the OTC swap transactions from an ICE Futures clearing member that:

(i) Is registered with the Commission as an FCM; and

(ii) clears the OTC swap transactions thus guaranteed.

(3) Permissible OTC swap transactions would be limited to cleared-only contracts in the eligible products identified in the order.

(4) Permissible OTC swap transactions would have to be submitted for clearance by an ICE Futures clearing member to ICE Clear pursuant to ICE Clear rules.

(5) An ICE Futures floor member could not enter into OTC swap transactions with another ICE Futures floor member as the counterparty for ICE Clear cleared-only contracts.

(6) ICE Futures would maintain appropriate compliance systems in place to monitor the OTC swap transactions of its floor members.[15]

III. Sections 4(c) and 4d of the CEA

A. Permitting the OTC Contracts To Be Cleared

Section 4(c)(1) of the CEA empowers the CFTC to ''promote responsible

[4] Jurisdiction is retained for, *inter alia*, provisions of the CEA proscribing fraud and manipulation. *See* Commission Reg. § 35.2, 17 CFR 35.2 (Commission regulations are hereinafter cited as ''Reg. § ____'').

[5] Reg. § 35.1(b)(1)(i).

[6] ''Commodity'' is defined in Section 1a(4) of the CEA to include a variety of specified agricultural products, ''and all other goods and articles, except onions * * * and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.''

[7] *See* 58 FR 5587 (January 22, 1993). Section 4(c) of the CEA was added by section 502(a) of the Futures Trading Practices Act of 1992, Pub. L. 102–546, 106 Stat. 3590.

[8] Pub. L. 06–554, 114 Stat. 2763 (2000).

[9] *See, e.g.*, CEA section 2(d), (g), and (h).

[10] Reg. § 35.2(b).

[11] Reg. § 35.2(a).

[12] Reg. § 35.2(c).

[13] The OTC transaction would be required to involve the coffee, sugar, or cocoa underlying the corresponding cleared-only contract. The unit size, quality, and other specifications for the OTC coffee, sugar, or cocoa transaction would be approximately equivalent to the unit size, quality, and other specifications of the corresponding physical delivery futures contract listed on ICE Futures.

[14] Reg. § 35.1(b)(2)(x).

[15] The Commission noted that these conditions are substantially similar to the conditions included in two previously issued Commission orders that permit floor members to be Eligible Contract Participants (''ECPs'') pursuant to Section 1a(12)(C) of the Act, 7 U.S.C. 1a(12)(C). On March 14, 2006, the Commission issued an order that permitted Chicago Mercantile Exchange (''CME'') floor members to be ECPs with respect to OTC transactions in excluded commodities entered into pursuant to Section 2(d)(1) of the Act. On August 3, 2006, the Commission issued a second order (the first was issued February 4, 2003) that permitted New York Mercantile Exchange (''NYMEX'') floor members to be ECPs with respect to OTC transactions in exempt commodities entered into pursuant to Section 2(h)(1) of the Act.

economic or financial innovation and fair competition'' by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.[16] The Commission may grant such an exemption by rule, regulation, or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

In enacting Section 4(c), Congress noted that the goal of the provision ''is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'' [17] The Commission requested comment on whether it should permit the OTC transactions in coffee, sugar, and cocoa to be cleared through ICE Clear as described above. The Commission also requested comment on whether it should determine ICE Futures floor members, subject to certain conditions, to be ESPs for the purpose of entering into the OTC transactions in coffee, sugar, and cocoa.

Section 4(c)(2) provides that the Commission may grant exemptions from Section 4(a) of the CEA only when the Commission determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts, or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.[18]

Section 4(c)(3) includes within the term ''appropriate persons'' a number of specified categories of persons deemed appropriate under the Act for entering into transactions exempt by the Commission under Section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. ESPs, as defined in Part 35 of the Commission's regulations, will be eligible to submit for clearing to ICE Clear the OTC transactions described above. That definition includes many of the classes of persons explicitly referred to in CEA Section 4(c)(3) (*e.g.*, a bank or trust company) as well as some classes of persons who are included under the category of Section 4(c)(3)(K) (''[s]uch other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections''). ICE Futures has requested that the Commission expand this list of appropriate persons to include ICE Futures floor members. The Commission requested comment on this determination. The Commission also requested comment as to whether these exemptions will affect its ability to discharge its regulatory responsibilities under the CEA, or with the self-regulatory duties of any contract market or Derivatives Clearing Organization (''DCO'').

B. Segregation of Customer Funds

CEA Section 4d(a)(2) prohibits commingling customer positions executed on a contract market and property supporting such positions together with any property not required to be so segregated. Section 4d(a)(2) provides that the Commission may grant exceptions to this prohibition by order. In this case, the OTC coffee, sugar, and cocoa contracts are not executed on a contract market and thus holding them together with customer property and positions required to be segregated would, absent a Commission order, violate Section 4d. As discussed further below, the Commission has analyzed the risks and benefits associated with commingling the cleared-only positions and associated customer funds with positions and customer funds otherwise required to be segregated, and has determined that the benefits of the proposal outweigh the risks and that the proposal, along with conditions set forth by the Commission, will provide for a sufficient level of safeguards to address the risks adequately.

IV. Comment Letters

The Commission received eleven letters in response to its request for comment. An initial comment letter from the CME Group Inc. (''CME Group'') requested an extension of the comment period and listed various concerns CME Group suggested might have to be addressed in order for the Commission to act on ICE Clear's request for an extension of the swaps exemption of Part 35. However, a subsequent comment letter from CME Group took the position that the Commission should permit the clearing of OTC agricultural swap contracts but pursuant to appropriate conditions to protect the market and market participants in a manner that would establish a level playing field for all DCOs.

Brief comments from two individuals expressed concerns related to their belief that the OTC transactions would be undertaken primarily by large traders, such as hedge funds, to the detriment of smaller traders who use the markets for hedging. Neither of these comments provided any evidence that would support the conclusion that smaller traders would be adversely affected by the requested relief. One of the comments did note that there was no mention of the application of speculative limits. As discussed further below, the order will require ICE Futures to apply position accountability levels to the cleared-only contracts that are appropriate in light of the position accountability levels applicable to the underlying futures contracts.

The remaining seven comment letters are from two futures exchanges and five commodity trading firms, all of which

[16] Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

[17] House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213.

[18] Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) The requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) The agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) Will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

support ICE Clear's and ICE Futures' requests for exemption.

With respect to the ICE Futures request that floor members be deemed ESPs, NYMEX commented regarding the Commission's assertion that the proposed conditions pertaining to the determination were substantially similar to the conditions included in two previously issued Commission orders that permit floor members to be ECPs pursuant to Section 1a(12)(C) of the CEA.[19] Specifically, NYMEX stated that the Commission previously has required that the clearing member providing a financial guarantee to a floor member deemed to be an ECP must maintain capitalization of a certain size to be able to issue such a guarantee, that the financial requirement was not included in the list of conditions to be applied to ICE Futures clearing members guaranteeing floor members deemed to be ESPs, and that the Notice did not provide any policy rationale for imposing different financial standards for clearing member guarantors.

On February 4, 2003, the Commission issued to NYMEX the first order determining that floor members could be ECPs. Due to the order's novel nature and the concern that a trader entering into OTC transactions could create financial difficulty for the guarantor FCM, the clearing entity, or other clearing firms, the order required clearing members that guaranteed and cleared OTC transactions to meet specified minimum capital requirements, and for NYMEX to submit a report to the Commission not later than 30 days after the order was in effect for 18 months.[20]

CME subsequently petitioned the Commission for an order that would permit CME floor members to be deemed ECPs. After reviewing the impact of the NYMEX order upon NYMEX and its floor members, and noting the lack of problems associated with it, the Commission issued an order to CME that did not include a special guarantor capitalization requirement.[21] Immediately thereafter, Commission staff advised NYMEX that it could petition for a new or amended order that would not include a special guarantor capitalization requirement, but NYMEX to date has not so petitioned.

V. Findings and Conclusions

After considering the complete record in this matter, including the comments received, the Commission finds that the requirements of CEA Section 4(c) have been met with respect to the requests for an order permitting the clearing of certain OTC transactions and determining that certain floor brokers and floor traders qualify as ESPs.

First, permitting the clearing of these transactions is consistent with the public interest and with the purposes of the CEA. The purposes of the CEA include ''promot[ing] responsible innovation and fair competition among boards of trade, other markets, and market participants.''[22] The purpose of exemptions is ''to promote economic or financial innovation and fair competition.''[23] Permitting the clearing of OTC coffee, sugar, and cocoa transactions by ICE Clear, as well as permitting ICE Futures floor members to trade such products, would appear to foster both financial innovation and competition. It could benefit the marketplace by providing ESPs the ability to bring together flexible negotiation with central counterparty guarantees and capital efficiencies. Clearing also may increase the transparency of the OTC market.

Second, the bilateral transactions in the OTC agricultural swaps would be entered into solely between appropriate persons. These would be limited to those persons qualifying as ESPs under Part 35 and those floor brokers and traders deemed ESPs herein by the Commission. ICE Futures floor brokers or traders that entered into the swap would be registered with the Commission and would have the requisite skills, experience, and market expertise to trade for their own accounts. Each such floor member would be financially backed by the ICE Clear clearing member that submits the swap for clearing, and all of its activity in the OTC agricultural swaps, limited only to coffee, sugar, or cocoa, will be closely monitored by ICE Futures.

Third, the exemption would not have a material adverse effect on the ability of the Commission or any DCM to carry out its regulatory responsibilities under the CEA. ICE Clear will use the same systems, procedures, people, and processes to clear the bilateral agricultural swap contracts in coffee, sugar, and cocoa as it currently employs with respect to all of the other transactions it clears.

With respect to ICE Clear's request for an order pursuant to Section 4d permitting ICE Clear and FCMs clearing through ICE Clear to commingle funds supporting positions in the cleared-only contracts resulting from these agricultural swaps with customer funds required to be segregated under CEA Section 4d, the Commission has considered whether the additional risk to customers presented by such commingling can be adequately addressed and mitigated. Additional risk is presented to customers as a result of the risk of default involving the commingled cleared-only contracts. However, the carrying FCM should have adequate means to address a default by a customer trading these contracts. Since each cleared-only contract will have identical economic terms as its underlying corresponding contract listed on ICE Futures and will settle on both a daily and final basis to that corresponding listed contract, the carrying FCM (or, if necessary, ICE Clear) economically could hedge any contracts that are the subject of a default by entering into the offsetting underlying exchange-listed contract. Therefore, the additional risk would be mitigated. The order requires that ICE Clear review its members' risk management capabilities to verify that all members participating in the program maintain sufficient operational capability to engage in such offsetting transactions. The order also requires that ICE Futures (1) maintain a coordinated market surveillance program that encompasses the cleared-only contracts and the underlying futures contracts, and (2) adopt position accountability levels for each of the cleared-only contracts subject to the order that are appropriate in light of the position accountability levels applicable to the underlying futures contracts. These measures should mitigate market risk.

Accordingly, the Commission has determined that ICE Clear will be able to employ reasonable safeguards to protect customer funds, and that it will be able to measure, monitor, manage, and account for risks associated with transactions and open interest in the bilateral swap contracts as it does for other contracts it clears. The Commission believes that ICE Clear has demonstrated sufficiently that it will continue to comply with all of the core principles in CEA Section 5b of the Act in connection with holding customer positions in OTC agricultural swaps with property held in segregated accounts pursuant to CEA Section 4d.

[19] *See supra* note 15.

[20] The order required that, as part of the report, NYMEX review its experiences and the experiences of its floor members and clearing members under the order during those 18 months.

[21] The floor member must have a guarantee from, and the trades must be cleared by, a CME clearing member FCM. That FCM must have adjusted net capital that equals or exceeds the greater of $2,500,000, CFTC requirements as computed pursuant to Reg. § 1.17, or Securities and Exchange Commission requirements.

[22] CEA section 3(b), 7 U.S.C. 5(b).

[23] CEA section 4(c)(1), 7 U.S.C. 6(c)(1).

VI. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[24] imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The exemption will not require a new collection of information from any entities that would be subject to the exemption.

B. Cost-Benefit Analysis

Section 15(a) of the CEA,[25] requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has considered the costs and benefits of this exemptive order in light of the specific provisions of Section 15(a) of the CEA, as follows:

1. *Protection of market participants and the public.* The contracts that are the subject of the exemptive requests will only be entered into by persons who are ''appropriate persons'' as set forth in Section 4(c) of the Act. Only ESPs and those floor brokers and traders deemed ESPs pursuant to ICE Futures' request herein will enter into transactions in the OTC agricultural swaps that are the subject of ICE Clear's request. Allowing the commingling of funds supporting positions in the resulting cleared-only contracts with customer funds required to be segregated under CEA Section 4d will benefit ESP market participants by facilitating clearing and the reduction of credit risk for contracts that meet market participants' specific risk-management requirements. ESP customers holding positions in cleared-only contracts also would benefit from having their property held in segregated accounts in the event of the insolvency of an FCM. In addition, the order is premised on ICE Clear maintaining a number of existing risk management and other safeguards.

2. *Efficiency and competition.* Allowing these swap agreements to be cleared appears likely to promote liquidity and transparency in the markets for OTC derivatives on coffee, sugar, and cocoa, as well as on futures on those commodities. Determining ICE Futures floor members to be ESPs will likely increase the flow of trading information between markets, increase the pool of potential counterparties for participants trading OTC, and provide additional trading expertise to the market. The commingling of funds supporting cleared-only positions with customer funds supporting exchange-traded positions should result in improved, more efficient, collateral management and lower administrative costs since risk-offsetting positions will be held together in the same account rendering a more precise estimation of the risk posed by the account. These types of efficiencies also generally support competition.

3. *Financial integrity of futures markets and price discovery.* Price discovery is likely to be enhanced through market competition. The extended exemption also may promote financial integrity by providing the benefits of clearing to these OTC markets. As discussed above, the risks associated with commingling funds supporting cleared-only positions with customer funds supporting exchange-traded positions are appropriately mitigated.

4. *Sound risk management practices.* Clearing of OTC transactions is likely to foster risk management by the participant counterparties. ICE Clear's risk management practices in clearing these transactions are subject to the Commission's supervision and oversight.

5. *Other public interest considerations.* The granted exemptions are likely to encourage market competition in agricultural derivatives products without unnecessary regulatory burden.

The Commission requested comment on its application of these factors in the proposing release. No comments were received.

VII. Order

After considering the above factors and the comment letters received in response to its request for comments on its application of these factors in the proposing release, the Commission has determined to issue the following:

Order

(1) The Commission, pursuant to its authority under CEA Section 4(c) and subject to the conditions below, hereby:

(A) Permits ESPs to submit for clearing, and FCMs and ICE Clear to clear, OTC agricultural swap contracts in coffee, sugar, or cocoa; and

(B) Permits all ICE Futures floor members that are registered with the Commission, when trading for their own accounts, to be deemed ESPs for the purpose of entering into bilateral swap transactions involving coffee, sugar, or cocoa agricultural commodities to be cleared on ICE Clear.

(2) The Commission, pursuant to its authority under CEA Section 4d and subject to the conditions below, hereby permits ICE Clear and its clearing members that are registered FCMs and acting pursuant to this order to hold money, securities, and other property, used to margin, guarantee, or secure transactions in OTC agricultural swap contracts involving coffee, sugar, or cocoa and belonging to customers that are ESPs (including customers that are deemed ESPs in accordance with this order) with other customer funds used to margin, guarantee, or secure trades or positions in commodity futures or commodity option contracts executed on or subject to the rules of a contract market designated pursuant to Section 5 of the Act in a segregated account or accounts maintained in accordance with Section 4d of the CEA (including any orders issued pursuant to Section 4d(a)(2) of the CEA) and the Commission's regulations thereunder, and all such customer funds shall be accounted for and treated and dealt with as belonging to the customers of the ICE Clear clearing member consistently with CEA Section 4d and the regulations thereunder.

(3) This order is subject to the following conditions:

(A) The contracts, agreements, or transactions subject to this order must be executed pursuant to the requirements of Part 35 of the Commission's regulations, as modified herein, and are limited to cleared-only contracts in the following agricultural products: coffee, sugar, or cocoa;

[24] 44 U.S.C. 3507(d).

[25] 7 U.S.C. 19(a).

(B) The economic terms and the daily settlement prices of each contract, agreement, or transaction subject to this order must be analogous to the economic terms, and equal to the daily settlement prices, respectively, of a corresponding futures contract listed for trading on ICE Futures;

(C) All contracts, agreements, or transactions subject to this order must be submitted for clearing by an ICE Futures clearing member to ICE Clear pursuant to ICE Clear rules;

(D) Each ICE Futures floor member acting as an ESP pursuant to this order must be the subject of a financial guarantee from a member of ICE Clear covering the trading of the OTC swap contracts, agreements, or transactions subject to this order. The clearing member must be registered with the Commission as an FCM and must clear for the floor member the contracts, agreement, or transactions covered by the financial guarantee;

(E) An ICE Futures floor member is prohibited from entering into a transaction in a cleared-only contract subject to this order with another ICE Futures floor member as the counterparty;

(F) ICE Clear and its clearing members will mark to market each cleared-only contract subject to this order on a daily basis in accordance with ICE Clear rules;

(G) ICE Clear will apply its margining system and calculate margin rates for each cleared-only contract subject to this order in accordance with its normal and customary practices;

(H) ICE Futures must maintain appropriate compliance systems in place to monitor the transactions of its floor members in the OTC swap transactions permitted pursuant to this order;

(I) ICE Clear will apply appropriate risk management procedures with respect to transactions and open interest in the cleared-only contracts subject to this order. ICE Clear will conduct financial surveillance and oversight of its members clearing the cleared-only contracts, and will conduct oversight sufficient to assure ICE Clear that each such member has the appropriate operational capabilities necessary to manage defaults in such contracts. ICE Clear and its clearing members acting pursuant to this order will take all other steps necessary and appropriate to manage risk related to clearing cleared-only contracts;

(J) ICE Clear will make available open interest and settlement price information for the cleared-only contracts in the eligible products (coffee, sugar, and cocoa) on a daily basis in the same manner as for contracts listed on ICE Futures;

(K) ICE Futures shall establish and maintain a coordinated market surveillance program that encompasses the cleared-only contracts subject to this order and the underlying futures contracts listed by ICE Futures on its designated contract market. ICE Futures shall adopt position accountability levels for each of the cleared-only contracts subject to this order that are appropriate in light of the position accountability levels applicable to the underlying futures contracts.

(L) Cleared-only contracts subject to this order shall not be treated as fungible with any contract listed for trading on ICE Futures.

(M) Each FCM acting pursuant to this order shall keep the types of information and records that are described in CEA Section 4g and Commission regulations thereunder, including but not limited to Reg. § 1.35, with respect to all cleared-only contracts in eligible products subject to this order. Such information and records shall be produced for inspection in accordance with the requirements of Reg. § 1.31;

(N) ICE Futures shall provide to the Commission the types of information described in Part 16 of the Commission's regulations in the manner described in Parts 15 and 16 of the Commission's regulations with respect to all cleared-only contracts;

(O) ICE Clear will apply large trader reporting requirements to cleared-only contracts in accordance with its rules, and each FCM acting pursuant to this order shall provide to the Commission the types of information described in Part 17 of the Commission's regulations in the manner described in Parts 15 and 17 of the Commission's regulations with respect to all cleared-only contracts in which it participates; and

(P) ICE Clear and ICE Futures shall at all times fulfill all representations made in their requests for relief under CEA Sections 4(c) and 4d and all supporting materials thereto.

This order is based upon the representations made and supporting material provided to the Commission by ICE Clear and ICE Futures in their requests. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its finding that the exemptions set forth herein are appropriate. Further, in its discretion, the Commission may condition, modify, suspend, terminate, or otherwise restrict the exemptions granted in this order, as appropriate, on its own motion.

Issued in Washington, DC, on December 12, 2008 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–30057 Filed 12–17–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

DoDEA FY 2009 Grant Competition Announcement

AGENCY: Department of Defense Education Activity, DoD.

ACTION: Notice of grant competition announcement; amendment.

SUMMARY: The Department of Defense Education Activity (DoDEA) is amending the Promoting Student Achievement at Schools Impacted by Military Force Structure Changes grant competition announcement, which appeared in the **Federal Register** on November 18, 2008 (73 FR 68423–68425). The amendments include a change in the expected dates, the elimination of the letter of intent, and the addition of Web site information where questions and answers will be posted.

Expected Dates and Procedures

Concept Paper Application Available: 16 Jan 09.

Deadline for Submission of Concept Papers: 06 Mar 09, 5 p.m. (EST).

Full Applications Available (by invitation only): 13 Apr 09.

Deadline for Submission of Full Proposals: 25 May 09, 5 p.m. (EST).

Deadline for Intergovernmental Review: 01 Jul 09.

Letter of Intent

There will be no letter of intent.

Posted Questions and Answers

DoDEA will post questions and answers on its Educational Partnerships' Web site: *http://www.militaryk12partners.dodea.edu.*

DoDEA Point of Contact

Mr. Brian Pritchard, Contracts and Grants Liaison, Department of Defense Education Activity (DoDEA) E-mail: *brian.pritchard@hq.dodea.edu.*

Dated: December 11, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–30050 Filed 12–17–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License: Vytral Systems Co. Ltd, LLC

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Vytral Systems Co. Ltd, LLC a revocable, nonassignable, partially exclusive license to practice throughout the United States the Government-owned inventions described in U.S. Patent App. No. 11/086,737 (Navy Case Number 95819): Wireless Serial Data Transmission Method and Apparatus and all patents or patent applications: (i) To which any of the above mentioned patents directly claims priority, (ii) for which any of the above mentioned patents directly forms a basis for priority, (iii) that were co-owned applications that directly incorporate by reference, or are incorporated by reference into, any of the above mentioned patents; (iv) reissues, reexaminations, extensions, continuations, continuing prosecution applications, requests for continuing examinations, divisions, and registrations of any of the above mentioned patents; and (v) foreign patents, patent applications and counterparts relating to any of the above mentioned Patents, including, without limitation, certificates of invention, utility models, industrial design protection, design patent protection, and other governmental grants or issuances.

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any.

ADDRESSES: Written objections are to be filed with the Naval Undersea Warfare Center Division, Newport, 1176 Howell St., Bldg 990, Code 07TP, Newport, RI 02841.

FOR FURTHER INFORMATION CONTACT: Dr. Theresa A. Baus, Head, Technology Partnership Enterprise Office, Naval Undersea Warfare Center Division, Newport, 1176 Howell St., Bldg 990, Code 07TP, Newport, RI 02841, telephone: 401–832–8728, or E-Mail: *Theresa.Baus@navy.mil.*

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 11, 2008.

T. M. Cruz,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–30043 Filed 12–17–08; 8:45 am]

BILLING CODE 5810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, 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 January 20, 2009.

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, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

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: December 12, 2008.

Stephanie Valentine,

Acting IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: Extension.

Title: 21st Century Community Learning Centers Annual Performance Report.

Frequency: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1,400.

Burden Hours: 36,400.

Abstract: Originally authorized under Title X, Part I, of the Elementary and Secondary Education Act, the program was initially administered through the U.S. Department of Education, which provided grants directly to over 1,825 grantees. With the reauthorization of the program under the No Child Left Behind Act, direct administration of the program was transferred to state education agencies (SEA) to administer their own grant competitions. Preliminary data shows that states have awarded approximately 1,400 grants to support more than 4,700 centers in every state in the country. The purpose of the 21st Century Community Learning Centers (21st CCLC) program, as reauthorized under Title IV, Part B, of the No Child Left Behind Act of 2001, 4201 *et seq.*, (20 U.S.C. 7171 *et seq.*), is to provide expanded academic enrichment opportunities for children attending low-performing schools. To reflect the changes in the authorization and administration of the 21st CCLC program and to comply with its reporting requirements, the Education Department (ED) is requesting authorization for the collection of data through Web-based, data-collection modules, the Annual Performance Report, the Grantee Profile, the Competition Overview, and the State Activities module, which collectively will be housed in an application called the 21st CCLC Profile and Performance Information Collection System (PPICS). The data will continue to be used to fulfill ED's requirement under the Government Performance and Results Act (GPRA) to report to Congress annually on the implementation and progress of 21st CCLC projects and the use of state administrative and technical assistance funds allocated to the states to support the program. The data collection will also provide SEA liaisons with needed descriptive data

about their grantees and allow SEA liaisons to conduct performance monitoring and identify areas of needed technical assistance.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3860. 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 the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–30078 Filed 12–17–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

DEPARTMENT OF THE TREASURY

OFFICE OF MANAGEMENT AND BUDGET

Federal Family Education Loan Program (FFELP)

AGENCY: Department of Education, Department of the Treasury, Office of Management and Budget.

ACTION: Notice of terms and conditions of purchase of loans under the Ensuring Continued Access to Student Loans Act of 2008; correction.

SUMMARY: On December 2, 2008, the Department of Education, the Department of the Treasury, and the Office of Management and Budget (collectively, ''Secretaries and Director'') jointly published a notice in the **Federal Register** (73 FR 73263) announcing the terms and conditions under which the Department will purchase loans pursuant to section 459A of the Higher Education Act of 1965, as amended (HEA), enacted by the Ensuring Continued Access to Student Loans Act of 2008 (Pub. L. 110–227) and amended by Public Law 110–315 and Public Law 110–350 (December 2 Notice). The terms and conditions announced in the December 2 Notice apply to the purchase of Federal Family Education Loan Program (''FFELP'') loans made for the 2007–2008 academic year (the ''Short-term Purchase Program''). Included as an appendix to the December 2 Notice was the Master Loan Sale Agreement under which these purchases will be made. This notice makes three corrections to the December 2 Notice.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Education, Office of Federal Student Aid, Union Center Plaza, 830 First Street, NE., room 113F1, Washington, DC 20202. Telephone: (202) 377–4401 or by e-mail: *ffel.agreementprocess@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact listed in this section.

SUPPLEMENTARY INFORMATION:

Correction

Under the Short-term Purchase Program, the Department will purchase loans made under sections 428 (subsidized Stafford loans), 428B (PLUS loans), or 428H (unsubsidized Stafford loans) of the HEA for the 2007–2008 academic year (''Eligible 2007–2008 Loans''). The December 2 Notice described the method the Department uses to determine the amount of loans it will purchase in a week from each lender that offers to sell loans during that week. The December 2 Notice makes clear that the Department will spend up to $500 million to purchase loans in each week of the Short-term Purchase Program. As noted in the December 2 Notice, if $500 million is not sufficient to purchase all loans offered for sale during a week, the Department must determine that portion of the available funds which it will use to purchase loans offered by each seller that submitted an offer for that week.

The December 2 Notice included an error in its explanation of how the Department will determine the portion of the $500 million that is available each week that it will use to purchase loans offered by each seller that submitted an offer for that week if there are not sufficient funds to purchase all loans offered. Specifically, in the second full paragraph, second column on page 73264 of the December 2 Notice, and in the second full paragraph in section 1 of the Master Loan Sale Agreement, which appears on page 73272 of the December 2 Notice, we incorrectly state that the Department will purchase from each seller that portion of the loans it offers to sell equal to each seller's percentage of all Eligible 2007–2008 Loans held by all sellers that submitted offers for that week. This is not an accurate description of the method the Department uses.

To determine the amount it will spend to purchase loans from each seller, the Department will first determine the total outstanding principal amount of Stafford and PLUS loans made for the 2007–2008 academic year that are held by all sellers that submitted offers for that week (without regard to the amount of those loans offered for sale by a seller for that week), and the percentage of that total that is held by each of those sellers.[1] The Department will then multiply $500 million by each seller's percentage of that total to determine the amount it will spend to purchase loans offered for sale by that seller for that week.

To correct this error, the Secretaries and the Director make the following corrections to the December 2 Notice:

1. In the second full paragraph, second column of page 73264, the first sentence is deleted and replaced with the following:

> If the amount needed to purchase all loans in qualifying offers in a given week exceeds $500 million, the Department will first determine the total outstanding principal amount of subsidized and unsubsidized Stafford loans and PLUS loans made for the 2007–2008 academic year held by all lenders that submit qualifying offers to sell loans for that week, and the percentage of that total held by each of those lenders. The Department will then multiply $500 million by each lender's percentage. To purchase loans from each lender, the Department will spend the resulting amount, or such lesser amount as may be needed to purchase all loans offered for sale by that lender.

2. In the second full paragraph on page 73272 of the December 2 Notice (73 FR 73272), the sentence that reads ''If the amount needed to purchase all Eligible Loans in qualifying offers exceeds $500 million, the Department will purchase, from each Lender, an amount up to the total outstanding

[1] The Department will make this determination using data showing amounts held as of November 19, 2008.

balances of the Loans offered by such Lender multiplied by the percentage which the Lender's FFELP Loan volume originated in the 2007–2008 academic year bears to the FFELP Loan volume originated in the 2007–2008 academic year by all Lenders that submitted qualifying offers to sell Loans in the same week.'' is deleted and replaced with the following:

If the amount needed to purchase all Eligible Loans in qualifying offers in a given week exceeds $500 million, the Department will determine the total outstanding principal amount of Stafford and PLUS loans made for the 2007–2008 academic year that are held by all Lenders that submit qualifying offers to sell loans for that week, and the percentage of that total amount held by each of those Lenders. The Department will then multiply $500 million by each Lender's percentage of that total. To purchase Eligible Loans offered for sale by a Lender, the Department will spend the resulting amount determined for that Lender, or such lesser amount as needed to purchase all Eligible Loans offered for sale by that Lender.

3. The first sentence of section 5B(iii)(4) of the Master Loan Sale Agreement on page 73282 of the December 2 Notice is revised by adding, after the words ''to provide Loan Documents'' the words ''described in section 3Q(xi), (xii), and (xiii)''.

Applicable Program Regulations: 34 CFR part 682.

Program Authority: 20 U.S.C. 1087i–1.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html.*

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Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number 84.032 Federal Family Education Loan Program)

Dated: December 11, 2008.

Kent Talbert,

Acting Under Secretary for Education.

Dated: December 12, 2008.

Karthik Ramanathan,

Acting Assistant Secretary for Financial Markets of the Department of the Treasury.

Steve McMillin,

Deputy Director, Office of Management and Budget.

[FR Doc. E8–30009 Filed 12–17–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13305–000]

Whitestone Power and Communications; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 11, 2008.

On October 20, 2008, Whitestone Power and Communications filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Microturbine Hydrokinetic River-In-Stream Energy Conversion Power Project, located in the Tanana River, within the Unorganized Borough, near Delta Junction, Alaska. The project uses no dam or impoundment.

The proposed project would consist of: (1) 1 hydrokinetic turbine generating unit, with a total installed capacity of 25 kilowatts, (2) a proposed 3000-foot-long, 12.47-kilovolt transmission line, and (3) appurtenant facilities. The project is estimated to have an annual generation of 65 megawatt-hours, which would be used by the applicant.

Applicant Contact: Mr. Steven Selvaggio, Whitestone Community Association, Whitestone Power and Communications, PO Box 1630, Delta Junction, Alaska 99737, phone: (907) 895–4938.

FERC Contact: Kelly T. Houff (202) 502–6393.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13305) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29986 Filed 12–17–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–352–000]

West Valley Holdings, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 11, 2008.

This is a supplemental notice in the above-referenced proceeding of West Valley Holdings, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is December 30, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic

service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29987 Filed 12–17–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8754–1]

Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods: Designation of a New Reference Method

AGENCY: Environmental Protection Agency.

ACTION: Notice of the designation of a new reference method for monitoring ambient air quality.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has designated, in accordance with 40 CFR Part 53, a new reference method for measuring mass concentrations of coarse particulate matter ($PM_{10-2.5}$) in the ambient air.

FOR FURTHER INFORMATION CONTACT: Surender Kaushik, Human Exposure and Atmospheric Sciences Division (MD–D205–03), National Exposure Research Laboratory, U.S. EPA, Research Triangle Park, North Carolina 27711. Phone: (919) 541–5691, e-mail: *Kaushik.Surender@epa.gov*.

SUPPLEMENTARY INFORMATION: In accordance with regulations at 40 CFR Part 53, the EPA evaluates various methods for monitoring the concentrations of those ambient air pollutants for which EPA has established National Ambient Air Quality Standards (NAAQSs) as set forth in 40 CFR Part 50. Monitoring methods that are determined to meet specific requirements for adequacy are designated by the EPA as either reference methods or equivalent methods (as applicable), thereby permitting their use under 40 CFR Part 58 by States and other agencies for determining attainment of the NAAQSs.

The EPA hereby announces the designation of a new reference method for measuring mass concentrations of coarse particulate matter ($PM_{10-2.5}$) in the ambient air. This designation is made under the provisions of 40 CFR Part 53, as amended on December 18, 2006 (71 FR 61271).

The new reference method for $PM_{10-2.5}$ is a manual method that utilizes a pair of FRM samplers that has already been designated as $PM_{2.5}$ (RFPS–0498–116) and PM_{10C} (RFPS–1298–125), and the requirements specified in Appendix O of 40 CFR Part 50. The newly designated $PM_{10-2.5}$ reference method is identified as follows:

RFPS–1208–173, ''BGI Incorporated Model PQ200 $PM_{10-2.5}$ sampler pair for the determination of coarse particulate matter as $PM_{10-2.5}$ consisting of a pair of BGI Model PQ200 samplers, with one configured for sampling $PM_{2.5}$ (RFPS–0498–116) and the other configured for sampling PM_{10c} (RFPS–1298–125) with the $PM_{2.5}$ separator replaced with a BGI WINS Eliminator and operated in accordance with the Model PQ200 Instruction manual supplement Appendix O.

An application for a reference method determination for the candidate method was received by the EPA on July 31, 2008. The sampler pair is commercially available from the applicant, BGI Incorporated, 58 Guinan Street, Waltham, MA 02451, USA (*http://www.bgiusa.com*).

After reviewing the information submitted by the applicant in the application, EPA has determined, in accordance with CFR Parts 53 (as amended on October 17, 2006), that this method should be designated as a reference method. The information submitted by the applicant in the application will be kept on file, either at EPA's National Exposure Research Laboratory, Research Triangle Park, North Carolina 27711 or in an approved archive storage facility, and will be available for inspection (with advance notice) to the extent consistent with 40 CFR Part 2 (EPA's regulations implementing the Freedom of Information Act).

As a designated reference method, this method is acceptable for use by states and other air monitoring agencies under the requirements of 40 CFR Part 58, Ambient Air Quality Surveillance. For such purposes, the method must be used in strict accordance with the operation or instruction manual associated with the method and subject to any specifications and limitations (e.g., configuration or operational settings) specified in the applicable designation method description (see the identifications of the method above).

Use of the method should also be in general accordance with the guidance and recommendations of applicable sections of the ''Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I,'' EPA/600/R–94/038a and ''Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Part 1,'' EPA–454/R–98–004 (available at *http://www.epa.gov/ttn/amtic/qabook.html*). Vendor modifications of a designated reference method used for purposes of Part 58 are permitted only with prior approval of the EPA, as provided in Part 53. Provisions concerning modification of such methods by users are specified under Section 2.8 (Modifications of Methods by Users) of Appendix C to 40 CFR Part 58.

In general, a method designation applies to any sampler or analyzer which is identical to the sampler or analyzer described in the application for designation. In some cases, similar samplers or analyzers manufactured prior to the designation may be upgraded or converted (e.g., by minor modification or by substitution of the approved operation or instruction manual) so as to be identical to the designated method and thus achieve designated status. The manufacturer should be consulted to determine the feasibility of such upgrading or conversion.

Part 53 requires that sellers of designated reference or equivalent method analyzers or samplers comply with certain conditions. These conditions are specified in 40 CFR 53.9 and are summarized below:

(a) A copy of the approved operation or instruction manual must accompany the sampler or analyzer when it is delivered to the ultimate purchaser.

(b) The sampler or analyzer must not generate any unreasonable hazard to operators or to the environment.

(c) The sampler or analyzer must function within the limits of the applicable performance specifications

given in 40 CFR Parts 50 and 53 for at least one year after delivery when maintained and operated in accordance with the operation or instruction manual.

(d) Any sampler or analyzer offered for sale as part of a reference or equivalent method must bear a label or sticker indicating that it has been designated as part of a reference or equivalent method in accordance with Part 53 and showing its designated method identification number.

(e) If such an analyzer has two or more selectable ranges, the label or sticker must be placed in close proximity to the range selector and indicate which range or ranges have been included in the reference or equivalent method designation.

(f) An applicant who offers samplers or analyzers for sale as part of a reference or equivalent method is required to maintain a list of ultimate purchasers of such samplers or analyzers and to notify them within 30 days if a reference or equivalent method designation applicable to the method has been canceled or if adjustment of the sampler or analyzer is necessary under 40 CFR 53.11(b) to avoid a cancellation.

(g) An applicant who modifies a sampler or analyzer previously designated as part of a reference or equivalent method is not permitted to sell the sampler or analyzer (as modified) as part of a reference or equivalent method (although it may be sold without such representation), nor to attach a designation label or sticker to the sampler or analyzer (as modified) under the provisions described above, until the applicant has received notice under 40 CFR 53.14(c) that the original designation or a new designation applies to the method as modified, or until the applicant has applied for and received notice under 40 CFR 53.8(b) of a new reference or equivalent method determination for the sampler or analyzer as modified.

Aside from occasional breakdowns or malfunctions, consistent or repeated noncompliance with any of these conditions should be reported to: Director, Human Exposure and Atmospheric Sciences Division (MD–E205–01), National Exposure Research Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of this new reference method is intended to assist the States in establishing and operating their air quality surveillance systems under 40 CFR Part 58. Questions concerning the commercial availability or technical aspects of the method should be directed to the applicant.

Jewel F. Morris,

Acting Director, National Exposure Research Laboratory.

[FR Doc. E8–30124 Filed 12–17–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, December 18, 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.

Draft Final Rules—Repeal of Millionaires' Amendment Regulations.

Draft Final Rules—Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants.

Report of the Audit Division on Karen Carter for Congress.

Report of the Audit Division on Texans for Henry Cuellar Congressional Campaign.

Report of the Audit Division on Christine Jennings for Congress.

Report of the Audit Division on Friends of Weiner.

Election of Officers.

Future Meeting Dates.

Management and Administrative Matters.

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.

PERSON TO CONTACT FOR INFORMATION: Robert Biersack, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary the Commission.

[FR Doc. E8–29885 Filed 12–17–08; 8:45 am]

BILLING CODE 6715–01–M

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 January 12, 2009.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Bank Applications Officer) 33 Liberty Street, New York, New York 10045–0001:

1. New York Private Bank & Trust Corporation and Emigrant Bancorp, Inc., both of New York, New York, to acquire 100 percent of the voting shares of DollarSavingsDirect.com (in formation), Ossining, New York.

B. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Glenwood Bancorporation, Glenwood, Iowa, to acquire 100 percent of the voting shares of Tabor Enterprises, Inc., and thereby indirectly acqurie voting shares of First State Bank, both of Tabor, Iowa.

Board of Governors of the Federal Reserve System, December 15, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–30083 Filed 12–17–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Office of Liaison, Policy and Review; Meeting of the NTP Board of Scientific Counselors Technical Reports Review Subcommittee

AGENCY: National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH).

ACTION: Meeting announcement and request for comments.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given of a meeting of the NTP Board of Scientific Counselors (BSC) Technical Reports Review Subcommittee (TRR Subcommittee). The primary agenda topic is the peer review of the findings and conclusions presented in six draft NTP Technical Reports of rodent toxicology and carcinogenicity studies in conventional rats and mice. The TRR Subcommittee meeting is open to the public with time scheduled for oral public comment. The NTP also invites written comments on the draft reports (see ''Request for Comments'' below). The TRR Subcommittee deliberations on the draft reports will be reported to the NTP BSC at a future meeting.

DATES: The TRR Subcommittee meeting will be held on February 25, 2009. All individuals who plan to attend are encouraged to register online by February 18, 2009, at the NTP Web site (*http://ntp.niehs.nih.gov/go/15833*). The draft reports should be posted by January 14, 2009. Written comments on the draft reports should be received by February 11, 2009. Persons needing interpreting services in order to attend should contact 301–402–8180 (voice) or 301–435–1908 (TTY). For other accommodations while on the NIEHS campus, contact 919–541–2475 or e-mail *niehsoeeo@niehs.nih.gov.* Requests should be made at least 7 days in advance of the event.

ADDRESSES: The TRR Subcommittee meeting will be held in the Rodbell Auditorium, Rall Building at the NIEHS, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709. Public comments and any other correspondence should be submitted to Dr. Barbara Shane, Executive Secretary for the NTP BSC (NTP Office of Liaison, Policy and Review, NIEHS, P.O. Box 12233, MD A3–01, Research Triangle Park, NC 27709; courier address: 530 Davis Drive, Durham, NC 27713; telephone: 919–541–4253, fax: 919–541–0295; or e-mail: *shane@niehs.nih.gov*).

SUPPLEMENTARY INFORMATION:

Background

The primary agenda topic is the peer review of the findings and conclusions of six draft NTP Technical Reports of rodent toxicology and carcinogenicity studies (see Preliminary Agenda below).

Attendance and Registration

The meeting is scheduled for February 25, 2009, from 8:30 a.m. to adjournment and is open to the public with attendance limited only by the space available. Individuals who plan to attend are encouraged to register online at the NTP Web site by February 18, 2009 (*http://ntp.niehs.nih.gov/go/15833*) to facilitate access to the NIEHS campus. A photo ID is required to access the NIEHS campus. The NTP is making plans to videocast the meeting through the Internet at *http://www.niehs.nih.gov/news/video/live.*

Availability of Meeting Materials

A copy of the preliminary agenda, committee roster, and any additional information, when available, will be posted on the NTP Web site (*http://ntp.niehs.nih.gov/go/15833*) or may be requested in hardcopy from the Executive Secretary (see **ADDRESSES** above). The draft reports should be posted on the NTP Web site by January 14, 2009. Following the meeting, summary minutes will be prepared and made available on the NTP Web site.

Request for Comments

The NTP invites written comments on the draft reports, which should be received by February 11, 2009, to enable review by the TRR Subcommittee and NTP staff prior to the meeting. Persons submitting written comments should include their name, affiliation, mailing address, phone, e-mail, and sponsoring organization (if any) with the document. Written comments received in response to this notice will be posted on the NTP Web site, and the submitter will be identified by name, affiliation, and/or sponsoring organization.

Public input at this meeting is also invited and time is set aside for the presentation of oral comments on the draft reports. Each organization is allowed one time slot per draft report. At least 7 minutes will be allotted to each speaker, and if time permits, may be extended to 10 minutes at the discretion of the chair. Persons wishing to make an oral presentation are asked to notify Dr. Barbara Shane via online registration at *http://ntp.niehs.nih.gov/go/15833*, phone, or e-mail (see **ADDRESSES** above) by February 18, 2009, and if possible, to send a copy of the statement or talking points at that time. Written statements can supplement and may expand the oral presentation. Registration for oral comments will also be available at the meeting, although time allowed for presentation by on-site registrants may be less than that for pre-registered speakers and will be determined by the number of persons who register on-site.

Background Information on the NTP Board of Scientific Counselors

The NTP BSC is a technical advisory body comprised of scientists from the public and private sectors who provide primary scientific oversight to the overall program and its centers. Specifically, the BSC advises the NTP on matters of scientific program content, both present and future, and conducts periodic review of the program for the purposes of determining and advising on the scientific merit of its activities and their overall scientific quality. The TRR Subcommittee is a standing subcommittee of the BSC. BSC members are selected from recognized authorities knowledgeable in fields such as toxicology, pharmacology, pathology, biochemistry, epidemiology, risk assessment, carcinogenesis, mutagenesis, molecular biology, behavioral toxicology and neurotoxicology, immunotoxicology, reproductive toxicology or teratology, and biostatistics. Its members are invited to serve overlapping terms of up to four years. BSC and TRR Subcommittee meetings are held annually or biannually.

Dated: December 9, 2008.

Samuel H. Wilson,

Acting Director, National Institute of Environmental Health Sciences and National Toxicology Program.

Preliminary Agenda

National Toxicology Program Board of Scientific Counselors

Technical Reports Review Subcommittee Meeting

February 25, 2009

National Institute of Environmental Health Sciences

Rodbell Auditorium, Rall Building

111 T.W. Alexander Drive, Research Triangle Park, NC

Technical Reports (TR) Scheduled for Review

- TR 559 2,3′,4,4′,5-Pentachlorobiphenyl (PCB 118) (CASRN 31508–00–6)
  - Insulating fluid for electronics; a representative mono-ortho substituted PCB evaluated as part of a series of

studies to assess the carcinogenic potency of a class of agents with dioxin-like activity

• TR 558 3,3′,4,4′-Tetrachloroazobenzene (CASRN 14047–09–7)

○ Impurity in dichloroaniline and in herbicides derived from dichloroaniline; evaluated as part of the Dioxin Toxic Equivalency Factor Evaluation for compounds with dioxin-like activity

• TR 560 Androstenedione (CASRN 63–05–8)

○ Dietary supplement that was used by athletes during training, but now is banned for over-the-counter sale

• TR 557 β-Myrcene (CASRN 123–35–3)

○ Intermediate in the commercial production of terpene alcohols, which are intermediates in the production of aroma and flavoring chemicals; used as a scent in cosmetics and soaps and as a flavoring additive in food and beverages; major constituent of hop and bay oils

• TR 555 Tetralin (CASRN 119–64–2)

○ Used as an industrial solvent for paints, waxes, polishes, pesticides, rubber, asphalt, and aromatic hydrocarbons; used as an insecticide; derived from naphthalene

• TR 562 Goldenseal Root Powder (CASRN goldensealRT)

○ Natural herbal remedy for which there is little or no toxicity data

[FR Doc. E8–30024 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Planning and Evaluation; Privacy Act of 1974; Report of New System of Records

AGENCY: Office of the Assistant Secretary for Planning and Evaluation (ASPE).

ACTION: Notice of new System of Records (SOR).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the Office of Assistant Secretary for Planning and Evaluation (ASPE) is proposing to establish a new system of records, called the Partnership for Long Term Care Data Set. The Partnership allows states to offer special Medicaid asset disregards to persons purchasing specially certified long term care insurance policies. This program and the data collection were established by the Deficit Reduction Act of 2005—Section 6021. Although the Privacy Act requires only that the ''routine uses'' portion of the system be published for comment, ASPE invites comments on all portions of this notice. Elsewhere in today's **Federal Register**, a related final rulemaking establishing the State Long Term Care Partnership: Reporting Requirements for Insurers.

DATES: *Effective Date:* The new system of records, including routine uses, will become effective January 27, 2009 unless ASPE receives comments that require alteration to this notice.

ADDRESSES: Address comments to the Privacy Act Officer, Office of Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Ave, SW., Room Number 436E.2, Washington, DC 20201. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m.–3 p.m. Eastern Time Zone. Call 202–205–8999 for appointment.

FOR FURTHER INFORMATION CONTACT: Hunter McKay, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Ave, SW., Room Number 424E, Washington, DC 20201. The telephone number is (202) 205–8999 and the e-mail address is *hunter.mckay@hhs.gov.*

SUPPLEMENTARY INFORMATION:

The Partnership for Long Term Care initiative was mandated by Section 6021 of Public Law 109–171, the Deficit Reduction Act of 2005 (DRA). The Partnership allows states to offer special Medicaid asset disregards to persons purchasing specially certified long term care insurance policies. The asset disregards allow program participants to keep additional assets should they need to apply for Medicaid coverage of long term care. DRA also mandates the use of a standard reporting system for all insurers participating in a state Partnership for Long Term Care program through a Medicaid State Plan Amendment approved after May 14, 1993. Participating insurers are required to report data on Partnership policy purchasers, features of the policies they purchase, and, selected claims information.

The Privacy Act permits us to disclose information without the consent of individuals under a ''routine use.'' A routine use is a disclosure outside of the Department of Health and Human Services that is compatible with the purpose for which we collected the information. The proposed routine uses in the new system of records meet the compatibility criterion of the statute.

Dated: November 21, 2008.

Mary M. McGeein,

Principal Deputy Assistant Secretary for Planning and Evaluation.

SYSTEM NO. 09–90–0085

SYSTEM NAME:

Partnership for Long Term Care Data Set.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Thomson Reuters, 610 Opperman Drive, Eagan, Minnesota 55123.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Purchasers of long term care insurance policies certified by a selected state (Medicaid state plan amendment approved after May 14, 1993) insurance commissioner as meeting the state's Partnership's requirements for certification.

CATEGORIES OF RECORDS IN THE SYSTEM:

◊ Name
◊ Address
◊ Social Security Number
◊ Date of Birth
◊ Long Term Care Insurance Policy Information
○ Long Term Care Insurance Company
○ Long Term Care Insurance Policy Number
○ Type of Policy (Group, Individual and Comprehensive, Nursing Home Only)
○ Policy Issue State
○ Lifetime Maximum Benefit
○ Duration of Insurance Benefits (dollars or days)
○ Daily Benefit Amount
○ Inflation Protection Feature (required by DRA for select ages)
◊ Claims Information
○ Qualifying Condition for Claim (ADL, Cognitive Impairment, Other)
○ Benefits Payment by Type of Service (institutional or home)
○ Remaining Lifetime Maximum Benefits (by service type when multiple pools)

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The authority for this system of records is contained in Section 6021 of the Deficit Reduction Act of 2005, Public Law 109–171, 42 U.S.C. 1396p note.

PURPOSE(S) OF THE SYSTEM:

The purpose of the system of records is to support Medicaid eligibility determinations for persons participating in a Partnership for long term care program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Section 552a(b)(3) of the Privacy Act permits an agency to establish disclosures not anticipated by the statute itself, compatible with the purpose for which the information was collected, under which the information may be released without the consent of the individual to whom the information pertains. ASPE is identifying the following routine disclosures for information held in the Partnership for Long Term Care Data Set. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including, but not limited to, ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected. Disclosure may be made under the following circumstances.

1. Disclosure may be made to a State, local, tribal or other public authority for the purpose of verifying Partnership program participation and calculation of the amount of the Medicaid Partnership asset disregard.

2. Disclosure may be made to the Department of Justice when: (a) The agency or any component thereof; or (b) any employee of the agency in his or her official capacity; (c) any employee of the agency in his or her individual capacity where agency or the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. Disclosure may be made to a court or adjudicative body in a proceeding when: (a) The agency or any component thereof; or (b) any employee of the agency in his or her official capacity; (c) any employee of the agency in his or her individual capacity where agency or the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

4. When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate public authority, whether Federal, foreign, state, local, tribal, or otherwise responsible for enforcing, investigating, or prosecuting such violation or charged with enforcing, or implementing the statute, rule, regulation, or order issued pursuant hereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutorial responsibility of the receiving entity.

5. Disclosure may be made to a Member of Congress or to a congressional staff member in response to an inquiry of the congressional office made at the written request of the constituent about whom the record is maintained. The Member of Congress does not have any greater authority to obtain records than the individual would have if requesting the record directly.

6. Disclosure may be made to agency contractors, grantees, or volunteers who have been engaged to assist the agency in the performance of a contract service, grant, cooperative agreement or other activity related to this system of records and who need to have access to the records in order to perform the activity. Recipients shall be required to comply with the requirements of the Privacy Act of 1974, as amended 5 U.S.C. 552a.

7. Disclosure may be made to an individual or organization conducting a research, demonstration, or evaluation project related to long term care financing generally, the performance of long term care insurance or Partnership programs, or for the purposes of determining, evaluating, assessing cost effectiveness, or quality of the long term care services provided through a Partnership program.

8. To another Federal or state agency for the purpose of operating the Medicaid program or otherwise assisting states in the administration of those portions of the Medicaid program with direct connection to state Partnership programs.

9. To appropriate federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, and the information disclosed is relevant and necessary for that assistance.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

All records are stored on paper or magnetic media.

RETRIEVABILITY:

The records are retrieved by the long term care insurance policy number, name, social security number, or a combination of these.

SAFEGUARDS:

For computerized records, safeguards established in accordance with Department standards and National Institute of Standards and Technology guidelines (e.g., security codes) will be used, limiting access to authorized personnel. System security policy and practices are established in accordance with HHS, Information Resources Management (IRM) Circular #10, Automated Information Systems Security Program; HCFA Automated Information System (AIS) Guide, Systems Security Policies; and OMB Circular No. A–130 (revised), Appendix III.

RETENTION AND DISPOSAL:

We are working with the National Archives and Records Administration (NARA) to determine the appropriate retention schedule. Due to the nature of these records, we expect them to be preserved for at least 20 years after the death of the policyholder. When the retention period has been approved by NARA, we will amend this notice.

SYSTEM MANAGER(S) AND ADDRESS:

Hunter McKay, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Ave, SW., Room Number 424E, Washington, DC 20201.

NOTIFICATION PROCEDURE:

For purpose of notification, individuals may write the system manager, who will require the insured's name, insurance company name, insurance policy number, and, for verification purposes, date of birth, to ascertain whether or not the individual's record is in the system. (These notification procedures are in accordance with Department regulation 45 CFR part 5b.)

RECORD ACCESS PROCEDURE:

Same as notification procedures. Requestors should also reasonably specify the record contents being

sought. (These access procedures are in accordance with the Department regulation 45 CFR 5b.5(a)(2).)

CONTESTING RECORD PROCEDURES:

Contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7.)

RECORD SOURCE CATEGORIES:

Information is reported by private long term care insurance companies selling policies that have been certified by a state insurance commissioner as Partnership qualified in a state that had obtained a Medicaid state plan amendment approved after of May 14, 1993.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. E8–28345 Filed 12–17–08; 8:45 am]

BILLING CODE 4154–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0613]

Clinical Studies of Safety and Effectiveness of Orphan Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA) Office of Orphan Product Development (OPD) is providing notice of a funding opportunity announcement for Federal assistance. The goal of the OPD grant program is to support the clinical development of products for use in rare diseases or conditions where no current therapy exists or where the proposed product will be superior to the existing therapy. FDA provides grants for clinical studies on safety and/or effectiveness that will either result in, or substantially contribute to, market approval of these products.

DATES: See section IV.E of the **SUPPLEMENTARY INFORMATION** section for application submission dates.

FOR FURTHER INFORMATION CONTACT:

Scientific/Research Contact: Katherine Needleman, Office of Orphan Products Development, Food and Drug Administration (HF–35), rm. 6A–55, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3666, e-mail: *katherine.needleman@fda.hhs.gov*.

Financial/Grants Management Contact: Vieda Hubbard, Office of Acquisitions & Grant Services, 5630 Fishers Lane (HFA–500), rm. 2104, Rockville, MD 20857, 301–827–7177, e-mail: *vieda.hubbard@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Research Project Grants (R01)
Request for Application (RFA) Number: RFA–FD–09–001
Catalog of Federal Domestic Assistance Number(s): 93.103

A. Research Objectives

1. Background

OPD was created to identify and promote the development of orphan products. Orphan products are drugs, biologics, medical devices, and foods for medical purposes that are indicated for a rare disease or condition (that is, one with prevalence, not incidence, of fewer than 200,000 people in the United States). Diagnostics and vaccines will qualify for orphan status only if the U.S. population to whom they will be administered is fewer than 200,000 people per year.

2. Research Objectives

The goal of FDA's OPD grant program is to support the clinical development of products for use in rare diseases or conditions where no current therapy exists or where the proposed product will be superior to the existing therapy. FDA provides grants for clinical studies on safety and/or effectiveness that will either result in, or substantially contribute to, market approval of these products. Applicants must include, in the application's ''Background and Significance'' section, documentation to support the estimated prevalence of the orphan disease or condition (or in the case of a vaccine or diagnostic, information to support the estimates of how many people will be administered the diagnostic or vaccine annually) and an explanation of how the proposed study will either help gain product approval or provide essential data needed for product development.

See section VII.A of this document for policies related to this announcement.

II. Award Information

A. Mechanism of Support

Support will be in the form of a research project (R01) grant. The R01 grant is an award made to support a discrete, specified, circumscribed project to be performed by the named investigator(s) in an area representing the investigator's specific interest and competencies, based on the mission of FDA. The Project Director/Principal Investigator (PD/PI) will be solely responsible for planning, directing, and executing the proposed project.

All awards will be subject to all policies and requirements that govern the research grant programs of the Public Health Service (PHS) as incorporated in the Department of Health and Human Services (HHS) Grants Policy Statement, dated January 1, 2007 (*http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*), including the provisions of 42 CFR part 52 and 45 CFR parts 74 and 92. The regulations issued under Executive Order 12372 do not apply to this program. The National Institutes of Health (NIH) modular grant program does not apply to this FDA grant program. All grant awards are subject to applicable requirements for clinical investigations imposed by sections 505, 512, and 515 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355, 360b, and 360e), section 351 of the PHS Act, regulations issued under any of these sections, and other applicable HHS statutes and regulations regarding human subject protection.

Except for applications for studies of medical foods that do not need premarket approval, FDA will only award grants to support premarket clinical studies to determine safety and effectiveness for approval under section 505 or 515 of the Federal Food, Drug, and Cosmetic Act or safety, purity, and potency for licensing under section 351 of the PHS Act. FDA will support the clinical studies covered by this notice under the authority of section 301 of the PHS Act (42 U.S.C. 241). FDA's research program is described in the Catalog of Federal Domestic Assistance (CFDA) No. 93.103.

B. Funds Available

1. Award Amount

Of the estimated FY 2010 funding ($14.1 million), approximately $10 million will fund noncompeting continuation awards, and approximately $4.1 million will fund 10 to 12 new awards, subject to availability of funds. It is anticipated that funding for the number of noncompeting continuation awards and new awards in FY 2011 will be similar to FY 2010. Grants will be awarded up to $200,000 or up to $400,000 in total (direct plus indirect) costs per year for up to 4 years. Please note that the dollar limitation will apply to total costs, not direct costs, as in

previous years. A fourth year of funding is available only for phase 2 or 3 clinical studies. Applications for the smaller grants ($200,000) may be for phase 1, 2, or 3 studies. Study proposals for the larger grants ($400,000) must be for studies continuing in phase 2 or 3 of investigation. Budgets for each year of requested support may not exceed the $200,000 or $400,000 total cost limit, whichever is applicable.

Phase 1 studies, including the initial introduction of an investigational new drug (IND) or device into humans, are usually conducted in healthy volunteer subjects, and are designed to determine the metabolic and pharmacological actions of the product in humans, and the side effects, including those associated with increasing drug doses. In some phase 1 studies that include subjects with the rare disorder, it may also be possible to gain early evidence on effectiveness.

Phase 2 studies include early controlled clinical studies conducted to: (1) Evaluate the effectiveness of the product for a particular indication in patients with the disease or condition and (2) determine the common short-term side effects and risks associated with it.

Phase 3 studies gather more information about effectiveness and safety that is necessary to evaluate the overall risk-benefit ratio of the product and to provide an acceptable basis for product labeling.

2. Length of Support

The length of support will depend on the nature of the study. For those studies with an expected duration of more than 1 year, a second, third, or fourth year of noncompetitive continuation of support will depend on the following factors: (1) Performance during the preceding year, (2) compliance with regulatory requirements of IND/investigational device exemption (IDE), and (3) availability of Federal funds.

3. Funding Plan

In addition to the requirement for an active IND/IDE discussed in section V.C of this document, documentation of assurances with the Office of Human Research Protection (OHRP) (see section IV.F.1 of this document) must be on file with the FDA grants management office before an award is made. Any institution receiving Federal funds must have an institutional review board (IRB) of record even if that institution is overseeing research conducted at other performance sites. To avoid funding studies that may not receive or may experience a delay in receiving IRB approval, documentation of IRB approval and Federal Wide Assurance (FWA or assurance) for the IRB of record for all performance sites must be on file with the FDA grants management office before an award to fund the study will be made. In addition, if a grant is awarded, grantees will be informed of any additional documentation that should be submitted to FDA's IRB.

Because the nature and scope of the proposed research will vary from application to application, it is anticipated that the size and duration of each award will also vary. Although the financial plans of FDA provide support for this program, awards under this funding opportunity are contingent upon the availability of funds.

FDA grants policies as described in the HHS Grants Policy Statement: (*http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*) will apply to the applications submitted and awards made in response to this FOA.

III. Eligibility Information

A. Eligible Applicants

1. Eligible Institutions

The grants are available to any foreign or domestic, public or private, for-profit or nonprofit entity (including State and local units of government). Federal agencies that are not part of HHS may apply. Agencies that are part of HHS may not apply. For-profit entities must commit to excluding fees or profit in their request for support to receive grant awards. Organizations that engage in lobbying activities, as described in section 501(c)(4) of the Internal Revenue Code of 1968, are not eligible to receive grant awards.

2. Eligible Individuals

Any individual(s) with the skills, knowledge, and resources necessary to carry out the proposed research as the PD/PI is invited to work with his/her organization to develop an application for support. Individuals from under-represented racial and ethnic groups as well as individuals with disabilities are always encouraged to apply for FDA support.

More than one PD/PI (i.e., multiple PDs/PIs) may be designated on the application for projects that require a ''team science'' approach and therefore clearly do not fit the single-PD/PI model. Additional information on the implementation plans and policies and procedures to formally allow more than one PD/PI on individual research projects is available at *http://grants.nih.gov/grants/multi_pi*.[1] All PDs/PIs must be registered in the NIH electronic Research Administration (eRA) Commons (hereafter called eRA Commons or the Commons) prior to the submission of the application. (See *http://era.nih.gov/ElectronicReceipt/preparing.htm* for instructions.)

When multiple PDs/PIs are proposed, FDA requires one PD/PI to be designated as the ''Contact'' PI. The ''Contact'' PI will be responsible for: (1) All communication between the PDs/PIs and FDA, (2) assembling the application materials outlined in section IV of this document, and (3) coordinating progress reports for the project. The contact PD/PI must meet all eligibility requirements for PD/PI status in the same way as other PDs/PIs, but has no other special roles or responsibilities within the project team beyond those mentioned in the previous sentence.

The decision of whether to apply for a single PD/PI or multiple PD/PI grant is the responsibility of the investigators and applicant organizations and should be determined by the scientific goals of the project. Applications for multiple PD/PI grants will require additional information, as outlined in the instructions in section IV of this document, and the FDA review criteria for approach, investigator, and environment has been modified to accommodate applications involving either a single PD/PI or multiple PDs/PIs as indicated in section IV of this document. A weak or inappropriate PD/PI can have a negative effect on the review. Multiple PDs/PIs on a project share the authority and responsibility for leading and directing the project, intellectually and logistically. Each PD/PI is responsible and accountable to the grantee organization, or, as appropriate, to a collaborating organization, for the proper conduct of the project or program, including the submission of all required reports. For further information on multiple PDs/PIs, please see *http://grants.nih.gov/grants/multi_pi*.

B. Cost Sharing or Matching

This grant program does not require the applicant to match or share in the project costs if an award is made.

C. Other Special Eligibility Criteria

Applicants may submit more than one application, provided each application is scientifically distinct.

[1] FDA has verified the Web site addresses throughout this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.

IV. Application and Submission Information

To comply with the President's Management Agenda, HHS is participating, as a partner, in the new governmentwide grants.gov application site. Applicants should apply electronically by visiting the Web site www.grants.gov and following instructions under ''Apply for Grants.''Users of grants.gov will be able to download a copy of the application package, complete it offline, and then upload and submit the application via the grants.gov Web site. We strongly encourage using the ''Tips'' posted on www.grants.gov under the announcement number when preparing your submission. This process is similar to the R01 Grant Application process currently used at NIH. You can visit the following Web site for helpful background on preparing to apply, preparing an application, and submitting an application to Grants.gov: *http://era.nih.gov/ElectronicReceipt/*. In order to apply electronically, the applicant must have a Data Universal Number System (DUNS) number, and register in the Central Contractor Registration (CCR) database, in eRA Commons (*http://era.nih.gov/ElectronicReceipt/preparing.htm*), and in grants.gov (further explained in the following section IV.A of this document).

A. Registration Information

To download a SF424 (R&R) Application Package and SF424 (R&R) Application Guide for completing the SF424 (R&R) forms for this FOA, link to *http://www.grants.gov/Apply/* (hereafter called Grants.gov/Apply) and follow the directions provided on that Web site.

A one-time registration is required for institutions/organizations at both:

- Grants.gov (*http://www.grants.gov/GetStarted*) and
- eRA Commons (*http://era.nih.gov/ElectronicReceipt/preparing.htm*).

A registration process with Grants.gov and eRA Commons is necessary before submission and applicants are highly encouraged to start the process at least 4 weeks prior to the grant submission date. PDs/PIs should work with their institutions/organizations to make sure they are registered in the eRA Commons.

Several additional separate actions are required before an applicant institution/organization can submit an electronic application, as follows:

(1) Organizational/Institutional Registration at: *http://www.grants.gov/applicants/get_registered.jsp.*

- Your organization will need to obtain a DUNS number (*https://eupdate.dnb.com/requestoptions/government/ccrreg/*) and register with the CCR (*http://www.ccr.gov/*) as part of the Grants.gov registration process.
- The DUNS number is a 9-digit identification number that uniquely identifies business entities.
- The CCR database is a governmentwide warehouse of commercial and financial information for all organizations conducting business with the Federal Government.
- If your organization does not have a Taxpayer Identification Number (TIN) or Employer Identification Number (EIN), allow for extra time. A valid TIN or EIN is necessary for CCR registration.
- The CCR also validates the EIN against Internal Revenue Service records—a step that will take an additional 1 to 2 business days.
- Tips for foreign organization registration are available at: *http://era.nih.gov/ElectronicReceipt/preparing.htm#4.*
- Direct questions regarding Grants.gov registration can be directed to the

Grants.gov Customer Support Center: (*http://www.grants.gov/help/help.jsp*), 1–800–518–4726, Monday through Friday, 7 a.m. to 9 p.m., e.s.t., e-mail: *support@grants.gov*.

(2) Organizational/Institutional Registration on the eRA Commons (*https://commons.era.nih.gov/commons/registration/registrationInstructions.js*p)

- To find out if an organization is already Commons-registered, see the ''List of Grantee Organizations Registered in eRA Commons''(*http://era.nih.gov/userreports/ipf_com_org_list.cfm*).
- Direct questions regarding the Commons registration can be directed to: eRA Commons Help Desk, 301–402–7469 or 866–504–9552 (toll free), TTY: 301–451–5939, Monday through Friday, 7 a.m. to 8 p.m., e.s.t., e-mail: *commons@od.nih.gov*.

(3) PD/PI Registration on the eRA Commons Web site at: *http://era.nih.gov/docs/COM_UGV2630.pdf*.

- The individual(s) designated as PDs/PIs on the application must also be registered in the eRA Commons. In the case of multiple PDs/PIs, all PDs/PIs must be registered in the eRA Commons prior to the submission of the application.
- Each PD/PI must hold a PD/PI account in the Commons. Applicants should not share a Commons account for both an Authorized Organization Representative/Signing Official (AOR/SO) role and a PD/PI role; however, if they have both a PD/PI role and an Internet Assisted Review (IAR) role, both roles should exist under one Commons account. When multiple PDs/PIs are proposed, all PDs/PIs at the applicant organization must be affiliated with that organization. PDs/PIs located at another institution need not be affiliated with the applicant organization, but must be affiliated with their own organization to be able to access the Commons.
- This registration/affiliation must be done by the AOR/SO or their designee who is already registered in the Commons.
- Both the PD/PI(s) and AOR/SO need separate accounts in the eRA Commons since both are authorized to view the application image.Note that if a PD/PI is already registered in the eRA Commons, another registration to apply for an FDA opportunity is not necessary.

Note that if a PD/PI is also an NIH peer reviewer with an Individual DUNS and CCR registration, that particular DUNS number and CCR registration are for the individual reviewer only. These are different than any DUNS number and CCR registration used by an applicant organization. Individual DUNS and CCR registration should be used only for the purposes of personal reimbursement and should not be used on any grant applications submitted to the Federal Government.

Several of the steps of the registration process could take 4 weeks or more. Therefore, applicants should immediately check with their business official to determine whether their organization/institution is already registered in both Grants.gov and the Commons (*https://commons.era.nih.gov/commons/*). The FDA will accept electronic applications only from organizations that have completed all necessary registrations.

If you experience technical difficulties with your online submission, you should contact the grants.gov Customer Response Center: (*http://www.grants.gov/contactus/contactus.jsp*. If the Customer Response Center is unable to resolve your problem, please contact Marc Pitts, Grants Management Specialist, Division of Acquisition Support and Grants (DASG), Office of Acquisition & Grant Services (OAGS), Food and Drug Administration, 301–827–7162, e-mail: *marc.pitts@fda.hhs.gov*.

B. Request Application Information

In FYs 2010 and 2011, all applications must be submitted electronically through Grants.gov. Applicants must download the SF424 (R&R) application forms and the SF424 (R&R) Application Guide for this FOA through Grants.gov/Apply.

Note: Only the forms package directly attached to a specific FOA can be used. You will not be able to use any other SF424 (R&R) forms (e.g., sample forms, forms from another FOA), although some of the ''Attachment'' files may be useable for more than one FOA.

For further assistance, contact Marc Pitts at 301–827–7162. Telecommunications for the hearing impaired: 301–480–0434.

C. Content and Form of Application Submission

Prepare all applications using the SF424 (R&R) application forms along with the SF424 (R&R) Application Guide for this FOA through *http://www.grants.gov/applicants/apply_for_grants.jsp*.

Note: The following link provides additional information to the Adobe transition submission process: (*http://era.nih.gov/ElectronicReceipt/files/adobe_transition.pdf*).

The SF424 (R&R) Application Guide is critical to submitting a complete and accurate application to FDA. Some fields within the SF424 (R&R) application components, although not marked as mandatory, are required by FDA (e.g., the ''Credential'' log-in field of the ''Research & Related Senior/Key Person Profile'' component must contain the PD/PI's assigned eRA Commons User ID). Agency-specific instructions for such fields are clearly identified in the Application Guide. For additional information, see ''Frequently Asked Questions—Application Guide, Electronic Submission of Grant Applications'' (*http://era.nih.gov/ElectronicReceipt/faq_prepare_app.htm#1*).

Prepare all applications using the SF424 (R&R) application forms along with the SF424 (R&R) Application Guide for this FOA through Grants.gov/Apply at: *http://www.grants.gov/applicants/apply_for_grants.jsp*.

Note that the move to electronic applications has brought a change in terminology. The new Grants.gov terminology is as follows:

New = New
Resubmission = A Revised or Amended application
Renewal = Competing Continuation
Continuation = Noncompeting Progress Report
Revision = Competing Supplement

The SF424 (R&R) application has several components. Some components are required, others are optional. The forms package associated with this FOA in Grants.gov/APPLY includes all applicable components, required and optional. A completed application in response to this FOA includes the data in the following components:

Required Components
SF424 (R&R) (Cover component)
Research & Related Project/Performance Site Locations
Research & Related Other Project Information
Research & Related Senior/Key Person
PHS398 Cover Page Supplement
PHS398 Research Plan
PHS398 Checklist
PHS398 Research & Related Budget
Research & Related Subaward Budget Attachment(s) Form
Optional Components
PHS398 Cover Letter File
Foreign Organizations—(Non-domestic (non-U.S.) Entity)

Applications from foreign organizations must:

- Request budgets in U.S. dollars.
- Prepare detailed budgets for all applications (that is, complete the Research & Related Budget component of the SF424).
- Not seek charge back of customs and import fees.
- Make every effort to comply with the format specifications, which are based upon a standard U.S. paper size of 8.5'' x 11'' within each portable document format (PDF).
- Comply with Federal/FDA policies on human subjects, animals, and biohazards.
- Comply with Federal/FDA biosafety and biosecurity regulations. See section VI.B of this document, ''Administrative and National Policy Requirements.''
- Indicate in the 398 Research Plan how the proposed project has specific relevance to FDA's mission and objectives and has the potential for significantly advancing sciences in the United States.

Proposed research should provide special opportunities for furthering research programs through the use of unusual talent, resources, populations, or environmental conditions in other countries that are not readily available in the United States or that augment existing U.S. resources.

D. Special Instructions

1. Applicants Who Are Submitting a Renewal or Revision

Applicants submitting a renewal or resubmission are required to enter the previous grant number into the Federal Identifier field in the SF424 (R&R) Cover Component form (box #8). Renewal and resubmission applications that do not include this number will receive an error message. Applicants should log on to the eRA Commons to obtain the previous grant number. If the number is not available in Commons, contact Marc Pitts at 301–827–7162 at FDA to get the previous grant number in order to submit the application. Visit *http://era.nih.gov/ElectronicReceipt/resubmission_FAQ.htm* for additional information. If an application for the same study was submitted in response to a previous RFA but has not yet been funded, an application in response to this notice will be considered a request to withdraw the previous application. The applicant for a resubmitted application should address the issues presented in the summary statement from the previous review and include a copy of the summary statement itself as part of the resubmitted application. An application that has received two prior disapprovals is not eligible for resubmission.

2. Applications With Multiple PDs/PIs

When multiple PDs/PIs are proposed, FDA requires one PD/PI to be designated as the ''Contact'' PI. The ''Contact PI will be responsible for: (1) All communication between the PDs/PIs and FDA, (2) assembling the application materials outlined below, and (3) coordinating progress reports for the project. The contact PD/PI must meet all eligibility requirements for PD/PI status in the same way as other PDs/PIs, but has no other special roles or responsibilities within the project team beyond those mentioned in the previous sentence.

Information for the Contact PD/PI should be entered in item 15 of the SF424 (R&R) Cover component. All other PDs/PIs should be listed in the Research & Related Senior/Key Person component and assigned the project role of ''PD/PI.'' Please remember that all PDs/PIs must be registered in the eRA Commons prior to application submission. The Commons ID of each PD/PI must be included in the ''Credential'' field of the Research & Related Senior/Key Person component. Failure to include this data field will cause the application to be rejected.

All projects proposing multiple PDs/PIs will be required to include a new section describing the leadership of the project.

Multiple PD/PI Leadership Plan: For applications designating multiple PDs/PIs, a new section of the research plan entitled ''Multiple PD/PI Leadership Plan'' (section 14 of the PHS398 Research Plan component), must be included. A rationale for choosing a multiple PD/PI approach should be described. The governance and organizational structure of the research project should be described, and should include communication plans, process

for making decisions on scientific direction, and procedures for resolving conflicts. The roles and administrative, technical, and scientific responsibilities for the project or program should be delineated for the PDs/PIs, including responsibilities for human subjects or animal studies as appropriate.

If budget allocation is planned, the distribution of resources to specific components of the project or the individual PDs/PIs should be delineated in the Leadership Plan. In the event of an award, the requested allocations may be reflected in a footnote on the Notice of Award (NoA).

3. Applications Involving a Single Institution

When all PDs/PIs are within a single institution, follow the instructions contained in the SF424 (R&R) Application Guide: (*http://grants.nih.gov/grants/funding/424/index.htm*).

4. Applications Involving Multiple Institutions

When multiple institutions are involved, one institution must be designated as the prime institution and funding for the other institution(s) must be requested via a subcontract to be administered by the prime institution. When submitting a detailed budget, the prime institution should submit its budget using the Research & Related Budget component. All other institutions should have their individual budgets attached separately to the Research &Related Subaward Budget Attachment(s) Form. See section 4.8 of the SF424 (R&R) Application Guide for further instruction regarding the use of the subaward budget form.

Information concerning the consortium/subcontract budget is provided in the budget justification. Separate budgets for each consortium/subcontract grantee are required.

E. Submission Dates and Times

1. Submission, Review, and Anticipated Start Dates

Opening Date: January 4, 2009, for FY 2010 and January 3, 2010, for FY 2011 (Earliest date an application may be submitted to Grants.gov)
Application Due Date(s): February 4, 2009, in FY 2010 and February 3, 2010, in FY 2011
Peer Review Date(s): May/June 2009 and 2010 and November/December 2009 and 2010
Council Review Date(s): September 2009 and September 2010
Earliest Anticipated Start Date(s): November 2009 and November 2010

Please note that there is only one receipt date for FY 2010 and one receipt date for FY 2011 for new and resubmitted applications.Resubmissions and applications that were submitted previously but were deemed non-responsive to the RFA due to technical or IND issues will be allowed to resubmit on October 15, 2009, and October 15, 2010. Resubmissions will also be accepted in the February receipt dates in both FYs.

Note: On time submission requires that applications be successfully submitted to Grants.gov no later than 5 p.m. local time (of the applicant institution/organization). Applications must be received by the close of business on February 4, 2009. Late applications may be accepted under extreme circumstances beyond the control of the applicant. Applications not received on time will not be considered for review and will generally be returned to the applicant.

The protocol in the grant application should be submitted to the IND/IDE no later than January 5, 2009, for FY 2010 and no later than January 4, 2010, for FY 2011. The current version of the protocol that is included in the grant application and is intended to be used if the study is funded is the protocol that must be submitted to the IND/IDE before the application is reviewed. The date that corresponds with the IND/IDE submission/amendment date that corresponds to the protocol in the grant application should be reported in the title of the grant with the IND/IDE number.

a. *Letter of intent.* A letter of intent is not required for the funding opportunity.

2. Submitting an Application Electronically to FDA

To submit an application in response to this FOA, applicants should access this FOA via *http://www.grants.gov/Apply* and follow steps 1 through 4. Note: Applications must only be submitted electronically.

3. Application Processing

Applications may be submitted on or after the opening date and must be successfully received by Grants.gov no later than 5 p.m. local time (of the applicant institution/organization) on the application submission/receipt date(s). (See section IV.D.1. of this document.) If an application is not submitted by the receipt date(s) and time, the application may be delayed in the review process or not reviewed.

Once an application package has been successfully submitted through Grants.gov, any errors have been addressed, and the assembled application has been created in the eRA Commons, the PD/PI and the AOR/SO have 2 business days to view the application image to determine if any further action is necessary.

- If everything is acceptable, no further action is necessary. The application will automatically move forward for processing after 2 business days, excluding Federal holidays.
- Prior to the submission deadline, the AOR/SO can ''Reject'' the assembled application and submit a changed/corrected application within the 2-day viewing window. This option should be used if it is determined that some part of the application was lost or did not transfer correctly during the submission process, the AOR/SO will have the option to ''Reject'' the application and submit a Changed/Corrected application. In these cases, please contact the eRA Help Desk to ensure that the issues are addressed and corrected. Once rejected, applicants should follow the instructions for correcting errors in section 2.12 of the SF424 (R&R) Application Guide (*http://grants.nih.gov/grants/funding/424/index.htm#*), including the requirement for cover letters on late applications. The ''Reject'' feature should also be used if you determine that warnings are applicable to your application and need to be addressed now. Remember, warnings do not stop further application processing. If an application submission results in warnings (but no errors), it will automatically move forward after 2 weekdays if no action is taken. Some warnings may need to be addressed later in the process. If the 2-day window falls after the submission deadline, the AOR/SO will have the option to ''Reject'' the application if, due to an eRA Commons or Grants.gov system issue, the application does not correctly reflect the submitted application package (e.g., some part of the application was lost or didn't transfer correctly during the submission process). The AOR/SO should first contact the eRA Commons Helpdesk (*http://ithelpdesk.nih.gov/eRA/*) to confirm the system error, document the issue, and determine the best course of action. FDA will not penalize the applicant for an eRA Commons or Grants.gov system issue.
- If the AOR/SO chooses to ''Reject'' the image after the submission deadline for a reason other than an eRA Commons or Grants.gov system failure, a changed/corrected application still can be submitted but it will be subject to the NIH/FDA late policy (*http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-030.html*) guidelines and may not be accepted. The reason for this

delay should be explained in the cover letter attachment. Late applications may be accepted under extreme circumstances beyond the control of the applicant. In the absence of such extreme circumstances beyond the applicant's control, applications not received on time will not be considered for review and will generally be returned to the applicant.

- Both the AOR/SO and PD/PI will receive e-mail notifications when the application is rejected or the application automatically moves forward in the process after 2 days.
- In unusual circumstances, the following can occur: Additional information may be considered, on a case-by-case basis, for inclusion in the ad hoc expert panel review, however, FDA cannot assure inclusion of any information after the receipt date other than evidence of final IRB approval, FWA or assurance, and certification of adequate supply of study product.

Upon receipt, applications will be evaluated for completeness. Incomplete applications will not be reviewed.

There will be an acknowledgement of receipt of applications from Grants.gov and the Commons. The submitting AOR receives the Grants.gov acknowledgments. The AOR and the PI receive Commons acknowledgments. Information related to the assignment of an application to a Scientific Review Group is also in the Commons.

Note: Because e-mail can be unreliable, it is the responsibility of the applicant to check periodically on their application status in the Commons.

FDA will not accept any application in response to this FOA that is essentially the same as one currently pending initial merit review unless the applicant withdraws the pending application. FDA will not accept any application that is essentially the same as one already reviewed. However, FDA will accept a resubmission application, but such application must include an introduction (3 pages maximum) addressing the critique from the previous review.

F. Intergovernmental Review

This initiative is not subject to Intergovernmental Review under the terms of Executive Order 12372.

G. Funding Restrictions

All FDA awards are subject to the terms and conditions, cost principles, and other considerations described in the HHS Grants Policy Statement *http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*.

1. Protection of Human Research Subjects

All institutions engaged in human subject research financially supported by HHS must file an assurance of protection for human subjects with the OHRP (45 CFR part 46). Applicants are advised to visit the OHRP Web site at *http://www.hhs.gov/ohrp* for guidance on human subject protection issues. Also refer to section VII of this document.

The requirement to file an assurance applies to both ''awardee'' and collaborating ''performance site'' institutions. Awardee institutions are automatically considered to be ''engaged'' in human subject research whenever they receive a direct HHS award to support such research, even where all activities involving human subjects are carried out by a subcontractor or collaborator. In such cases, the awardee institution bears the responsibility for protecting human subjects under the award. Please see the following link for more on Engagement of Institutions in Research *http://www.hhs.gov/ohrp/humansubjects/assurance/engage.htm*.

The awardee institution is also responsible for, among other things, ensuring that all collaborating performance site institutions engaged in the research hold an approved assurance prior to their initiation of the research. No awardee or performance site institution may spend funds on human subject research or enroll subjects without the approved and applicable assurance(s) on file with OHRP. An awardee institution must, therefore, have its own IRB of record and assurance. The IRB of record may be an IRB already being used by one of the ''performance sites,'' but it must specifically be registered as the IRB of record with OHRP.

For further information, applicants should review the section on human subjects in the application instructions as posted on the Grants.gov application Web site. The clinical protocol should comply with ICHE6 ''Good Clinical Practice Consolidated Guidance'' which sets an international ethical and scientific quality standard for designing, conducting, recording, and reporting trials that involve the participation of human subjects. All human subject research regulated by FDA is also subject to FDA's regulations regarding the protection of human subjects (21 CFR parts 50 and 56). Applicants are encouraged to review the regulations, guidance, and information sheets on human subject protection and good clinical practice available on the Internet at *http://www.fda.gov/oc/gcp/*.

2. Key Personnel and Human Subject Protection Education

The awardee institution is responsible for ensuring that all key personnel receive appropriate training in their human subject protection responsibilities. Key personnel include all PIs, co-investigators, and performance site investigators responsible for the design and conduct of the study. HHS, FDA, and OPD do not prescribe or endorse any specific education programs. Many institutions have already developed educational programs on the protection of research subjects and have made participation in such programs a requirement for their investigators. Other sources of appropriate instruction might include the online tutorials offered by the Office of Human Subjects Research, NIH at *http://ohsr.od.nih.gov/* and by OHRP at *http://www.hhs.gov/ohrp/education/*.

Within 30 days of the award, the PI should provide a letter to FDA's grants management office that includes the names of the key personnel, the title of the human subjects protection education program completed for each key personnel, and a one-sentence description of the program. This letter should be signed by the PI and cosigned by an institution official and sent to the Grants Management Specialist whose name appears on the official Notice of Grant Award (NGA).

H. Other Submission Requirements

1. Informed Consent

Consent forms, assent forms, and any other information given to a subject are part of the grant application and must be provided, even if in a draft form. The consent forms should be attached in an appendix section. The applicant is referred to HHS and FDA regulations at 45 CFR 46.116 and 21 CFR 50.25 for details regarding the required elements of informed consent.

2. PD/PI Credential (e.g., Agency Login)

FDA requires the PD/PI(s) to fill in his/her Commons User ID in the ''PROFILE—Project Director/Principal Investigator'' section, ''Credential'' log-in field of the ''Research & Related Senior/Key Person Profile'' component.

3. Organizational DUNS

The applicant organization must include its DUNS number in its Organization Profile in the eRA Commons. This DUNS number must match the DUNS number provided at CCR registration with Grants.gov. For additional information, see ''Frequently

Asked Questions—Application Guide, Electronic Submission of Grant Applications'' at: *http://era.nih.gov/ElectronicReceipt/faq_prepare_app.htm#1*.

4. PHS398 Research Plan Component Sections

Page limitations of the PHS398 Research Plan component must be followed as outlined in the SF424 (R&R) Application Guide. Although each section of the Research Plan component needs to be uploaded separately as a PDF attachment, applicants are encouraged to construct the Research Plan component as a single document, separating sections into distinct PDF attachments just before uploading the files. This approach will enable applicants to better monitor formatting requirements such as page limits. All attachments must be provided to FDA in PDF format, filenames must be included with no spaces or special characters, and a .pdf extension must be used.

All application instructions outlined in the SF424 (R&R) Application Guide must be followed. Note: The link below provides additional information regarding the Adobe transition submission process: (*http://era.nih.gov/ElectronicReceipt/files/adobe_transition.pdf*).

5. Appendix Materials

Applicants must follow the specific instructions on Appendix materials as described in the SF424 (R&R) Application Guide. (See *http://grants.nih.gov/grants/funding/424/index.htm*.)

Do not use the appendix to circumvent the page limitations of the Research Plan component. An application that does not observe the required page limitations may be delayed in the review process.

6. Resource Sharing Plan(s)

Not Applicable

7. Foreign Applications(Non-domestic (non-U.S.) Entity)

Indicate how the proposed project has specific relevance to the mission and objectives of FDA and has the potential for significantly advancing sciences in the United States.

V. Application Review Information

A. General Information

FDA grants management and program staff will review all applications sent in response to this notice. To be responsive, an application must be submitted in accordance with the requirements of this notice.

Applications found to be non-responsive will be returned to the applicant without further consideration.

Applicants are strongly encouraged to contact FDA to resolve any questions about criteria before submitting their application. Please direct all questions of a technical or scientific nature to the OPD program staff and all questions of an administrative or financial nature to the grants management staff (see **FOR FURTHER INFORMATION CONTACT**).

Responsive applications will be reviewed and evaluated for scientific and technical merit by an ad hoc panel of experts in the subject field of the specific application. Consultation with the proper FDA review division may also occur during this phase of the review to determine whether the proposed study will provide acceptable data that could contribute to product approval. Responsive applications will be subject to a second review by the National Cancer Institute, National Cancer Advisory Board (NCAB) for concurrence with the recommendations made by the first-level reviewers, and funding decisions will be made by the Commissioner of Food and Drugs or his designee.

A score will be assigned to each application based on the scientific/technical review criteria. The review panel may advise the program staff about the appropriateness of the proposal to the goals of the OPD grant program.

Applications submitted in response to this FOA will compete for available funds with all other recommended applications submitted in response to this FOA. The following will be considered in making funding decisions:

- Scientific merit of the proposed project as determined by peer review,
- Availability of funds, and
- Relevance of the proposed project to program priorities.

The goal of FDA's OPD grant program is to support the clinical development of products for use in rare diseases or conditions where no current therapy exists or where the product will improve the existing therapy. In their written critiques, reviewers will be asked to comment on each of the following criteria in order to judge the likelihood that the proposed research will have a substantial impact on the pursuit of these goals. Each of these criteria will be addressed and considered in assigning the overall score, and weighted as appropriate for each application. Note that an application does not need to be strong in all categories to be judged likely to have major scientific impact and thus deserve a meritorious priority score.

Investigators: Assessing the competence of the principal investigator(s) and key personnel to conduct the proposed research.This includes their academic qualifications, research experiences, productivity, and any special attributes.

Resources and Environment: Evaluating any special attributes or deficiencies relevant to the conduct of the proposed studies.

Budget: Evaluating whether all items of the requested budget are appropriate and justified.

Human Subjects and Monitoring: Evaluating possible physical, psychological, or social injury patients might experience as subjects in the proposed research. Discussing whether the rights and welfare of the individuals will be adequately protected. Assessing the safety-monitoring plan including the reporting of adverse events. Evaluating the informed consent documents as well as the plan to monitor the integrity of the data collected and the compliance with the protocol.

B. Scientific/Technical Review Criteria

The ad hoc expert panel will review the application based on the following scientific and technical merit criteria:

(1) The soundness of the rationale for the proposed study;

(2) The quality and appropriateness of the study design, including the design of the monitoring plans;

(3) The statistical justification for the number of patients chosen for the study, based on the proposed outcome measures, and the appropriateness of the statistical procedures for analysis of the results;

(4) The adequacy of the evidence that the proposed number of eligible subjects can be recruited in the requested timeframe;

(5) The qualifications of the investigator and support staff, and the resources available to them;

(6) The adequacy of the justification for the request for financial support;

(7) The adequacy of plans for complying with regulations for protection of human subjects and monitoring; and

(8) The ability of the applicant to complete the proposed study within its budget and within time limits stated in this RFA.

C. Program Review Criteria

(1) Applications must propose clinical trials intended to provide safety and/or efficacy data.

(2) There must be an explanation in the ''Background and Significance''

section of how the proposed study will either contribute to product approval or provide essential data needed for product development.

(3) The ''Background and Significance'' section of the application must contain information documenting the prevalence, not incidence, of the population to be served by the product is fewer than 200,000 individuals in the United States. The applicant should include a detailed explanation supplemented by authoritative references in support of the prevalence figure. Diagnostic tests and vaccines will qualify only if the population to whom they will be administered is fewer than 200,000 individuals in the United States per year.

(4) The study protocol proposed in the grant application must be under an active IND or IDE (not on clinical hold) to qualify the application for scientific and technical review. Additional IND/IDE information is described as follows:

The proposed clinical protocol should be submitted to the applicable FDA IND/IDE review division a minimum of 30 days before the grant application deadline. The number assigned to the IND/IDE that includes the proposed study should appear on the face page of the application with the title of the project. The date the subject protocol was submitted to FDA for the IND/IDE review should also be provided. Protocols that would otherwise be eligible for an exemption from the IND regulations must be conducted under an active IND to be eligible for funding under this FDA grant program. If the sponsor of the IND/IDE is other than the principal investigator listed on the application, a letter from the sponsor permitting access to the IND/IDE must be submitted in both the IND/IDE and in the grant application. The name(s) of the principal investigator(s) named in the application and in the study protocol must be submitted to the IND/IDE. Studies of already approved products, evaluating new orphan indications, are also subject to these IND/IDE requirements.

Only medical foods that do not need premarket approval and medical devices that are classified as non-significant risk (NSR) are free from these IND/IDE requirements. Applicants studying an NSR device should provide a letter in the application from FDA's Center for Devices and Radiological Health indicating the device is an NSR device.

(5) The requested budget must be within the limits, either $200,000 in total costs per year for up to 3 years for any phase study, or $400,000 in total costs per year for up to 4 years for phase 2 or 3 studies. Any application received that requests support over the maximum amount allowable for that particular study will be considered non-responsive.

(6) In an appendix to the application, there must be evidence that the product to be studied is available to the applicant in the form and quantity needed for the clinical trial proposed.A current letter from the supplier as an appendix will be acceptable. If negotiations regarding the supply of the study product are underway but have not been finalized at the time of application, please provide a letter indicating such in the application. Verification of adequate supply of study product will be necessary before an award is made.

(7) The protocol should be submitted in the application. The protocol may be included as an appendix. Page limits, font size, and margins should comply with the Application Guide, Electronic Submission of Grant Applications (*http://era.nih.gov/ElectronicReceipt/faq_prepare_app.htm#1*).

D. Additional Review Criteria

In addition to the previously mentioned criteria, the following items will continue to be considered in the determination of scientific merit and the priority score:

Resubmission Applications (formerly ''revised/amended'' applications): The adequacy of the responses to comments from the previous scientific review group will be assessed including the appropriateness of the improvements in the resubmission application.

Protection of Human Subjects from Research Risk: The involvement of human subjects and protections from research risk relating to their participation in the proposed research will be assessed. See the ''Human Subjects Sections'' of the PHS398 Research Plan component of the SF424 (R&R).

Inclusion of Women, Minorities and Children in Research: The adequacy of plans to include subjects from both genders, all racial and ethnic groups (and subgroups), and children as appropriate for the scientific goals of the research will be assessed. Plans for the recruitment and retention of subjects will also be evaluated. See the ''Human Subjects Sections'' of the PHS398 Research Plan component of the SF424 (R&R).

Care and Use of Vertebrate Animals in Research: The adequacy of the plans for care and use of vertebrate animals to be used in the project will be assessed. See the ''Other Research Plan Sections'' of the PHS398 Research Plan component of the SF424 (R&R).

Biohazards: If materials or procedures are proposed that are potentially hazardous to research personnel and/or the environment, determine if the proposed protection is adequate.

E. Additional Review Considerations

Budget and Period of Support: The reasonableness of the proposed budget and the appropriateness of the requested period of support in relation to the proposed research may be assessed by the reviewers. The priority score should not be affected by the evaluation of the budget.

Applications from Foreign Organizations: Whether the project presents special opportunities for furthering research programs through the use of unusual talent, resources, populations, or environmental conditions in other countries that are not readily available in the United States or that augment existing U.S. resources will be assessed.

F. Sharing Research Data

Sharing research data is not applicable.

G. Sharing Research Resources

Sharing research resources is not applicable.

H. Anticipated Announcement and Award Dates

Earliest anticipated start/award date(s): November 1, 2009, and November 1, 2010.

VI. Award Administration Information

A. Award Notices

After the review of the application is completed, the PD/PI will be able to access his or her summary statement (written critique) via the eRA Commons.

If the application is under consideration for funding, FDA may request information from the applicant prior to making the award. For details, applicants may refer to the HHS Grants Policy Statement: (*http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*).

A formal notification in the form of a NoA will be provided to the applicant organization. The NoA signed by the grants management officer is the authorizing document. Once all administrative and programmatic issues have been resolved, the NoA will be generated via e-mail notification from the awarding component to the grantee business official.

Selection of an application for award is not an authorization to begin performance. Any costs incurred before receipt of the NoA are at the recipient's risk. These costs may be reimbursed only to the extent considered allowable

pre-award costs. See section IV.G, ''Funding Restrictions.''

B. Administrative and National Policy Requirements

All FDA grant and cooperative agreement awards include the HHS Grants Policy Statement as part of the NoA. For these terms of award, see the HHS Grants Policy Statement at: *http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*.

C. Reporting

1. Monitoring Activities

a. *OPD monitoring of clinical trials language*. These guidelines are intended to provide information for principal investigators who are conducting clinical trials. The procedures outlined herein are in addition to (and not in lieu of) IRB, OHRP, and other FDA requirements.

It is an OPD policy that data and safety monitoring of a clinical trial is to be commensurate with the risks posed to study participants and with the size and complexity of the study. In addition, the OPD requires that a Grantee and any third party engaged in supporting the clinical research be responsible for oversight of data and safety monitoring, ensuring that monitoring systems are in place, that the quality of the monitoring activity is appropriate, and that the OPD Project Officer is informed of recommendations emanating from monitoring activities.

b. *FDA requirements for monitoring*. The OPD requires that each clinical trial it supports, regardless of phase, has data and safety monitoring procedures in place to safeguard the well-being of study participants and to ensure scientific integrity. Monitoring must be performed on a regular basis throughout the subject accrual, treatment, and followup periods.

The specific approach to monitoring will depend on features of the clinical trial to be conducted e.g., several levels of monitoring: Data and Safety Monitoring Board (DSMB), Study Monitoring Committee (SMC) and Independent Medical Monitor.

Monitoring activities should be appropriate to the study, study phase, population, research environment, and degree of risk involved.

In small, single-site studies, safety monitoring is often performed by the independent medical monitor or a safety monitoring committee in conjunction with the study statistician. All phase 3 studies and any high risk phase 1 or 2 clinical trial will also require a DSMB. It may be desirable to utilize a DSMB for:

- Trials involving highly experimental therapies or specialized review procedures external to the OPD (e.g., gene therapy or xenotransplantation);
- Trials involving substantial risk to study participants (e.g., studies with irreversible outcomes); or
- Trials involving particularly vulnerable study participants (e.g., children or persons with impaired ability to consent).

c. *Study monitoring plan*. The OPD requires that the protocol document include a section describing the proposed plan for interim data monitoring. This section will detail who is to be responsible for interim monitoring (i.e., a DSMB, an SMC, or the study investigator), what data will be monitored (i.e., performance and safety data only vs. efficacy data as well), the timing of the first data review (e.g., ''the first interim look will occur when the initial 20 participants have completed the 6-month followup visit''), and the frequency of interim reviews (which will depend on such factors as the study design, interventions and anticipated recruitment rate). The plan will specify ''stopping guidelines'' and other criteria for the monitors to follow in their review of the interim data.

A preliminary monitoring plan must be submitted as part of the Research Plan portion of the grant application for a clinical trial. The plan will be examined as part of the peer review process, and any comments and concerns will be included in an administrative note in the summary statement. OPD staff will ensure that all concerns are resolved before the grant award is made.

2. Oversight Activities

The program project officer will monitor grantees periodically. The monitoring may be in the form of telephone conversations, e-mails, or written correspondence between the project officer/grants management officer or specialist and the principal investigator. Information including, but not limited to, information regarding study progress, enrollment, problems, adverse events, changes in protocol, and study monitoring activities will be requested. Periodic site visits with officials of the grantee organization may also occur. The results of these monitoring activities will be recorded in the official grant file and will be available to the grantee upon request consistent with applicable disclosure statutes and with FDA disclosure regulations. Also, the grantee organization must comply with all special terms and conditions of the grant, including those which state that future funding of the study will depend on recommendations from the OPD project officer. The scope of the recommendations will confirm the following: (1) There has been acceptable progress toward enrollment, based on specific circumstances of the study; (2) there is an adequate supply of the product/device; and (3) there is continued compliance with all applicable FDA and HHS regulatory requirements for the trial.

In addition to the requirement for an active IND/IDE discussed in section V.C of this document, documentation of assurances with the OHRP (see section IV.F.1 of this document) must be on file with FDA's grants management office before an award is made. Any institution receiving Federal funds must have an IRB of record even if that institution is overseeing research conducted at other performance sites. To avoid funding studies that may not receive or may experience a delay in receiving IRB approval, documentation of IRB approval and (FWA or assurance) for the IRB of record for all performance sites must be on file with the FDA grants management office before an award to fund the study will be made. In addition, if a grant is awarded, grantees will be informed of any additional documentation that should be submitted to FDA's IRB.

3. Reporting Requirement

The grantee must file a final program progress report, financial status report, and invention statement within 90 days after the end date of the project period as noted on the notice of grant award.

When multiple years are involved, awardees will be required to submit the Non-Competing Grant Progress Report (PHS 2590) annually and financial statements as required in the HHS Grants Policy Statement, dated October 1, 2006, (*http://www.hhs.gov/grantsnet/adminis/gpd/*). Also, all new and continuing grants must comply with all regulatory requirements necessary to keep the status of their IND/IDE ''active'' and ''in effect,'' that is, not on ''clinical hold.'' Failure to meet regulatory requirements will be grounds for suspension or termination of the grant.

Awardees will be required to submit the Non-Competing Continuation Grant Progress Report (PHS 2590) (*http://grants.nih.gov/grants/funding/2590/2590.htm*) annually and financial statements as required in the HHS Grants Policy Statement *http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*.

A listing and a justification for any study changes that occurred in the past year must be included in the Non-Competing Continuation Grant Progress Report (PHS 2590).

A final progress report, invention statement, and Financial Status Report are required when an award is relinquished when a recipient changes institutions or when an award is terminated.

VII. Other Information

A. Required Federal Citations

1. Clinical Trials Data Bank

The Food and Drug Administration Amendments Act of 2007 (FDAAA) contains provisions that expand the current database known as ClinicalTrials.gov to include additional requirements for individuals and entities, including grantees, who are involved in conducting clinical trials that involve products regulated by FDA or that are funded by HHS, including FDA. These additional requirements include mandatory registration of certain types of clinical trials, as well as reporting of results for certain trials for inclusion in the ClinicalTrials.gov database. ClinicalTrials.gov, which was created after the Food and Drug Administration Modernization Act of 1997, provides patients, family members, healthcare providers, researchers, and members of the public easy access to information on clinical trials for a wide range of diseases and conditions. The U.S. National Library of Medicine has developed this site in collaboration with NIH and FDA. ClinicalTrials.gov is available to the public through the Internet at *http://clinicaltrials.gov*.

ClinicalTrials.gov contains information about certain clinical trials, both federally and privately funded, of drugs (including biological products) and medical devices. The types of trials that are required to be registered, and for which results must be reported, are known as ''applicable clinical trials.'' FDAAA defines the types of clinical trials that are ''applicable clinical trials'' and, therefore, are subject to the registration and results reporting requirements. The registry listing for each trial includes information such as descriptive information about the trial, patient eligibility criteria, recruitment status, location information on the clinical trial sites, and points of contact for those wanting to enroll in the trial. The database also contains information on the results of clinical trials. More detailed information on the definition of ''applicable clinical trial'' and the registry and results reporting requirements can be found at *http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-014.html* and *http://prsinfo.clinicaltrials.gov/fdaaa.html*.

FDAAA also added new requirements concerning clinical trials supported by grants from HHS, including FDA. Under these provisions, any grant or progress report forms required under a grant from any part of HHS, including FDA, must include a certification that the person responsible for entering information into ClinicalTrials.gov (the ''responsible party'') has submitted all required information to the database. There are also provisions regarding when agencies within HHS, including FDA, are required to verify compliance with the database requirements before releasing funding to grantees.OPD program staff will be providing additional information on these requirements, including the appropriate means by which to certify that a grantee has complied with the database requirements.

2. Data and Safety Monitoring Plan

Data and safety monitoring may be required for certain types of clinical trials. See section VI.C.1.c for more details and other FDA monitoring requirements. The establishment of DSMBs is required for multi-site clinical trials involving interventions that entail potential risk to the participants, and generally for phase 3 clinical trials. Although phase 1 and phase 2 clinical trials may also use DSMBs, smaller clinical trials may not require this oversight format, and alternative monitoring plans may be appropriate.

3. Access to Research Data Through the Freedom of Information Act (FOIA)

FOIA, (5 U.S.C. 552), provides individuals with a right to access certain records in the possession of the Federal government, subject to certain exemptions. The government may withhold information under the exemptions and exclusions contained in the FOIA. The exact language of the exemptions can be found in the FOIA. Additional guidance on the exemptions and how they apply to certain documents can be found in the HHS regulations implementing the FOIA (45 CFR part 5) and FDA regulations implementing the FOIA(21 CFR part 20). (Also see the HHS Web site: (*http://www.hhs.gov/foia/*).

Data included in the application may be considered trade secret or confidential commercial information within the meaning of relevant statutes and implementing regulations. FDA will protect trade secret or confidential commercial information to the extent allowed under applicable law.

4. Use of Animals in Research

Recipients of PHS support for activities involving live vertebrate animals must comply with PHS Policy on Humane Care and Use of Laboratory Animals (*http://grants.nih.gov/grants/olaw/references/PHSPolicyLabAnimals.pdf*) as mandated by the Health Research Extension Act of 1985 (*http://grants.nih.gov/grants/olaw/references/hrea1985.htm*), and the U.S. Department of Agriculture Animal Welfare Regulations (*http://www.nal.usda.gov/awic/legislat/usdaleg1.htm*) as applicable.

5. Inclusion of Women And Minorities in Clinical Research

Applicants for PHS clinical research grants are encouraged to include minorities and women in study populations so research findings can be of benefit to all people at risk of the disease or condition under study. It is recommended that applicants place special emphasis on including minorities and women in studies of diseases, disorders, and conditions that disproportionately affect them. This policy applies to research subjects of all ages. If women or minorities are excluded or poorly represented in clinical research, the applicant should provide a clear and compelling rationale that shows inclusion is inappropriate.

6. Inclusion of Children as Participants in Clinical Research

FDA regulations at 21 CFR part 50, subpart D, contain additional requirements that must be met by IRBs reviewing clinical investigations regulated by FDA and involving children as subjects. FDA is part of HHS; accordingly, the research project grants under this program are supported by HHS, and HHS regulations at 45 CFR part 46, subpart D also apply to research involving children as subjects.

7. Standards for Privacy of Individually Identifiable Health Information

HHS issued final modification to the ''Standards for Privacy of Individually Identifiable Health Information,'' the ''Privacy Rule,'' on August 14, 2002. The Privacy Rule is a federal regulation under the Health Insurance Portability and Accountability Act of 1996 that governs the protection of individually identifiable health information, and is administered and enforced by the HHS Office for Civil Rights (OCR).

Decisions about applicability and implementation of the Privacy Rule reside with the researcher and his/her institution. The OCR Web site *http://www.hhs.gov/ocr/* provides information on the Privacy Rule.

8. Healthy People 2010

PHS is committed to achieving the health promotion and disease prevention objectives of ''Healthy People 2010,'' a PHS-led national activity for setting priority areas. This FOA is related to one or more of the priority areas. Potential applicants may obtain a copy of ''Healthy People 2010'' at *http://www.health.gov/healthypeople*.

9. Smoke-Free Workplace

PHS strongly encourages all grant recipients to provide a smoke-free workplace and discourage the use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of a facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

10. Authority and Regulation

This program is not subject to the intergovernmental review requirements of Executive Order 12372. FDA's research program is described in the Catalog of Federal Domestic Assistance (CFDA), No. 93.103 *http://www.cfda.gov/*.

FDA will support the clinical studies covered by this notice under the authority of section 301 of the PHS Act as amended (42 U.S.C. 241) and under applicable regulations at 42 CFR part 52 and 45 CFR parts 74 and 92. All grant awards are subject to applicable requirements for clinical investigations imposed by sections 505, 512, and 515 of the Federal Food, Drug, and Cosmetic Act or safety, purity, and potency for licensing under section 351 of the PHS Act, including regulations issued under any of these sections.

All human subject research regulated by FDA is also subject to FDA's regulations regarding the protection of human subjects (21 CFR parts 50 and 56). Applicants are encouraged to review the regulations, guidance, and information sheets on human subject protection and Good Clinical Practice available on the Internet at *http://www.fda.gov/oc/gcp/*.

The applicant is referred to HHS regulations at 45 CFR 46.116 and 21 CFR 50.25 for details regarding the required elements of informed consent.

All awards will be subject to all policies and requirements that govern the research grant programs of the PHS as incorporated in the HHS Grants Policy Statement, dated January 1, 2007, (*http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*).

11. Human Subjects Protection

Federal regulations (45 CFR part 46) require that applications and proposals involving human subjects must be evaluated with reference to: (1) The risks to the subjects, (2) the adequacy of protection against these risks, (3) the potential benefits of the research to the subjects and others, and (4) the importance of the knowledge gained or to be gained (*http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm*).

12. Human Embryonic Stem Cell Research and Cloning

Section 498 of the PHS Act places certain restrictions on human fetal research.In addition, under currently applicable executive orders, HHS funds may not be used to support human embryo research under any extramural award instrument. HHS funds may not be used for the creation of a human embryo for research purposes or for research in which a human embryo is destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses *in utero* under 45 CFR 46.204 and 46.207 and subsection 498(b) of the PHS Act (42 U.S.C. 289g(b)). The term ''human embryo'' includes any organism not protected as a human subject under 45 CFR part 46, as of the date of enactment of the governing appropriations act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells.

In addition, HHS is prohibited, by a March 4, 1997, Presidential memorandum, from using Federal funds for cloning human beings. In implementing this program, FDA will comply with all applicable statutes, regulations, presidential memoranda and Executive orders.

Criteria for Federal funding of research on hESCs can be found at: *http://www.hhs.gov/faq/research/stemcell/r-0006.html* and *http://stemcells.nih.gov/research/registry/eligibilityCriteria.asp*.

Dated: December 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–30061 Filed 12–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Behavior and Health.

Date: December 19, 2008.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Gayle M. Boyd, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, MSC 7808, Bethesda, MD 20892, 301–451–9956, *gboyd@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 9, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29882 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice

is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Applications Related to Community Interventions or Nursing Science.

Date: January 9, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ellen K. Schwartz, EDD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3168, MSC 7770, Bethesda, MD 20892, 301–435–0681, *schwarte@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Epidemiology of Cancer Member Conflicts.

Date: January 14–15, 2009.

Time: 6 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sandra L. Melnick Seitz, DRPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028D, MSC 7770, Bethesda, MD 20892, 301–435–1251, *melnicks@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict Applications: CIGP, HBPP.

Date: January 16, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Najma Begum, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group; Molecular Oncogenesis Study Section.

Date: January 26–27, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Joanna M. Watson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, 301–435–1048, *watsonjo@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Nuclear Dynamics and Transport.

Date: January 29–30, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Fisherman's Wharf Hotel, 2500 Mason Street, San Francisco, CA 94133.

Contact Person: Jonathan Arias, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301–435–2406, *ariasj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 9, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29883 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Global Health Activities in Developing Countries—Centers of Excellence (HV–09–012).

Date: January 12, 2009.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Hilton Crystal City, 2399 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: William J Johnson, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Global Health Activities in Developing Countries—Administrative Coordinating Center. (HV–09–013)

Date: January 13, 2009.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate contract proposals.

Place: Hilton Crystal City, 2399 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: William J Johnson, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30026 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Resource Center for Atherosclerosis in Youth.

Date: January 15, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7213, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Robert Blaine Moore, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7213, Bethesda, MD 20892, 301–594–8394, *mooreb@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Resource Center for Electrocardiography and Cardiac Safety.

Date: January 20, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7213, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Robert Blaine Moore, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7213, Bethesda, MD 20892, 301–594–8394, *mooreb@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30028 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Research Demonstration and Dissemination Projects.

Date: January 27, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Holly K. Krull, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924, 301–435–0280, *krullh@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Clinical Trial Research Project.

Date: January 27, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30029 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public 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 Advisory Council for Nursing Research.

Date: January 27–28, 2009.

Open: January 27, 2009, 1 p.m. to Adjournment.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6C, Room 6, Bethesda, MD 20892.

Closed: January 28, 2009, 9 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6C, Room 6, Bethesda, MD 20892.

Contact Person: Mary E. Kerr, FAAN, RN, PhD, Deputy Director, National Institute of Nursing, National Institutes of Health, 31 Center Drive, Room 5B–05, Bethesda, MD 20892–2178, 301–496–8230, *kerrme@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/ninr/a-advisory.html*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29884 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Unsolicited Biodefense Program Project Application Review.

Date: January 13, 2009.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Alec Ritchie, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–435–1614, *aritchie@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 12, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30096 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: NIDCR Special Grants Review Committee; NIDCR Special Review Committee: Review of F, K, and R03s.

Date: February 19–20, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

Contact Person: Raj K. Krishnaraju, PhD, MS, Scientific Review Officer, Scientific Review Branch, National Inst. of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., Rm 4AN 32J, Bethesda, MD 20892, 301–594–4864, *kkrishna@nidcr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 12, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30097 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel; EUREKA RO1.

Date: January 23, 2009.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Arthur A. Petrosian, PhD, Scientific Review Administrator, Division of Extramural Programs, National Library of Medicine, National Institutes of Health, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosia@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30008 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biomedical Library and Informatics Review Committee.

Date: March 5–6, 2009.

Time: March 6, 2009, 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Time: March 7, 2009, 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Arthur A. Petrosian, PhD, Scientific Review Administrator, Division Of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosia@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–30010 Filed 12–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A Visa Program

AGENCY: Office of the Secretary, DHS.

ACTION: Notice.

SUMMARY: On December 18, 2008, DHS published in the **Federal Register** a final rule ''Changes to Requirements Affecting H–2A Nonimmigrants,'' which provides that the Secretary of Homeland Security will publish a list of designated countries whose nationals can be the beneficiaries of an approved H–2A petition and are eligible for H–2A visas. This initial list will be composed of countries that are important for the operation of the H–2A program and are cooperative in the repatriation of their citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. Publication of such notice is made by the Secretary of Homeland Security, with the concurrence of the Secretary of State. Under the final rule, the Department of Homeland Security (DHS) will only approve petitions for H–2A nonimmigrant status for nationals of countries designated by means of this list or by means of the special procedure allowing petitioners to request approval for particular beneficiaries if the Secretary of Homeland Security determines that it is in the U.S. interest. Pursuant to the final rule, this notice designates those countries the Secretary of Homeland Security, with the concurrence of the Secretary of State, has found to be eligible to participate in the H–2A program.

DATES: This notice is effective January 17, 2009, and shall be without effect at the end of one year after January 17, 2009.

SUPPLEMENTARY INFORMATION:

Designation of Countries Whose Nationals Are Eligible To Participate in the H–2A Visa Program

Pursuant to the authority provided to the Secretary of Homeland Security under sections 241, 214(a)(1), and 215(a)(1) of the Immigration and Nationality Act (INA) (8 U.S.C. 1231, 1184(a)(1), and 1185(a)(1)), I have designated, with the concurrence of the Secretary of State, that nationals from the following countries are eligible to participate in the H–2A visa program: Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; United Kingdom.

This notice does not affect the status of aliens who currently hold H–2A nonimmigrant status.

Nothing in this notice limits the authority of the Secretary of Homeland Security or his or her designee or any other federal agency to invoke against any foreign country or its nationals any other remedy, penalty or enforcement action available by law.

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8–29785 Filed 12–17–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2006–24163]

National Environmental Policy Act; Draft Environmental Impact Statement on U.S. Coast Guard Pacific Area Operations

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability; request for public comments.

SUMMARY: The U.S. Coast Guard, with the National Marine Sanctuary Program West Coast Region as a cooperating agency, announces the availability of the Draft Environmental Impact Statement (DEIS) to implement enhanced environmental protection measures to the Coast Guard's operations in the areas of responsibility for Coast Guard Districts 11 (California) and 13 (Oregon and Washington) for public review and comment. The DEIS analyzes the environmental impacts of routine Coast Guard vessel and air operations when engaged in the following missions and activities: Law enforcement, national security, search and rescue, aids to navigation, and oil pollution and vessel grounding response. This analysis does not include live fire exercises.

Comments and suggestions are invited from all interested parties to ensure that the full range and significance of issues related to this proposed action are identified. The Coast Guard has established a Web site at the address below to provide the public with additional information. *http://pacareaeis.uscg.e2m-inc.com.*

DATES: Comments and related materials must reach the Docket Management Facility on or before February 17, 2009.

ADDRESSES: You may submit comments identified by Coast Guard Docket Number USCG–2006–24163 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

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

(2) *By mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(3) *Fax:* 202–493–2251.

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, the proposed project, or the associated draft Environmental Impact Statement, contact LT Jeff Bray, Coast Guard Commandant, CG–0942, *JEFF.R.BRAY@USCG.MIL* or telephone 202–372–3752. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material on the Draft Environmental Impact Statement (DEIS). Publication of this notice begins the official 45-day public comment period that will help refine the alternatives being considered. The Coast Guard provides this notice to advise the public and other agencies of the Coast Guard's intentions, to obtain suggestions and information on the issues and alternatives included in the DEIS, and to request comments from those parties that may be interested or affected by these proposed alternatives.

All comments received will be posted, without change, to *http://www.regulations.gov,* docket number USCG–2006–24163, and will include any personal information you have provided.

If you submit a comment, please include your name and address, identify the docket number for this notice (USCG–2006–26143), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a self-addressed, stamped postcard or envelope. We will consider all comments received during the comment period.

Proposed Action

The Coast Guard proposes to develop and implement enhanced protective measures, as necessary, for marine protected species and marine protected areas that occur in the Eleventh Coast Guard District (California) (CGD11) and Thirteenth Coast Guard District (Washington and Oregon) (CGD13) areas of responsibility. The Coast Guard proposes this action to aid in the fulfillment of its missions, including protection of the environment, while fulfilling Coast Guard obligations to protect living marine resources. The Coast Guard published a notice of intent to prepare this EIS in the **Federal Register** (71 FR 14233, March 21, 2006).

The Proposed Action will be accomplished by (1) establishing a baseline (i.e., analyzing the No Action Alternative) of the significance of the environmental impact of current routine Coast Guard vessel and aircraft operations on the coastal and marine environment within the CGD11 and CGD13 areas of responsibility, with particular focus paid to impacts on marine protected species and marine protected areas; and (2) identifying and analyzing alternative measures which could be implemented to avoid or minimize adverse impacts on marine protected species and marine protected areas. Specifically, the Proposed Action is intended to incorporate measures that will help reduce the environmental impact of Coast Guard vessel and aircraft operations on marine protected species and marine protected areas when engaged in the following routine missions and activities: Law enforcement, national security, search and rescue, aids to navigation, and oil pollution and vessel grounding response. Live fire exercises were not included within this analysis. Budget and legal limitations dictate that any proposed measures be cost effective. Therefore, to be viable, proposed measures would have to further the Coast Guard's natural resource protection mission without compromising its ability to perform other missions.

The Coast Guard is committed to conducting operations in a manner that supports conservation and recovery of marine protected species and marine protected areas. The Proposed Action will further the Coast Guard's environmental protection mission while recognizing and supporting accomplishment of the Coast Guard's full mission portfolio.

Alternatives to the Proposed Action

The DEIS evaluates a variety of actions, listed below as Alternatives 1 through 6, to determine whether modification or supplementation of current procedures is required to accomplish the wide variety of Coast Guard missions in a manner that lessens the probability of adverse impacts on marine protected species and marine protected areas. Alternative 1, the No Action Alternative, documents baseline strategies the Coast Guard currently employs to protect marine resources in the CGD11 and CGD13 areas of responsibility. Alternatives 2 through 5 present discrete actions and are evaluated individually to determine whether their implementation is reasonable and would serve the purpose and need of minimizing and avoiding negative impacts on marine protected species and marine protected areas. Alternatives 2 through 5 are designed to augment or otherwise amend all those actions described in the No Action Alternative. Alternative 6, the Coast Guard's Preferred Alternative, represents a combination of select components of Alternatives 1 through 5.

Alternative 1—No Action Alternative: Under the No Action Alternative, the Coast Guard would continue current operations, without augmentation or modification. Existing strategic plans, directives, guidance, and permits would continue to guide Coast Guard vessel and aircraft operations in a manner intended to minimize, to the maximum extent possible, adverse impacts on marine protected species and marine protected areas. The level of protected living marine resource efforts would continue to be balanced with other Coast Guard missions and requirements, and would remain constantly in flux due to other mission responsibilities and operational tempo.

Alternative 2—Implement Improved Local Operating Procedures; Revise Coast Guard Speed and Approach Guidance; and Enhance Law Enforcement Operations To Include ''Pulse Operations'': This alternative would amend, append, eliminate portions of, or wholly incorporate the No Action Alternative and would build upon the existing Protected Living Marine Resources Program (PLMRP) at each District by formalizing localized operational mitigation procedures and protection efforts, strengthening and expanding Coast Guard speed and approach guidance, and better unifying inter-District and intra-District law enforcement strategies, including engaging in ''pulse operations.''

Alternative 3—Enhance Marine Protected Species and Marine Protected Area Awareness Training for Coast Guard Personnel: This alternative would amend, append, eliminate portions of, or wholly incorporate the No Action Alternative and would build upon the existing PLMRP at each District by requiring the Coast Guard to review, and if necessary, enhance, training for Officer of the Deck (OOD), coxswain, vessel lookouts and Air Station personnel.

Alternative 4—Implement a Web-based Whale Reporting Program: This alternative would amend, append, eliminate portions of, or wholly incorporate the No Action Alternative and would build upon the existing PLMRP at each District by implementing a Whale Reporting Program for CGD11 and CGD13 surface and aviation units. This reporting program would establish a real-time, Web-based whale reporting protocol within the ROI. This program would be maintained centrally by Coast Guard Pacific Area (PACAREA) personnel and would collect vital information on real-time locations of live, dead, injured, or entangled whales. The following information would be collected each time a whale is sighted: Time and location of sighting; distinctive features of the animal; estimated length; signs of injury or entanglement; description of behavior; description of any injuries; condition of carcass for dead whales; and contact information of reporter. The Web site would allow for regional sorting so that units could prepare for a patrol by logging on to the Web site and receiving vital real-time sighting information for the area they would be transiting or patrolling.

Alternative 5—Strengthen Partnerships To Facilitate Marine Protected Species and Marine Protected Area Public Outreach Programs: This alternative would amend, append,

eliminate portions of, or wholly incorporate the No Action Alternative and would build upon the existing PLMRP at each District by strengthening joint partnerships and efforts to support the conservation and recovery of marine protected species and marine protected areas.

Alternative 6—Preferred Alternative: Under the Preferred Alternative, the Coast Guard would further minimize or avoid impacts to marine protected species and marine protected areas by strengthening its current operations (No Action Alternative) by incorporating some of the various additional components described in Alternatives 2, 3 and 5. Specifically, this would entail:

A. Implementing Improved Local Operating Procedures, Revised Guidance, and Enhanced Law Enforcement Operations

- Annually review and update formal Protected Living Marine Resource Programs (PLMRPs) for the Districts.
- Require all Sectors, Air Stations and major Cutters to designate a Marine Protected Species (MPS) Point of Contact (POC).
- Update and amend speed and approach guidance (e.g., Guidance on Vessel Speed and Approach Around Whales message) to include both vessels and aircraft and continue to update regularly.
- Require each District to plan, execute, and document one collaborative marine protected species-driven pulse operation per year, thereby utilizing resources and the subject matter expertise of our partners.

B. Enhancing In-House Marine Protected Species and Marine Protected Area Training

- Enhance regional lookout, coxswain, and deck watch officer skills by providing CGD11 and CGD13 units a standardized regionally-focused marine protected species awareness training module. Module will include methods for detecting, identifying, and avoiding marine protected species and marine protected areas. Require personnel to demonstrate proof of knowledge of marine protected species sections of unit SOPs and knowledge of Speed and Approach Guidance.

C. Enhancing Partnerships To Facilitate Marine Protected Species and Marine Protected Area Outreach and Conservation

- Require each District to participate in one collaborative marine protected species public outreach campaign per year.
- Broadcast Notice to Mariners (NTMs) advising caution in known areas of high marine protected species concentration in bays.
- Include National Oceanic and Atmospheric Administration (NOAA), National Marine Sanctuary Program (NMSP) and U.S. Fish and Wildlife Service (USFWS) educational resources on PACAREA's Internet public domain.
- Utilize the Coast Guard Auxiliary and Sea Partners Program as main vehicles for public outreach; provide educational materials to the Coast Guard Auxiliary and Sea Partners.

We request comments from all interested parties to ensure that the full range and significance of issues related to this proposed action are identified. The Coast Guard requests that comments be as specific as possible with regard to the issues associated with the proposed action, alternatives, and analysis.

Dated: November 24, 2008.

David P. Pekoske,

Vice Admiral, United Stated Coast Guard, Pacific Area Commander.

[FR Doc. E8–30104 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2008–0021]

Public Meetings on Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of public meetings and requests for comments.

SUMMARY: This notice provides the time and location of public meetings that will be held by the Transportation Security Administration (TSA) regarding the Notice of Proposed Rulemaking entitled ''Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program'' (LASP NPRM), which was published in the **Federal Register** on October 30, 2008 (73 FR 64790).

DATES: The public meetings will be on January 6, 2009, in White Plains, NY; January 8, 2009, in Atlanta, GA; January 16, 2009, in Chicago, IL; January 23, 2009 in Burbank, CA; and January 28, 2009 in Houston, TX. The meetings will begin at 9 a.m., and registration will start at 8 a.m. All interested persons may provide written comments, which must be received in the public docket by February 27, 2009.

ADDRESSES: The public meetings will be held at the following locations:

(1) White Plains, NY: Westchester County Airport (HPN), Building 1 Airport Road, White Plains, NY 10604;

(2) Atlanta, GA: Renaissance Concourse Hotel Atlanta Airport, One Hartsfield Centre Parkway, Atlanta, GA 30354;

(3) Chicago, IL: Crowne Plaza Chicago O'Hare Hotel & Conference Center, 5440 North River Road, Rosemont, IL 60018;

(4) Burbank, CA: Burbank Airport Marriott Hotel & Convention Center, 2500 North Hollywood Way, Burbank, CA 91505; and

(5) Houston, TX: Conference Center, Hilton Houston Hotel—North Greenspoint, 12400 Greenspoint Drive, Houston, TX 77060.

Participants should check in with TSA staff when they arrive at the public meeting.

All interested persons may submit comments, identified by the TSA docket number to this document, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, In Person, or Fax: Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Fax (202) 493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Erik Jensen, Assistant General Manager, Policy and Plans, Office of General Aviation, TSNM, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 02598–6028; telephone (571) 227–2401; facsimile (571) 227–2918; e-mail *LASP@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this public meeting by submitting written comments, data, or views. We invite comments relating to

any aspect of the LASP NPRM. The areas in particular in which TSA seeks information and comment at the public meeting are listed below in the ''Specific Issues for Discussion'' section. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the document, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you would like TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file in the public docket all comments received by TSA, except for comments containing confidential information and sensitive security information (SSI).[1] TSA will consider all comments received on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the action. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

Upon receipt of such comments, TSA will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold documents containing SSI, confidential business information, or trade secrets in a separate file to which the public does not have access, and place a note in the public docket that TSA has received such materials from the commenter. If TSA determines, however, that portions of these comments may be made publicly available, TSA may include a redacted version of the comment in the public docket. If TSA receives a request to examine or copy information that is not in the public docket, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Department of Homeland Security's (DHS') FOIA regulation found in 6 CFR part 5.

Reviewing Comments in the Docket

Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual who submitted the comment (or signed the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://DocketInfo.dot.gov.*

You may review TSA's electronic public docket on the Internet at *http://www.regulations.gov.* In addition, DOT's Docket Management Facility provides a physical facility, staff, equipment, and assistance to the public. To obtain assistance or to review comments in TSA's public docket, you may visit this facility between 9 a.m. to 5 p.m., Monday through Friday, excluding legal holidays, or call (202) 366–9826. This docket operations facility is located in the West Building Ground Floor, Room W12–140 at 1200 New Jersey Avenue, SE., Washington, DC 20590.

Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) Web page at *http://www.regulations.gov;*

(2) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html;* or

(3) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Background

On October 30, 2008, TSA published in the **Federal Register** (73 FR 64790) the Notice of Proposed Rulemaking for the Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program. The LASP NPRM describes TSA's proposal to enhance the security of general aviation by expanding the scope of current requirements and by adding new requirements for certain U.S. operators with aircraft exceeding 12,500 pounds maximum take-off weight (MTOW) (large aircraft) and certain airports serving those aircraft. These measures are based on the current security program that applies to operators providing scheduled or charter services. Proposed measures include requiring the adoption of a security program, checking passengers against government terrorist watch lists, conducting criminal history checks on pilots, designating a security coordinator, and submission to an audit by an independent third party every two years. The LASP NPRM also proposes further security measures for all-cargo aircraft and for private charter operations with aircraft weighing over 45,500 kilograms (100,309.3 pounds) and would require certain airports that serve large aircraft to adopt a security program. TSA seeks comment on the proposal described in the LASP NPRM. TSA intends to analyze the public comments and issue a final rule.

Specific Issues for Discussion

There are several areas in particular in which TSA seeks information and comment from the industry at the public meeting, listed below. These key issues are intended to help focus public comments on subjects that TSA must explore in order to complete its review of the Large Aircraft Security Program (LASP). The comments at the meeting need not be limited to these issues, and TSA invites comments on any other aspect of the LASP NPRM. These are:

(1) The weight threshold of aircraft covered by the proposed rule.

(2) The phased approach in the implementation of the proposed rule and the determination of which phase would be applicable to each large aircraft operator.

(3) The security threat assessment (STA) requirements, including the

[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

transferability of the STAs for flight crew members and whether a proprietor, general partner, officer, director, or owner of aircraft operators should undergo a STA.

(4) Methods for positively identifying pilots and effectively linking them to the aircraft they are operating.

(5) The watchlist service provider (WLSP) requirement, including comments on the WLSP's system security plan, the role that watchlist service providers may continue to have if the responsibility for watchlist matching shifts to the U.S. Government in the future, whether there should be a limitation of the number of entities that would be approved as a WSLP, and whether WLSP covered personnel should be limited only to U.S. citizens, nationals or lawful permanent residents.

(6) Whether TSA should establish a minimum time for submission of passenger information to the service providers, what that minimum time should be, and the reasons supporting the suggested minimum time.

(7) Whether full program aircraft operators should be permitted to conduct their own audit and/or watchlist matching on flights operated under their LASP.

(8) Proposed privacy notice requirement.

(9) The third-party auditor requirement, including the establishment of a system of assigning auditors and methods of doing so, qualifications of auditors, and conflict of interests and independence issues affecting an auditor.

(10) Whether certain large aircraft operators (for instance, operators that are not carrying persons or property for compensation or hire or with aircraft having a MTOW of more than 45,500 kg) should have a different requirement as to what weapons are prohibited (for example, limit the prohibited items to only guns and firearms).

(11) The requirement for security coordinator, including the use of a single individual for multiple security coordinator roles.

(12) Whether any other types of airport should be covered by a security program.

(13) Amendment of the partial program or the supporting program for airports.

(14) Applicability of the proposed rule to fractional ownership operations.

(15) Qualifications of individuals who would be exempted from liability under the voluntary provision of emergency services.

(16) The burden estimates, estimated costs of compliance, estimates regarding the small entities affected, and economic impact on the newly-regulated entities.

Participation at the Meeting

The meeting is expected to begin at 9 a.m. Following an introduction by TSA, members of the public will be invited to present their views.

Anyone wishing to present an oral statement at the meeting must register in person between 8 and 9 a.m. on the day of the meeting, and provide his or her name and affiliation. Speakers should keep comments brief and plan to speak for no more than three minutes when presenting comments.

Public Meeting Procedures

TSA will use the following procedures to facilitate the meeting:

(1) There will be no admission fee or other charge to attend or to participate in the meeting. The meeting will be open to all persons who are scheduled to present statements or who register in person between 8 and 9 a.m. on the day of the meeting at the site of the public meeting. TSA will make every effort to accommodate all persons who wish to participate, but admission will be subject to availability of space in the meeting room. The meeting may adjourn early if scheduled speakers complete their statements or questions in less time than is scheduled for the meeting.

(2) An individual, whether speaking in a personal or a representative capacity on behalf of an organization, will be limited to a three-minute statement and scheduled on a first-come, first-served basis. If a large number of persons register to present comments, this amount of time may be shortened to provide all registered persons an opportunity to present their comments.

(3) Any speaker prevented by time constraints from speaking will be encouraged to submit written remarks, which will be made part of the record.

(4) For information on facilities or services for individuals with disabilities or to request assistance at the meeting, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above before December 31, 2008.

(5) Representatives of TSA will preside over the meeting.

(6) The meeting will be recorded by a court reporter. A transcript of the meeting and any material accepted by the panel during the meeting will be included in the public docket.

(7) Statements made by TSA representatives are intended to facilitate discussion of the issues or to clarify issues. Any statement made during the meeting by a TSA representative is not intended to be, and should not be construed as, a position of TSA.

(8) The meeting is designed to invite public views and gather additional information. No individual will be subject to cross-examination by any other participant; however, TSA representatives may ask questions to clarify a statement.

Issued in Arlington, Virginia, on December 12, 2008.

John Sammon,

Assistant Administrator for Transportation Sector Network Management.

[FR Doc. E8–30045 Filed 12–17–08; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

U.S. Customs and Border Protection

U.S. Immigration and Customs Enforcement

[CIS No. 2461–08; DHS Docket No. USCIS–2008–0065]

RIN 1615–ZA75

H–2A Petitioner's Employment-Related or Fee-Related Notification

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, DHS.

ACTION: Notice.

SUMMARY: This Notice announces the manner in which petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of agricultural workers in H–2A nonimmigrant status or job placement fee information. These procedures are necessary to enable petitioners to comply with the notification requirements established by the Department of Homeland Security's regulations governing the H–2A nonimmigrant classification.

DATES: This Notice is effective January 17, 2009.

FOR FURTHER INFORMATION CONTACT:

USCIS: Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, telephone (202) 272–8410.

USICE: Joe Jeronimo, National Program Manager, U.S. Immigration and Customs Enforcement, Department of Homeland Security, 500 12th Street,

SW., Washington, DC 20024, telephone (202) 732–3978.

USCBP: Bruce Ingalls, Chief, Debt Management Branch, U.S. Customs and Border Protection, Revenue Division, Attn: H–2 Team, Suite 100, 6650 Telecom Drive, Indianapolis, IN 46278, telephone (317) 298–1307.

SUPPLEMENTARY INFORMATION:

I. Background

The H–2A nonimmigrant classification applies to alien workers seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. Immigration and Nationality Act (INA) sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (H–2A classification designation). Aliens seeking H–2A nonimmigrant status must be petitioned for by a U.S. employer. However, prior to filing the petition, the U.S. employer must complete a temporary agricultural labor certification process with the Department of Labor (DOL) for the job opening the employer seeks to fill with an H–2A worker. After receiving a temporary labor certification, the U.S. employer files Form I–129, ''Petition for Nonimmigrant Worker,'' with the appropriate USCIS office. *See* 8 CFR 214.2(h)(5)(i)(A). Once a petition has been granted, the regulations impose additional responsibilities on such H–2A petitioners. These responsibilities include notifying DHS of certain occurrences related to their H–2A workers, as discussed below.

A. Employment-Related Notifications

The regulations require H–2A petitioners to provide notification to DHS within 2 work days in the following instances:

- When an H–2A worker fails to report to work within 5 work days of the employment start date on the H–2A petition or within 5 work days of the start date established by the petitioner, whichever is later;
- When the agricultural labor or services for which H–2A workers were hired is completed more than 30 days early; or
- When the H–2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

8 CFR 214.2(h)(5)(vi)(B). The regulations also require that petitioners retain evidence of the notification filed with DHS for a one-year period beginning from the date of the notification. 8 CFR 214.2(h)(5)(vi)(B)(*2*). Those petitioners that use a different employment start date than the start date stated on the H–2A petition must retain evidence of the changed start date and make such evidence available for inspection by DHS officers for a one-year period beginning on the newly established employment start date. *Id.* An H–2A petitioner that fails to meet these requirements is subject to liquidated damages in the amount of $10. 8 CFR 214.2(h)(5)(vi)(B)(*3*).

B. Fee-Related Notifications

The regulations provide petitioners with the opportunity to avoid denial or revocation (on notice) of their H–2A petition if they notify DHS regarding information they obtained following the filing of their H–2A petition concerning the beneficiary's payment or agreement to pay a fee or compensation in connection to any facilitator, recruiter, or similar employment service as a condition of obtaining the H–2A employment. 8 CFR 214.2(h)(5)(xi)(A)(*4*). The regulations prohibit such payments and agreements. 8 CFR 214.2(h)(5)(xi)(A). Notification of a beneficiary's payment or agreement to pay the prohibited fees must be made within 2 workdays of gaining such knowledge. 8 CFR 214.2(h)(5)(xi)(A)(*4*).

This Notice specifies the manner in which H–2A petitioners must file employment-related and fee-related notifications with DHS in order to comply with the regulations. 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(5)(xii)(A)(*4*).

II. Employment-Related Notifications

A. Filing Notifications

This Notice announces that beginning on January 17, 2009, H–2A petitioners must provide employment-related notifications to USCIS within 2 workdays of an event specified in 8 CFR 214.2(h)(5)(vi)(B). The petitioner must include the following information in the notification.

(1) The reason for the notification;

(2) The reason for untimely notification and evidence for good cause, if applicable;

(3) The USCIS receipt number of the approved H–2A petition;

(4) The petitioner's name, address, telephone number, and employer identification number (EIN);

(5) The employer's name, address, and telephone number, if it is different from that of the petitioner;

(6) The name of the H–2A worker in question;

(7) The date and place of birth of the H–2A worker in question; and

(8) The last known physical address and telephone number of the H–2A worker in question.

USCIS acknowledges that where an H–2A petitioner is reporting the failure of an H–2A worker to report to work within the prescribed time frame, petitioners may not know the names of H–2A workers who fail to report to the employment site if the workers are unnamed beneficiaries of the H–2A petition. In such cases, USCIS requires the petitioner to supply only the number of workers who failed to report to work within the prescribed time frame instead of such workers' names, dates of birth, and places of birth.

USCIS encourages the petitioner to submit notification electronically by e-mail. However, USCIS realizes that in certain instances electronic notification may not be possible or feasible for the H–2A petitioner. Accordingly, the following two methods for notification are acceptable. Notification by mail must be postmarked before the end of the 2 workday reporting window.

By e-mail: CSC–X.H–2AAbs@dhs.gov.

By mail: California Service Center, Attn: Div X/BCU ACD, P.O. Box 30050, Laguna Niguel, CA 92607–3004.

B. Failure To Comply With the Requirements

In cases where an H–2A petitioner makes an admission of an untimely notification (for example, a notification letter admitting that the notification is being sent after the close of the 2 workdays window), USCIS will make a determination of liability for liquidated damages. Untimely notification must be accompanied by evidence of good cause. Failure to notify timely may be excused in the discretion of USCIS if it is demonstrated that the delay was due to extraordinary circumstances beyond the control of the H–2A petitioner, and USCIS finds the delay commensurate with the circumstances. If the H–2A petitioner fails to demonstrate good cause for failure to make a timely notification, USCIS will communicate liability for liquidated damages to the H–2A petitioner and inform the petitioner that it will receive a demand letter for payment directly from U.S. Customs and Border Protection (CBP). H–2A petitioners must not send checks to USCIS when sending untimely notifications.

In any situation where U.S. Immigration and Customs Enforcement (ICE) uncovers evidence of liability for H–2A liquidated damages in the course of its investigatory work, ICE will make a determination of liability. ICE will provide the petitioner with written notice of non-compliance as well as the

petitioner's liability for liquidated damages. If the petitioner wishes to contest the allegations set forth in the notice of non-compliance, written notice must be received by ICE within 30 days of receipt of the notice of non-compliance. 8 CFR 214.2(h)(5)(vi)(C). If the petitioner fails to contest the finding of non-compliance, or the petitioner's response fails to raise an issue of material fact, ICE will communicate liability for liquidated damages to the H–2A petitioner and inform the petitioner that it will receive a demand letter for payment for liquidated damages directly from CBP.

CBP will collect all liquidated damage payments. The CBP demand letter will specify the manner in which payment must be made.

III. Fee-Related Notifications

This Notice announces that on January 17, 2009, H–2A petitioners may begin filing fee-related notifications to USCIS pursuant to 8 CFR 214.2(h)(5)(xi)(A)(*4*). The notification must include the following information:

(1) The USCIS receipt number of the H–2A petition;

(2) The petitioner's name, address, and telephone number;

(3) The employer's name, address, and telephone number, if it is different from that of the petitioner; and the

(4) Name and address of the facilitator, recruiter, or placement service to which alien beneficiaries paid or agreed to pay the prohibited fees.

As previously stated, USCIS encourages the petitioner to submit notification electronically by e-mail. However, USCIS realizes that in certain instances, electronic notification may not be possible or feasible for the H–2A petitioner. Accordingly, the following two methods for notification are acceptable. Notification by mail must be postmarked before the end of the 2 workday reporting window.

By e-mail: CSC.H2AFee@dhs.gov.

By mail: California Service Center, P.O. Box 10695, Laguna Niguel, CA 92607–1095.

IV. Paperwork Reduction Act

This Notice sets forth the procedures for H–2A petitioners to notify USCIS when:

- An H–2A worker fails to report to work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by the petitioner, whichever is later;
- When the agricultural labor or services for which H–2A workers were hired is completed more than 30 days early; or
- When the H–2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

H–2A petitioners must retain evidence of any such notification sent to USCIS, as well as evidence of an employment start date if different from the start date stated on the H–2A petition, for a one-year period.

This Notice further provides the procedures for H–2A petitioners to notify USCIS, after an H–2A petition has been filed, within 2 work days of learning that an H–2A alien worker paid a fee or other compensation to a facilitator, recruiter, or similar employment service as a condition of obtaining the H–2A employment.

These notification requirements are considered information collections covered under the Paperwork Reduction Act (PRA).

Since implementation will begin 30 days from the date of publication of this notice in the **Federal Register**, this new information collection has been submitted and approved by OMB under the emergency review and clearance procedures covered under the PRA. USCIS is requesting comments on this new information collection no later than January 17, 2009. When submitting comments on the information collection, your comments should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection

a. *Type of information collection:* New information collection.

b. *Title of Form/Collection:* H–2A's Petitioners Employment-Related or Fee-Related Notification

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract: Individuals or Households.* This information collection is necessary to provide employment related or fee related notification by an H–2A petitioner.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,000 respondents at .50 (30 minutes) per response.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 500 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, *Attention:* Chief, 202–272–8377.

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8–29786 Filed 12–17–08; 8:45 am]

BILLING CODE 9117–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[CBP Dec. 08–48]

Notice of H–2A Temporary Worker Visa Exit Program Pilot

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is establishing a new land-border exit system for certain temporary agricultural workers, starting on a pilot basis, at certain designated ports of entry. Under this pilot program, aliens admitted to the United States as H–2A temporary workers who were admitted to the United States at the ports of San Luis, Arizona, or Douglas, Arizona, must depart from either one of those ports and provide certain biographic and biometric information at one of the kiosks established for this purpose. Any nonimmigrant alien admitted under an H–2A nonimmigrant visa at one of the designated ports of entry will be issued a CBP Form I–94, Arrival and Departure Record, and be presented with

information material that explains the pilot program requirements.

DATES: The pilot program will commence August 1, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Erin M. Martin via e-mail at *ERIN.Martin@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On February 13, 2008, the Department of Homeland Security (DHS) published a Notice of Proposed Rulemaking in the **Federal Register** (73 FR 8230) proposing changes to requirements affecting temporary and seasonal agricultural workers within the H–2A nonimmigrant classification and their U.S. employers.[1] Among other things, DHS proposed to establish a visa exit program on a pilot basis that would require temporary agricultural workers within the H–2A nonimmigrant classification to register with CBP at the time of departure from the United States. DHS is publishing the final rule implementing the H–2A program in today's edition of the **Federal Register**, concurrent with this notice.

Specifically, the final rule implements the pilot program by adding 8 CFR 215.9, which provides that an alien admitted on an H–2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. Section 215.9 further states that CBP will publish a notice in the **Federal Register** designating which H–2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

The final rule indicates that the Temporary Worker Visa Exit Program will begin as a pilot. Accordingly, CBP is implementing the Temporary Worker Visa Exit Program, on a pilot basis. This notice contains all the required elements referenced in 8 CFR 215.9. Any alien subject to the program that is admitted into the United States at a designated port on or after August 1, 2009, is subject to the pilot program.

[1] The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H–2A classification).

General Requirements of the Temporary Worker Visa Exit Program Pilot

Any alien subject to the Temporary Worker Visa Exit Program must depart from a designated port of entry and must submit certain biographic and biometric information at one of the kiosks established for this purpose.

Aliens Subject to the Pilot Program

Any alien admitted into the United States under an H–2A nonimmigrant visa at one of the designated ports.

Designated Ports

San Luis, Arizona; Douglas, Arizona.

Entry Procedures

Any nonimmigrant alien admitted under an H–2A nonimmigrant visa at one of the designated ports of entry will be issued a CBP Form I–94, Arrival and Departure Record, and be presented with information material that explains the pilot program requirements. The information material will instruct the alien to appear in person at one of the designated ports of entry and register his or her final departure from the United States at that port on or before the date his or her work authorization expires.

Exit Procedures

An alien admitted under an H–2A nonimmigrant visa must depart at a designated port on or before the date his or her work authorization expires. At the time of departure, the alien must present the following biographic and biometric information at a kiosk installed for this purpose:

- *1—Biographic information*—name, date of birth, country of citizenship, passport number, and the name of the Consulate where the alien's visa was issued. The biographic information will be provided by scanning the alien's travel document (visa). If the scan of the visa fails, the alien will scan his or her passport. If the scan of the passport fails the alien will manually enter the required biographic information.
- *2—Biometric information*—a 4-finger scan from one hand.
- *3—The departure portion of the CBP Form I–94*—this must be deposited into the kiosk and the departing alien will receive a receipt verifying a successfully completed checkout registration.

Kiosks

Instructions for departure registration will be available in both English and Spanish for use by departing aliens at the kiosks.

Officer assistance will be available in the event that an alien is unable to utilize the designated kiosk to record his or her departure.

Jayson P. Ahern,

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

[FR Doc. E8–29787 Filed 12–17–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5274–N–01]

Notice of HUD-Held Multifamily and Healthcare Loan Sale

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

ACTION: Notice of sale of mortgage loan.

SUMMARY: This notice announces HUD's intention to sell an unsubsidized multifamily mortgage loan, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale (Pool 101 of MHLS 2009–1). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: For Pool 101 of MHLS 2009–1, the Bidder's Information Package (BIP) was made available to qualified bidders on November 20, 2008. Bids for the loan must be submitted on the bid date, which is currently scheduled for December 19, 2008. HUD anticipates that an award will be made on or before December 22, 2008. The sale closing is expected to take place on December 30, 2008.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the HUD Web site at *http://www.hud.gov/fhaloansales.cfm.* The executed documents must be mailed and faxed to DebtX at: The Debt Exchange, 133 Federal Street, 10th Floor, Boston, MA 02111, Attention: MHLS 2009–1 Sale Coordinator, Fax 1–617–531–3499.

FOR FURTHER INFORMATION CONTACT: John Lucey, Deputy Director, Asset Sales Office, Room 3136, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000; telephone 202–708–2625, extension 3927. Individuals with hearing or speech impairments may call 202–708–4594 (TTY). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell in Pool 101 of MHLS 2009–1 an unsubsidized mortgage loan (Mortgage Loan) secured by a multifamily property located in Columbus, Ohio. The Mortgage Loan is non-performing. The Mortgage Loan will be sold without FHA insurance and with servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loan.

The mortgagor, if it is a qualified bidder, may submit a bid on the Mortgage Loan. If interested, the Mortgagor should review the Qualification Statement to determine whether it may be eligible to qualify to submit a bid for Pool 101 of MHLS 2009–1.

The Bidding Process

The BIP will describe in detail the procedure for bidding in Pool 101 of MHLS 2009–1. The BIP or its supplement(s) will also include a standardized nonnegotiable loan sale agreement (Loan Sale Agreement). As part of its bid, each bidder must submit a deposit equal to the greater of $100,000 or 10 percent of the bid price. In the event the bidder's bid is less than $100,000.00, the minimum deposit shall be not less than fifty percent of the bidder's bid. HUD will evaluate the bids submitted and determine the successful bid in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price. Deposits will be returned to unsuccessful bidders. The Closing for Pool 101 of MHLS 2009–1 is scheduled for December 30, 2008.

These are the essential terms of sale. The Loan Sale Agreement, which will be included in the BIP or its supplement(s), will contain additional terms and details. To ensure a competitive bidding process, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP will describe the due diligence process for reviewing loan files in Pool 101 of MHLS 2009–1. Qualified bidders will be able to access loan information remotely via a high-speed Internet connection. Further information on performing due diligence review of the Mortgage Loans will be provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include this Mortgage Loan in a later sale. The Mortgage Loan will not be withdrawn after the Award Date except as is specifically provided in the Loan Sale Agreement.

This is a sale of an unsubsidized mortgage loan, pursuant to Section 204(a) of the Departments of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, 12 U.S.C. 1715z–11a(a).

Mortgage Loan Sale Procedure

HUD selected a competitive sale as the method to sell the Mortgage Loan. This method of sale optimizes HUD's return on the sale of this Mortgage Loan, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loan, and provides the quickest and most efficient vehicle for HUD to dispose of the Mortgage Loan.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are ineligible to bid on the Mortgage Loan included in Pool 101 of MHLS 2009–1:

(1) Any employee of HUD, a member of such employee's household, or an entity owned or controlled by any such employee or member of such an employee's household;

(2) Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 24 of the Code of Federal Regulations, Part 24, and Title 25 of the Code of Federal Regulations, Part 2424;

(3) Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for or on behalf of HUD in connection with Pool 101 of MHLS 2009–1;

(4) Any individual who was a principal, partner, director, agent or employee of any entity or individual described in subparagraph 3 above, at any time during which the entity or individual performed services for or on behalf of HUD in connection with Pool 101 of MHLS 2009–1;

(5) Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under subparagraphs 1 through 4 above to assist in preparing any of its bids on the Mortgage Loan;

(6) Any individual or entity which employs or uses the services of an employee of HUD (other than in such employee's official capacity) who is involved in Pool 101 of MHLS 2009–1;

(7) Any mortgagor (or affiliate of a mortgagor) that failed to submit to HUD on or before February 21, 2008, audited financial statements for fiscal years 1999 through 2007 for a project securing a Mortgage Loan;

(8) Any individual or entity and any Related Party (as such term is defined in the Qualification Statement) of such individual or entity that is a mortgagor in any of HUD's multifamily housing programs and that is in default under such mortgage loan or is in violation of any regulatory or business agreements with HUD, unless such default or violation is cured on or before December 9, 2008;

(9) Any entity or individual that serviced or held the Mortgage Loan at any time during the 2-year period prior to December 1, 2008, is ineligible to bid on the Mortgage Loan or on the pool containing such Mortgage Loan; and

(10) Any affiliate or principal of any entity or individual described in the preceding sentence (subparagraph 9); any employee or subcontractor of such entity or individual during that 2-year period; or any entity or individual that employs or uses the services of any other entity or individual described in this subparagraph in preparing its bid on such Mortgage Loan.

Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loan in Pool 101 of MHLS 2009–1.

Eligible Bidders With Respect to Pool 101 of MHLS 2009–1

Notwithstanding the foregoing, in order to bid on Pool 101 of MHLS 2009–1, bidders must be a Non-Profit entity, Housing Finance Authority, or a unit of local government.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding Pool 101 of MHLS 2009–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for the loan, upon the closing of the sale. Even if HUD elects not to publicly disclose any information relating to Pool 101 of MHLS 2009–1, HUD will have the right to disclose any information that HUD is obligated to disclose pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to Pool 101 of MHLS 2009–1 and does not establish

HUD's policy for the sale of other mortgage loans.

Dated: December 12, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E8–30177 Filed 12–16–08; 4:15 pm]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2008–NO247; 40120–1113–0000–C2]

Notice of Availability of the Florida Panther Recovery Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of the third revision of the Florida Panther Recovery Plan. The plan includes specific recovery objectives and criteria to be met in order to reclassify the Florida panther (*Puma concolor coryi*) to threatened status and eventually delist this species under the Endangered Species Act of 1973, as amended (Act).

ADDRESSES: You can obtain copies of the Florida Panther Recovery Plan by contacting the Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960 (telephone, 772–562–3909) or by visiting our Web sites at *http://endangered.fws.gov* or *http://verobeach.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Chris Belden, South Florida Ecological Services Office, 772–562–3909, ext. 237.

SUPPLEMENTARY INFORMATION:

Background

Restoring listed animals and plants to the point where they are again secure, self-sustaining components of their ecosystems is a primary goal of our threatened and endangered species program. To help guide the recovery effort, we are preparing recovery plans for most listed species. Recovery plans describe actions that may be necessary for conservation of species, establish criteria for reclassification from endangered to threatened status or delisting, and estimate time and cost for implementing recovery measures.

The Act (16 U.S.C. 1533 *et seq.*) requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide a public notice and an opportunity for public review and comment during recovery plan development. We made the draft third revision of the Florida Panther Recovery Plan available for public comment from January 31, 2006, through April 3, 2006 (71 FR 5066). We considered information we received during the public comment period and information from peer reviewers in our preparation of this final revised recovery plan. We will forward substantive comments to other Federal agencies so each agency can consider these comments in implementing approved recovery plans.

The Florida panther is the last subspecies of *Puma* still surviving in the eastern United States. Historically occurring throughout the southeastern United States, the panther today is restricted to less than 5 percent of its historic range in 1 breeding population of approximately 100 animals, located in south Florida. Wide ranging, and secretive, panthers occur at low densities. They require large contiguous areas to meet their social, reproductive, and energetic needs. Panther habitat selection is related to prey availability (i.e., habitats that make prey vulnerable to stalking and capturing are selected).

Habitat loss, degradation, and fragmentation are among the greatest threats to panther survival. Vehicle strikes and problems associated with being a single, small, isolated population have continued to keep the panther population at its current low numbers. Potential panther habitat throughout the southeast continues to be affected by urbanization, residential development, conversion to agriculture, mining and mineral exploration, and lack of land-use planning that recognizes panther needs. Public support is critical to attainment of recovery goals for the Florida panther and any reintroduction efforts. Potential opposition to panthers will be the most difficult aspect of panther recovery and must be addressed before any reintroduction efforts are initiated.

The goal of the Florida panther recovery plan is to achieve long-term viability of the panther to a point where it can be reclassified from endangered to threatened and then ultimately removed from the Federal List of Endangered and Threatened Species. The recovery plan identifies three objectives to meet this goal, including:

1. Maintain, restore, and expand the Florida panther population and its habitat in south Florida and expand the breeding portion of the population in south Florida to areas north of the Caloosahatchee River.

2. Identify, secure, maintain, and restore panther habitat in potential reintroduction areas within the panther's historic range, and establish viable populations of the panther outside south and south-central Florida.

3. Facilitate panther recovery through public awareness and education.

The plan presents criteria for reclassifying or delisting the panther. These criteria are based on the number of individuals and number of populations that provide for demographically and genetically viable populations, as determined by several population viability analyses, to ensure resilience to catastrophic events.

Reclassification of the Florida panther will be considered when:

1. Two viable populations of at least 240 individuals (adults and subadults) each have been established and subsequently maintained for a minimum of 12 years (or 2 panther generations).

2. Sufficient habitat quality, quantity, and spatial configuration to support these populations is retained/protected or secured for the long term.

Delisting of the Florida panther will be considered when:

1. Three viable, self-sustaining populations of at least 240 individuals (adults and subadults) each have been established and subsequently maintained for a minimum of 12 years.

2. Sufficient habitat quality, quantity, and spatial configuration to support these populations is retained/protected or secured for the long term.

A viable population, for purposes of Florida panther recovery, has been defined as one in which there is a 95 percent probability of persistence for 100 years. This population may be distributed in a metapopulation structure composed of subpopulations that total 240 individuals. There must be exchange of individuals and gene flow among subpopulations. For reclassification, exchange of individuals and gene flow can be either natural or through management. If managed, a commitment to such management must be formally documented and funded. For delisting, exchange of individuals and gene flow among subpopulations must be natural (i.e., not manipulated or managed). Habitat should be in relatively unfragmented blocks that provide for food, shelter, and characteristic movements (e.g., hunting, breeding, dispersal, and territorial behavior) and support each metapopulation at a minimum density of 2 to 3 animals per 100 square miles.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: December 10, 2008.

Teresa H. McKitrick.

Acting Regional Director, Southeast Region.

[FR Doc. E8–29890 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2008–N0311]; [20124–1113–0000–F2]

Barton Creek Office Park Environmental Assessment and Habitat Conservation Plan, Travis County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability of an Environmental Assessment and Habitat Conservation Plan (EA/HCP).

SUMMARY: Brandywine Realty Trust (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a) of the Endangered Species Act of 1973, as amended (Act). The Applicant has been assigned permit number TE–198648–0. The requested permit, which is for a period of 30 years, would authorize incidental take of the endangered golden-cheeked warbler (*Dendroica chrysoparia*). The proposed take would occur as a result of the construction and operation of the 14.83-acre Barton Creek Office Park.

DATES: To ensure consideration, we must receive written comments on or before February 17, 2009.

ADDRESSES: Persons wishing to review the application and/or EA/HCP may obtain a copy by written or telephone request to William Amy, U.S. Fish and Wildlife Service, Ecological Services Office, 10711 Burnet Road, Suite 200, Austin, TX 78758 (512/490–0057, extension 234). All documents will be available for public inspection, by written request or by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the above address. Data or comments concerning the application and HCP should be submitted in writing to the Field Supervisor at the above address. Please refer to permit number TE–198648–0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: William Amy at the above address.

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the ''taking'' of endangered species such as the golden-cheeked warbler. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

The subject tract is located in southwest Austin, on the west side of the Capital of Texas Highway (also known as Loop 360) immediately across from the intersection of Walsh Tarlton Lane, Travis County, Texas. Habitat for the golden-cheeked warbler has been documented on and adjacent to the subject tract. An EA/HCP has been included as part of the permit application. A determination of jeopardy or non-jeopardy to the species and a decision pursuant to the National Environmental Policy Act will not be made until at least 60 days from the date of publication of this notice. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

Applicant: Brandywine Realty Trust plans to construct and operate a commercial development on the 14.83-acre tract and pay Travis County an amount equal to 79.47 acres (the proposed alternative's mitigation acreage) multiplied by the Balcones Canyonlands Conservation Plan's (the ''BCCP'') fee level under its Alternative Process option (currently $6,500 per acre) in effect at the time of such payment. Payment shall be made prior to initiation of clearing activities for the development.

In the event that the Alternative Process fee option becomes unavailable, the Applicant will provide funding in the amount of $516,555 toward the acquisition of 79.47 acres of land within the Balcones Canyonlands Preserve (BCP) acquisition area.

The EA/HCP was prepared to consider the impacts of the proposed action on the human environment and to address impacts to listed species as a result of developing the subject tract. This document describes the impacts to the golden-cheeked warbler that would likely result from the development, steps the Applicant would take to minimize and mitigate such impacts to the maximum extent practicable, the funding available to implement those steps, and the alternatives that have been considered.

Thomas L. Baur,

Acting Regional Director, Region 2.

[FR Doc. E8–30038 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–260–09–1060–00–24 1A]

Call for Nominations for the Wild Horse and Burro Advisory Board

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Wild Horse and Burro Advisory Board Call for Nominations.

SUMMARY: The purpose of this notice is to solicit public nominations for three members to the Wild Horse and Burro Advisory Board. The Board provides advice concerning management, protection and control of wild free-roaming horses and burros on the public lands administered by the Department of the Interior, through the Bureau of Land Management, and the Department of Agriculture, through the Forest Service.

DATES: Nominations should be submitted to the address listed below no later than February 17, 2009.

ADDRESSES: National Wild Horse and Burro Program, Bureau of Land Management, Department of the Interior, P.O. Box 12000, Reno, Nevada 89520–0006, Attn: Ramona Delorme; Fax 775–861–6618.

FOR FURTHER INFORMATION CONTACT: Don Glenn, Division Chief, Wild Horse and Burro Program, (202) 452–5073. Individuals who use a telecommunications device for the deaf (TDD) may contact Ramona Delorme at any time by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Nominations for a term of three years are needed to represent the following categories of interest:

Wildlife Management

Humane Advocacy

Livestock Management

Any individual or organization may nominate one or more persons to serve on the Wild Horse and Burro Advisory Board. Individuals may also nominate themselves for Board membership. All nomination letters/or resumes should include the following:

1. *Which positions are you interested in being considered for:*
2. *Nominee's Full Name:*
3. *Business Address and Phone: (include e-mail address).*
4. *Home Address and Phone:* (include e-mail address).
5. *Present Occupation/Title:*
6. *Education:* (colleges, degrees, major field of study):

7. *Career Highlights:* Significant related experience, civic and professional activities, elected offices (included prior advisory committee experience or career achievements related to the interest to be represented) Attach additional pages, as necessary.

8. *Qualifications:* Education, training and experience that qualify you to serve on the Board.

9. *Experience or knowledge of wild horse and burro management and the issues facing the Bureau of Land Management:*

10. *Experience or knowledge of horses or burros:* (Equine health, training and management)

11. *Experience in working with disparate groups to achieve collaborative solutions:* (*e.g.*, civic organizations, planning commissions, school boards)

12. *Indicate any BLM permits, leases or licenses that you hold:*

13. *Attach or have Letters of References sent from Special Interests or Organizations you may represent. Also letters of endorsement from business associates, friends, coworkers, local State and/or Federal government or members of Congress if applicable.*

The above information is critical in determining selection and will influence the appointments.

As appropriate, certain Board members may be appointed as Special Government Employees. Special Government Employees serve on the board without compensation, and are subject to financial disclosure requirements in the Ethics in Government Act and 5 CFR 2634. Nominations are to be sent to the address listed under **ADDRESSES**, above.

Each nominee will be considered for selection according to their ability to represent their designated constituency, analyze and interpret data and information, evaluate programs, identify problems, work collaboratively in seeking solutions and formulate and recommend corrective actions. Pursuant to section 7 of the Wild Free-Roaming Horses and Burros Act, Members of the Board cannot be employed by either Federal or State Government. Members will serve without salary, but will be reimbursed for travel and per diem expenses at current rates for Government employees. The Board will meet no less than two times annually. The Director, Bureau of Land Management may call additional meetings in connection with special needs for advice.

Edwin L. Roberson,

Assistant Director, Renewable Resources and Planning.

[FR Doc. E8–30072 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UTU–27917; UTU–47084; UTU–79134; UTU–79796; UTU–27918; UTU–79133; UTU–79795]

Notice of Proposed Reinstatement of Terminated Oil and Gas Leases, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97–451), Whiting Oil and Gas Corporation timely filed a petition for reinstatement of oil and gas leases UTU27917, UTU27918, UTU47084, UTU79133, UTU79134, UTU79795, and UTU79796, for lands in Summit and San Juan County, Utah, and it was accompanied by all required rentals and royalties accruing from October 1, 2008, the date of termination.

FOR FURTHER INFORMATION CONTACT: Kent Hoffman, Deputy State Director, Division of Lands and Minerals at (801) 539–4080.

SUPPLEMENTARY INFORMATION: The Lessee has agreed to new lease terms for rentals and royalties at rates of $5 and $10 per acre and 16⅔ percent, respectively. The $500 administrative fee for the leases has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of the leases as set out in Section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the leases, effective October 1, 2008, subject to the original terms and conditions of the leases and the increased rental and royalty rates cited above.

Dated: December 11, 2008.

Kent Hoffman,

Deputy State Director, Division of Lands and Minerals.

[FR Doc. E8–30046 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–320–1610–DR; CA–350–1610–DR; CA–370–1610–DR]

Notice of Availability of Record of Decision for the Sage Steppe Ecosystem Restoration Strategy for the Alturas, Eagle Lake, and Surprise Field Offices

AGENCY: Bureau of Land Management.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the Bureau of Land Management (BLM) policies, the BLM announces the availability of the Records of Decision (RODs) for the Sage Steppe Ecosystem Restoration Strategy for the Alturas, Eagle Lake, and Surprise Field Offices. The RODs constitute the final decisions of the BLM and make the Sage Steppe Ecosystem Restoration Strategy effective immediately.

ADDRESSES: Copies of the RODs are available at the following locations: Alturas Field Office, Bureau of Land Management, 708 West 12th Street, Alturas, CA 96101; Eagle Lake Field Office 2950 Riverside Drive, Susanville, CA 96130; and Surprise Field Office, 602 Cressler Street, Cedarville, CA 96104. The RODs are also available on the internet at *http://www.blm.gov/ca/st/en/prog/planning.html.*

FOR FURTHER INFORMATION CONTACT: For further information contact Jeff Fontana, Public Affairs Officer, Bureau of Land Management, 2950 Riverside Dr., Susanville, CA 96130, telephone (530) 257–0456.

SUPPLEMENTARY INFORMATION: One of the most significant factors affecting the health, diversity and productivity of public lands in the region is the rapid expansion and encroachment of western juniper into the sagebrush steppe ecosystem. Western juniper has significantly increased in density and distribution since the late 1800's and if left unchecked can have significant impacts on soil resources, plant community structure and composition, water and nutrient cycles, and wildlife habitat. In order to address this ecosystem management issue across jurisdictional boundaries, the BLM joined forces with the United States Forest Service (USFS) and county governments to develop a comprehensive vegetation management strategy across a planning area that encompasses 6.5 million acres of public

and private land. The strategy broadly identifies restoration methods and provides guidelines for implementing site specific treatments over a 50-year timeframe. The Modoc National Forest is issuing a companion Record of Decision (ROD) and both agencies will work closely with county governments to implement the strategy in a cooperative and coordinated manner. BLM officially initiated the planning process for the Draft Sage Steppe EIS with the publishing of the Notice of Intent (NOI) to prepare an EIS in the **Federal Register** on July 18, 2005. A Public Scoping Notice was distributed following the NOI and a public notice was published in the Modoc Record on July 28, 2005. The Notice of Availability of the DEIS was published in the **Federal Register** on August 31, 2007. During the comment period nine public meetings, presentations and field trips were offered and 23 comment letters were received. Based upon public comments on the DEIS an additional alternative was added to the FEIS. This new alternative was identified by the agencies as the Preferred Alternative, as it best meets the purpose and need for the project. The Notice of Availability of the Final EIS was published in the **Federal Register** on May 9, 2008.

Any party adversely affected by the BLM's decision(s) to implement the Sage Steppe Ecosystem Restoration Strategy may appeal within 30 days of publication of this Notice of Availability. The appeal must be filed with the field office manager whose decision is being appealed at the above listed addresses. Please consult 43 CFR, part 4 for further information on the IBLA appeal process.

Dayne Barron,

Field Manager.

[FR Doc. E8–30074 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

[Docket No. MMS–2008–OMM–0030]

MMS Information Collection Activity: 1010–0059, Oil and Gas Production Safety Systems, Extension of a Collection; Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of extension of an information collection (1010–0059).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under 30 CFR 250, subpart H, Oil and Gas Production Safety Systems. This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

DATE: Submit written comments by January 20, 2009.

ADDRESSES: You should submit comments directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (1010–0059), either by fax (202) 395–6566 or e-mail (*OIRA_DOCKET@omb.eop.gov*).

Please also send a copy to MMS by either of the following methods:

- *http://www.regulations.gov.* Under the tab More Search Options, click Advanced Docket Search, then select Minerals Management Service from the agency drop-down menu, then click submit. In the Docket ID column, select MMS–2008–OMM–0030 to submit public comments and to view supporting and related materials available for this rulemaking. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's User Tips link. Submit comments to *regulations.gov* by January 20, 2009. The MMS will post all comments.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference Information Collection 1010–0059 in your subject line and mark your message for return receipt. Include your name and return address in your message text.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations and Standards Branch, (703) 787–1607. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulation that requires the subject collection of information.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR Part 250, Subpart H, Oil and Gas Production Safety Systems.

OMB Control Number: 1010–0059.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to manage the mineral resources of the OCS. Such rules and regulations will apply to all operations conducted under a lease, right-of-use and easement, and pipeline right-of-way. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition. Section 1332(6) states that ''operations in the [O]uter Continental Shelf should be conducted in a safe manner by well trained personnel using technology, precautions, and other techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstructions to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property or endanger life or health.''

Regulations implementing these responsibilities are under 30 CFR part 250, subpart H. Responses are submitted to MMS on occasion and are mandatory. No questions of a sensitive nature are asked. The MMS protects proprietary information according to the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR Part 2), 30 CFR part 252, OCS Oil and Gas Information Program, and 30 CFR 250.197, Data and information to be made available to the public or for limited inspection.

The MMS uses the information collected under subpart H to evaluate equipment and/or procedures that lessees and/or operators propose to use during production operations, including evaluation of requests for departures or use of alternative procedures. Information is also used to verify that production operations are safe and protect the human, marine, and coastal environment. The MMS inspectors review the records maintained to verify compliance with testing and minimum safety requirements.

Frequency: On occasion.

Estimated Number and Description of Respondents: Approximately 130 potential Federal oil or gas or sulphur lessees and/or operators.

Estimated Reporting and Recordkeeping Hour Burden: The estimated annual hour burden for this information collection is a total of 47,021 hours. The following chart

details the individual components and estimated hour burdens. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250 subpart H and NTL(s)	Reporting and recordkeeping requirement	Non-hour cost burdens		
		Hour burden	Average No. of annual responses	Annual burden hours
Submittals				
800; 801; 802; 803	Submit application for a production safety system with > 125 components.	8	2	16.
		$5,030 per submission × 2 = $10,060; $13,238 per offshore visit × 2 = $26,476; $6,884 per shipyard visit × 1 = $6,884.		
	25–125 components	7	21	147.
		$1,218 per submission × 21 = $25,578; $8,313 per offshore visit × 8 = $66,504; $4,766 per shipyard visit × 1 = $4,766.		
	< 25 components	6	76	456.
		$604 per submission × 76 = $45,904.		
	Submit modification to application for production safety system with > 125 components.	4	324	1,296.
		$561 per submission × 324 = $181,764.		
	25–125 components	3.5	188	658.
		$201 per submission × 188 = $37,788.		
	< 25 components	3	901	2,703.
		$85 per submission × 901 = $76,585.		
801(a)	Submit application for a determination that a well is incapable of natural flow.	3	50	150.
803(b)(2)	Submit required documentation for unbonded flexible pipe.	Burden is covered by the application requirement in § 250.802(e).		0.
803(b)(8); related NTLs.	Request approval to use chemical only fire prevention and control system in lieu of a water system.	8	150	1,200.
804; related NTL	Submit copy of state-required Emergency Action Plan (EAP) containing test abatement plans (Pacific OCS Region).	1	7	7.
NTL	Plan (EAP) containing test abatement plans (Pacific OCS Region).			
Subtotal			1,719 responses	6,633 hours.
			$482,309.	
General				
801(h)(2); 803(c)	Identify well with sign on wellhead that subsurface safety device is removed; flag safety devices that are out of service.	Usual/customary safety procedure for removing or identifying out-of-service safety devices.		0.
803(b)(8)(iv); (v)	Post diagram of firefighting system; furnish evidence firefighting system suitable for operations in subfreezing climates.	2	95	190.
804(a)(12); 800	Notify MMS prior to production when ready to conduct pre-production test and upon commencement for a complete inspection.	¾	208	156.
806(c)	Request evaluation and approval of other quality assurance programs covering manufacture of SPPE.	2	1	2.
Subtotal			304 responses	348 hours.

Citation 30 CFR 250 subpart H and NTL(s)	Reporting and recordkeeping requirement	Non-hour cost burdens		
		Hour burden	Average No. of annual responses	Annual burden hours
Recordkeeping				
801(h)(2); 802(e); 804(b).	Maintain records on subsurface and surface safety devices to include approved design & installation features, testing, repair, removal, etc.	20	770	15,400.
803(b)(1)(iii), (2)(i)	Maintain pressure-recorder charts	17	770	13,090.
803(b)(4)(iii)	Maintain schematic of the emergency shutdown (ESD) which indicates the control functions of all safety devices.	9	770	6,930.
803(b)(11)	Maintain records of wells that have erosion-control programs and results for 2 years; make available to MMS upon request.	6	770	4,620.
Subtotal			3,080 responses	40,040 hours.
Total Burden Hours			5,103 responses	47,021 hours.
			$482,309 non-hour burden costs.	

* Due to rulemaking (August 25, 2008, 73 FR 49942) cost recovery fees increased, effective 9/24/08.

Estimated Reporting and Recordkeeping Non-Hour Cost Burden: We have identified 10 non-hour cost burdens, all of which are the cost recovery fees required under § 250.802(e). However, note that the actual fee amounts are specified in 30 CFR 250.125, which provides a consolidated table of all of the fees required under the 30 CFR part 250 regulations. The total of the non-hour cost burden (cost recovery fees) in this IC request is an estimated $482,309.

The non-hour cost burdens required in 30 CFR part 250, subpart H (and respective cost-recovery fee amount per transaction) are required as follows:

- Submit application for a production safety system with > 125 components—$5,030 per submission; $13,238 per offshore visit; and $6,884 per shipyard visit.
- Submit application for a production safety system with 25–125 components—$1,218 per submission; $8,313 per offshore visit; and $4,766 per shipyard visit.
- Submit application for a production safety system with < 25 components—$604 per submission.
- Submit modification to application for production safety system with > 125 components—$561 per submission.
- Submit modification to application for production safety system with 25–125 components—$201 per submission.
- Submit modification to application for production safety system with < 25 components—$85 per submission.

We have not identified any other non-hour cost burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3501, *et seq.*) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *'' Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, on June 18, 2008, we published a **Federal Register** notice (73 FR 34787) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. In addition, § 250.199 provides the OMB control number for the information collection requirements imposed by the 30 CFR part 250, subpart H regulation. The regulation also informs the public that they may comment at any time on the collections of information and provides the address to which they should send comments. We have received no comments in response to these efforts.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by January 20, 2009.

Public Availability of Comments: Before including your address, phone number, email 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.

MMS Information Collection Clearance Officer: Arlene Bajusz (202) 208–7744.

Dated: October 8, 2008.

E.P. Danenberger,

Chief, Office of Offshore Regulatory Programs.

[FR Doc. E8–29740 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

States' Decisions on Participating in Accounting and Auditing Relief for Federal Oil and Gas Marginal Properties

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of states' decisions to participate or not participate in accounting and auditing relief for Federal oil and gas marginal properties located in their state for calendar year 2009.

SUMMARY: The Minerals Management Service (MMS) published final regulations on September 13, 2004 (69 FR 55076), codified at 30 CFR 204.200 through 204.215, to provide accounting and auditing relief for marginal Federal oil and gas properties. The rule requires MMS to publish in the **Federal Register** the decisions of the states concerned to allow or not allow one or both forms of relief in their state. As required in the rule, MMS provided states receiving a portion of the Federal royalties with a list of qualifying marginal Federal oil and gas properties located in their state so that each affected state could decide whether to participate in one or both relief options. This notice provides the decisions by the states concerned to allow one or both types of relief.

DATES: Effective January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Williams, Manager, Federal Onshore Oil and Gas Compliance and Asset Management, telephone (303) 231–3403, FAX (303) 231–3744, e-mail to *mary.williams@mms.gov*, or mail to P.O. Box 25165, MS 392B2, Denver Federal Center, Denver, Colorado 80225–0165.

SUPPLEMENTARY INFORMATION: The rule implemented certain provisions of section 7 of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 and provides two options for relief: (1) Notification-based relief for annual reporting, and (2) other requested relief, as proposed by industry and approved by MMS and the state concerned. The rule requires that MMS publish by December 1 of each year, a list of the states and their decisions regarding marginal property relief.

To qualify for the first option of relief (notification-based relief) for calendar year 2009, properties must have produced less than 1,000 barrels-of-oil-equivalent (BOE) per year for the base period (July 1, 2007, through June 30, 2008). Annual reporting relief will begin on January 1, 2009, with the annual report and payment due February 28, 2010; or March 31, 2010, if you have an estimated payment on file. To qualify for the second option of relief (other requested relief), properties must have produced less than 15 BOE per well per day for the base period.

The following table shows the states that have marginal properties, where a portion of the royalties are shared between the state and MMS, and the states' decisions to allow one or both forms of relief.

State	Notification-based relief (less than 1,000 BOE per year)	Request-based relief (less than 15 BOE per well per day)
Alabama	No	No.
California	No	No.
Colorado	No	No.
Kansas	No	No.
Louisiana	Yes	Yes.
Michigan	Yes	No.
Mississippi	No	No.
Montana	No	No.
Nebraska	No	No.
Nevada	No	No.
New Mexico	No	No.
North Dakota	No	No.
Oklahoma	No	No.
South Dakota	No	No.
Utah	No	No.
Wyoming	Yes	No.

Federal oil and gas properties located in all other states, where a portion of the royalties is not shared with the state, are eligible for relief if they qualify as marginal under this rule. For information on how to obtain relief, please refer to the rule, which can be viewed on the MMS Web site at *http://www.mrm.mms.gov/Laws_R_D/FRNotices/AC30.htm*.

Unless the information received is proprietary data, all correspondence, records, or information received in response to this notice are subject to disclosure under the Freedom of Information Act (FOIA). If applicable, please highlight the proprietary portions, including any supporting documentation, or mark the page(s) that contain proprietary data. Proprietary information is protected by the Trade Secrets Act (18 U.S.C. 1905), FOIA, Exemption 4, and Department regulations (43 CFR, Part 2).

Dated: December 1, 2008.

Gregory J. Gould,

Associate Director for Minerals Revenue Management.

[FR Doc. E8–30129 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1020 (Review)]

Barium Carbonate From China

AGENCY: United States International Trade Commission.

ACTION: Scheduling of an expedited five-year review concerning the antidumping duty order on barium carbonate from China.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)) (the Act) to determine whether revocation of the antidumping

duty order on barium carbonate from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* December 8, 2008.

FOR FURTHER INFORMATION CONTACT: Cynthia Trainor (202–205–3354), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background. On December 8, 2008, the Commission determined that the domestic interested party group response to its notice of institution (73 FR 51315, September 2, 2008) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Act.

Staff report. A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on December 30, 2008, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions. As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before January 7, 2009 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by January 7, 2009. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: December 12, 2008.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E8–29996 Filed 12–17–08; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

[2] The Commission has found the response submitted by Chemical Products Corp. to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–664]

In the Matter of Certain Flash Memory Chips and Products Containing the Same Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 17, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Spansion, Inc. of Sunnyvale, California and Spansion LLC of Sunnyvale, California. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation, of certain flash memory chips and products containing the same that infringe certain claims of U.S. Patent Nos. 6,380,029, 6,080,639, 6,376,877, and 5,715,194. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Heidi E. Strain, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–3352.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 11, 2008, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain flash memory chips or products containing the same that infringe one or more of claims 1–13 of U.S. Patent No. 6,380,029; claims 1–12 of U.S. Patent No. 6,080,639; claims 1–8 of U.S. Patent No. 6,376,877, and claims 13, 15–18, and 20–22 of U.S. Patent No. 5,715,194, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

Spansion, Inc., 915 DeGuigne Drive, P.O. Box 3453, Sunnyvale, California 94088.

Spansion LLC, 915 DeGuigne Drive, P.O. Box 3453, Sunnyvale, California 94088.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Samsung Electronics Co., Ltd., 250, Taepyeongno 2-ga, Jung-gu, Seoul 100–742 South Korea.

Samsung Electronics America, Inc., 105 Challenger Road, Ridgefield Park, New Jersey 07660.

Samsung International, Inc., 10220 Sorrento Valley Road, San Diego, California 92121.

Samsung Semiconductor, Inc., 3655 North First Street, San Jose, California 95134.

Samsung Telecommunications America, LLC, 1301 East Lookout Drive, Richardson, Texas 75082.

Apple, Inc., 1 Infinite Loop, Cupertino, California 95014.

Hon Hai Precision Industry Co., Ltd., 2 Zihyou Street, Tucheng City, Taipei County, 236 Taiwan.

AsusTek Computer Inc., No. 15 Li-Te Road Beitou District, Taipei, Taiwan.

Asus Computer International Inc., 800 Corporate Way, Fremont, California 94539.

Kingston Technology Company, Inc., 17600 Newhope Street, Fountain Valley, California 92708.

Kingston Technology (Shanghai) Co. Ltd., Building 7, No. 308, Fen Ju Road, Wai Gao Qiao Free Trade Zone, Shanghai 200131, China.

Kingston Technology Far East Co., No. 1–5, Li-Hsin Road, I, Science Based Industrial Park, Hsin-Chu, Taiwan.

Kingston Technology Far East (Malaysia), Sdn Bhd, Plot 111–B Bayan Lepas Industrial Park, Lebuhraya Kampung Jawa, Bayan Legas 11900, Malaysia.

Lenovo Group Limited, 23rd Floor, Lincoln House, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong.

Lenovo (United States) Inc., 1009 Think Place, Morrisville, North Carolina 27560.

Lenovo (Beijing) Limited, No. 6 Chuang Ye Road, Shangdi Information Industry Base, Haidian District, Beijing, 100085 China.

International Information Products (Shenzhen) Co., Ltd., Great Wall Technology Building, Nanshan District Science & Technology Park, Shenzhen City, Guangdong Province 518057, China.

Lenovo Information Products (Shenzhen) Co., Ltd., Lenovo Research and Development Building, Nanshan District Science & Technology Park, Shenzhen City, Guangdong Province 518057, China.

Lenovo (Huiyang) Electronic Industrial Co., Ltd., Lenovo Science and Technology Park, Sun Town, Huiyang District, Huizhou City, Guangdong Province 516213, China.

Shanghai Lenovo Electronic Co., Ltd., No. 550 Jinhai Road, Jinqiao Export Processing Zone, Pudong New District, Shanghai 200233, China.

PNY Technologies, Inc., 299 Webro Road, Parsippany, New Jersey 07054–0218.

Research In Motion Ltd., 295 Phillip Street, Waterloo, Ontario, Canada N2L 3W8.

Research In Motion Corporation, 122 W. John Carpenter Parkway, Suite 430, Irving, Texas 75039.

Sony Corporation, 7–1, Konan 1-chome, Minato-ku, Tokyo 108–0075, Japan.

Sony Corporation of America, 550 Madison Avenue, 27th Floor, New York, New York 10022–3211.

Sony Ericsson Mobile Communication AB, Nya Vattentornet, SE–221 88 Lund, Sweden.

Sony Ericsson Mobile Communications (USA), Inc., 7001 Development Drive, Research Triangle Park, North Carolina 27709.

Beijing SE Putian Mobile Communication Co., Ltd., No. 20, Tianzhu West Road, Tianzhu Konggang, Industrial Park, Shunyi, Beijing, 101312 China.

Transcend Information Inc., No. 70, XingZhong Road, NeiHu District, Taipei, Taiwan.

Transcend Information, Inc. (US), 1645 North Brian Street, Orange, California 92867.

Transcend Information Inc. (Shanghai Factory), 4F, Kaixuan City Industrial Park, No. 1010, Kaixuan Road, Shanghai, China 200052.

Verbatim Americas LLC, 1200 West W.T., Harris Boulevard, Charlotte, North Carolina 28262.

Verbatim Corporation, 1200 West W.T., Harris Boulevard, Charlotte, North Carolina 28262.

(c) The Commission investigative attorney, party to this investigation, is Heidi E. Strain, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: December 12, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29955 Filed 12–17–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–663]

In the Matter of Certain Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras, Components Thereof; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 17, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Eastman Kodak Company of Rochester, New York. A letter supplementing the complaint was filed on December 11, 2008. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation, of certain mobile telephones and wireless communication devices featuring digital cameras, and components thereof that infringes certain claims of U.S. Patent Nos. 5,493,335 and 6,292,218. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2734.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 11, 2008, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain mobile telephones and wireless communication devices featuring digital cameras, or components thereof that infringe one or more of claims 1 and 4 of U.S. Patent No. 5,493,335 and claims 15 and 23–27 of U.S. Patent No. 6,292,218, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Eastman Kodak Company, 343 State Street, Rochester, NY 14650.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Samsung Electronics Company, Ltd., 250, Taepyeongno 2-ga, Jung-gu, Seoul 100–742 Korea;

Samsung Electronics America, Inc., 105 Challenger Road, Ridgefield Park, NJ 07660;

Samsung Telecommunications America, LLC, 1301 East Lookout Drive, Richardson, TX 75082;

LG Electronics, Inc., LG Twin Towers, 20, Yoido-dong, Youngdungpo-gu, Seoul 150–721 Korea;

LG Electronics USA, Inc., 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632;

LG Electronics MobileComm USA, Inc., 10101 Old Grove Road, San Diego, CA 92131.

(c) The Commission investigative attorney, party to this investigation, is Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: December 12, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29954 Filed 12–17–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–502]

Sub-Saharan African Textile and Apparel Inputs: Potential for Competitive Production

AGENCY: United States International Trade Commission.

ACTION: Revised deadline for filing pre-hearing briefs and statements.

SUMMARY: The Commission has revised the deadline for filing pre-hearing briefs and statements for investigation No.

332–502, *Sub-Saharan African Textile and Apparel Inputs: Potential for Competitive Production*, from January 17, 2009 to January 16, 2009. The revised schedule reflecting this change is set out immediately below. All other requirements and procedures set out in the November 19, 2008 notice continue to apply (73 FR 71682).

DATES:

January 15, 2009: Deadline for filing request to appear at the public hearing.

January 16, 2009: Deadline for filing pre-hearing briefs and statements.

January 29, 2009: Public hearing.

February 12, 2009: Deadline for filing post-hearing briefs and statements.

February 24, 2009: Deadline for filing all other written submissions.

May 15, 2009: Transmittal of Commission report to the appropriate congressional committees and the Comptroller General.

FOR FURTHER INFORMATION CONTACT: Project leader Kimberlie Freund (202–708–5402 or *kimberlie.freund@usitc.gov*) or deputy project leader Joshua Levy (202–205–3236 or *joshua.levy@usitc.gov*) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet site (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Issued: December 12, 2008.

By order of the Commission.

William R. Bishop,

Hearing and Meetings Coordinator.

[FR Doc. E8–29962 Filed 12–17–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act, the Clean Water Act, RCRA, and EPCRA

Under 28 CFR 50.7, notice is hereby given that on December 1, 2008, a proposed Consent Decree in the *United States* v. *Shintech Incorporated and K-Bin Inc.,* Civil Action No. 4:08-cv-3519, was lodged with the United States District Court for the Southern District of Texas, Houston Division.

In its Complaint, the United States alleged that Shintech Incorporated and/or K-Bin Inc. (''Defendants''), at their facilities in Freeport, Texas, violated the provisions of the Clean Air Act that regulate industrial refrigerants to protect the stratospheric ozone layer; the hazardous waste management provisions of the Resource Conservation and Recovery Act (''RCRA''); the permit requirement of the Clean Water Act; and the provisions of the Emergency Planning and Community Right-to-Know Act (''EPCRA'') that require annual reports on materials present at regulated facilities.

Under the Consent Decree, Defendants will (1) pay a civil penalty of $2.585 million; (2) spend an estimated $4.8 million on injunctive relief; and (3) spend at least $4.7 million on three supplemental environmental projects (''SEPs'').

To address the Clean Air Act violations, Defendants will replace six refrigeration equipment with units that use non-ozone depleting refrigerants; conduct training programs for employees that service, maintain, or repair refrigeration equipment; and conduct third-party audits of its facilities. To ensure compliance with RCRA, Shintech has agreed to close two hazardous waste management units and install an aboveground tank system to prevent the storage or disposal of hazardous waste on land. Shintech has already corrected the Clean Water Act and EPCRA violations.

All three SEPs will be performed by Shintech. Two are designed to reduce air pollution and the third is designed to improve water quality. First, Shintech has agreed, for a period of at least two years, to implement and manage a recycling program in the City of Houston that will collect, recycle, and dispose of residential, refrigerant-containing appliances containing ozone depleting substances. Second, Shintech will upgrade five of its polyvinyl chloride (''PVC'') slurry strippers to reduce its emissions of PVC an estimated 10,000 pounds per year. Third, Shintech will add at least 300 acres of forest and wetlands to the Austin's Woods preserve (also called the Colombia Bottomlands area), which will be managed by the U.S. Fish and Wildlife Service.

The United States Department of Justice will receive for a period of thirty (30) days, from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or submitted via e-mail to *pubcomment-ees.enrd@usdoj.gov,* and should refer to the *United States* v. *Shintech Incorporated and K-Bin Inc.,* DOJ case number 90–5–2–1–08745/1.

During the public comment period, the Consent Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. If requesting from the Consent Decree Library a full copy of the Consent Decree including all attachments, please enclose a check in the amount of $18.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen M. Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–29958 Filed 12–17–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Proposed Information Collection Request on the ETA 203, Characteristics of the Insured Unemployed; Comment Request for Extension Without Change

AGENCY: Employment and Training Administration.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collection of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or by accessing: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm.*

DATES: Written comments must be submitted to the office listed in the addressee section below on or before February 17, 2009.

ADDRESSES: Send comments to Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S–4531, Washington, DC 20210, telephone number (202) 693–3308 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background: The ETA 203, Characteristics of the Insured Unemployed, is a once a month snapshot of the demographic composition of the claimant population. It is based on those who file a claim in the week containing the 19th of the month which reflects unemployment during the week containing the 12th. This corresponds with the BLS total unemployment sample week. This report serves a variety of socio-economic needs because it provides aggregate data reflecting unemployment insurance claimants' sex, race/ethnic group, age, industry, and occupation.

II. Desired Focus of Comments: Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension without change of the ETA 203, Characteristics of the Insured Unemployed. Comments are requested to:

- Evaluate whether the proposed collection of information is necessary to assess performance of the nonmonetary determination function, 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions: This is a request for OMB approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)) for continuing an existing collection of information previously approved and assigned OMB Control No. 1205–0009.

Type of Review: Extension without change.

Agency: Employment and Training Administration.

Title: Characteristics of the Insured Unemployed.

OMB Number: 1205–0009.

Agency Number: ETA 203.

Affected Public: State Governments.

Total Respondents: 53.

Frequency: Monthly.

Total Responses: 636.

Average Time per Response: .33 hours.

Estimated Total Burden Hours: 212 hours per year.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 11, 2008.

Cheryl Atkinson,

Administrator, Office of Workforce Security.

[FR Doc. E8–29960 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Publication of Year 2008 Form M–1 With Electronic Filing Option; Notice

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice on the Availability of the Year 2008 Form M–1 with Electronic Filing Option.

SUMMARY: This document announces the availability of the Year 2008 Form M–1, Annual Report for Multiple Employer Welfare Arrangements and Certain Entities Claiming Exception. It is substantively identical to the 2007 Form M–1. The Form M–1 may again be filed electronically over the Internet.

FOR FURTHER INFORMATION CONTACT: For inquiries regarding the Form M–1 filing requirement, contact Amy J. Turner or Beth L. Baum, Office of Health Plan Standards and Compliance Assistance, at (202) 693–8335. For inquiries regarding how to obtain or file a Form M–1, see the **SUPPLEMENTARY INFORMATION** section below.

SUPPLEMENTARY INFORMATION:

I. Background

The Form M–1 is required to be filed under section 101(g) and section 734 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and 29 CFR 2520.101–2.

II. The Year 2008 Form M–1

This document announces the availability of the Year 2008 Form M–1, Annual Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs). This year's Form M–1 is substantively identical to the Year 2007 Form M–1. The electronic filing option has been retained and filers are encouraged to use this method. The Year 2008 Form M–1 is due March 2, 2009, with an extension until May 1, 2009 available.

The Employee Benefits Security Administration (EBSA) is committed to working together with administrators to help them comply with this filing requirement. Copies of the Form M–1 are available on the Internet at *http://www.dol.gov/ebsa/forms_requests.html*. In addition, after printing, copies will be available by calling the EBSA toll-free publication hotline at 1–866–444–EBSA (3272). Questions on completing the form are being directed to the EBSA help desk at (202) 693–8360. For questions regarding the electronic filing capability, contact the EBSA computer help desk at (202) 693–8600.

Statutory Authority: 29 U.S.C. 1021–1024, 1027, 1029–31, 1059, 1132, 1134, 1135, 1181–1183, 1181 note, 1185, 1185a–b, 1191, 1191a–c; Secretary of Labor's Order No. 1–2003, 68 FR 5374 (February 2, 2003).

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. E8–30062 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,160]

Boise Cascade, LLC, Wood Products Division, St. Helens, OR; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 3, 2008, Oregon AFL–CIO Labor Liaison requested administrative reconsideration of the negative

determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on October 8, 2008. The Notice of Determination was published in the **Federal Register** on October 27, 2008 (73 FR 63736).

The initial investigation resulted in a negative determination based on the finding that imports of softwood veneer did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding imports of softwood veneer and requested the Department of Labor conduct additional investigation regarding import impact on subject plant production.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 10th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29936 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,904]

Nestaway, LLC, Garfield Heights, OH; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 13, 2008, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Region 2–B requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on October 8, 2008. The Notice of Determination was published in the **Federal Register** on October 27, 2008 (73 FR 63736).

The initial investigation resulted in a negative determination based on the finding that imports of dishwasher rack components did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding the customers of the subject firm and alleged that there were other products manufactured at the subject facility, which were not revealed in the initial investigation.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 10th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29934 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,976]

Stauble Machine and Tool Co., Inc., Louisville, KY; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated December 2, 2008, petitioners requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on November 7, 2008. The Notice of Determination was published in the **Federal Register** on November 25, 2008 (73 FR 71696).

The initial investigation resulted in a negative determination based on the finding that imports of metal stamping parts did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding subject firm's production facility in Mexico and alleged a shift in production from the subject firm to Mexico.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 10th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29935 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,052]

Chrysler LLC, St. Louis North Assembly Plant Including On-Site Leased Workers From HAAS TCM, Inc., and Logistics Services, Inc., Fenton, MO; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 14, 2008, applicable to workers of Chrysler LLC, St. Louis North Assembly Plant, Fenton, Missouri. The notice was published in the **Federal Register** on May 2, 2008 (73 FR 24317). The certification was

subsequently amended to include on-site leased workers from HAAS TMC, Inc. The amendment was issued on November 18, 2008, and published in the **Federal Register** on December 1, 2008 (73 FR 72848).

At the request of a UAW, Region 5 official, the Department reviewed the certification for workers of the subject firm. The workers assemble Dodge Ram full-sized pickup trucks.

New information shows that leased workers from Logistics Services, Inc., were employed on-site at the Fenton, Missouri, location of Chrysler LLC, St. Louis North Assembly Plant. The Department has determined that these workers were sufficiently under the control of Chrysler LLC, St. Louis North Assembly Plant, to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Logistics Services, Inc., working on-site at the Fenton, Missouri, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Chrysler LLC, St. Louis North Assembly Plant, Fenton, Missouri, who were adversely affected by increased imports of Dodge Ram full-sized pickup trucks.

The amended notice applicable to TA–W–63,052 is hereby issued as follows:

''All workers of Chrysler LLC, St. Louis North Assembly Plant, including on-site leased workers from HAAS TCM, Inc., and Logistics Services, Inc., Fenton, Missouri, who became totally or partially separated from employment on or after March 18, 2007, through April 14, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 9th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29933 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,962K]

Hanesbrands, Inc., Eden Division, Including On-Site Leased Workers From Diversco Integrated Services, Eden, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 13, 2007, applicable to workers of Hanesbrands, Inc., Eden Division, Eden, North Carolina. The notice was published in the **Federal Register** on September 27, 2007 (72 FR 54939).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in a variety of support activities related to the firm's production of laminated fabric and fabric components.

New information shows that workers leased from Diversco Integrated Services were employed on-site at the Eden Division, Eden, North Carolina, location of Hanesbrands, Inc.

The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers from Diversco Integrated Services working on-site at the Eden Division, Eden, North Carolina, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Hanesbrands, Inc., Eden Division who were adversely affected by a shift in production of laminated fabric and fabric components to El Salvador, the Dominican Republic and Honduras.

The amended notice applicable to TA–W–61,962K is hereby issued as follows:

''All workers of Hanesbrands, Inc., Eden Division, Eden, North Carolina, including on-site leased workers from Diversco Integrated Services, Eden, North Carolina, who became totally or partially separated from employment on or after August 7, 2006, through September 13, 2009, are eligible to apply for trade adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 9th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29932 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,962L]

Hanesbrands, Inc., Forest City Division, Including On-Site Leased Workers From Diversco Integrated Services, Forest City, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 13, 2007, applicable to workers of Hanesbrands, Inc., Forest City Division, Forest City, North Carolina. The notice was published in the **Federal Register** on September 27, 2007 (72 FR 54939).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in a variety of support activities related to the firm's production of laminated fabric and fabric components.

New information shows that workers leased from Diversco Integrated Services were employed on-site at the Forest City Division, Forest City, North Carolina, location of Hanesbrands, Inc.

The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers from Diversco Integrated Services working on-site at the Forest City Division, Forest City, North Carolina, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Hanesbrands, Inc., Forest City Division, who were adversely affected by a shift in production of laminated fabric and fabric components

to El Salvador, the Dominican Republic and Honduras.

The amended notice applicable to TA–W–61,962L is hereby issued as follows:

''All workers of Hanesbrands, Inc., Forest City Division, Forest City, North Carolina, including on-site leased workers from Diversco Integrated Services, Forest City, North Carolina, who became totally or partially separated from employment on or after August 7, 2006, through September 13, 2009, are eligible to apply for trade adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 9th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29931 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,327; TA–W–64,327A; TA–W–64,327B

Jatco USA, Inc., Remanufacturing Department, Including On-Site Workers of Kelly Services, Inc. and Express Personnel, Wixom, MI; Jatco USA, Inc., Quality Investigations Department, Including On-Site Workers of Kelly Services, Inc. and Express Personnel, Wixom, MI; Jatco USA, Inc., Administrative Department, Including On-Site Workers of Kelly Services, Inc. and Express Personnel, Wixom, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on November 18, 2008, applicable to workers of Jatco USA, Inc., Remanufacturing Department, Wixom, Michigan (TA–W–64,327); Jatco USA, Inc., Quality Investigations Department, Wixom, Michigan (TA–W–64,327A); and Jatco USA, Inc., Administrative Department, Wixom, Michigan (TA–W–64,327B). The notice will be published in the **Federal Register** soon.

The workers were engaged in the production of remanufactured automatic transmissions. Workers also inspected the remanufactured automatic transmissions and provided administrative support for the production of remanufactured automatic transmissions.

At the request of the company official, the Department reviewed the certification for workers of the subject firm.

Information shows that workers leased from Kelly Services, Inc. and Express Personnel were employed on-site at the Remanufacturing Department, Quality Investigations Department and Administrative Department at the Wixom location of Jatco USA, Inc. The Department has determined that these workers were sufficiently under the control of Jatco USA, Inc., Remanufacturing Department, Wixom, Michigan (TA–W–64,327); Jatco USA, Inc., Quality Investigations Department, Wixom, Michigan (TA–W–64,327A); and Jatco USA, Inc., Administrative Department, Wixom, Michigan (TA–W–64,327B).

Based on these findings, the Department is amending this certification to include leased workers from Kelly Services, Inc. and Express Personnel working on-site at Jatco USA, Inc., Remanufacturing Department, Wixom, Michigan (TA–W–64,327); Jatco USA, Inc., Quality Investigations Department, Wixom, Michigan (TA–W–64,327A); and Jatco USA, Inc., Administrative Department, Wixom, Michigan (TA–W–64,327B) to be considered leased workers.

The intent of the Department's certification is to include all workers employed at Jatco USA, Inc., Remanufacturing Department, Wixom, Michigan (TA–W–64,327); Jatco USA, Inc., Quality Investigations Department, Wixom, Michigan (TA–W–64,327A); and Jatco USA, Inc., Administrative Department, Wixom, Michigan (TA–W–64,327B) who were adversely affected by a shift in production of remanufactured automatic transmissions to Mexico. The amended notice applicable to TA–W–64,327 is hereby issued as follows:

All workers of Jatco USA, Inc., Remanufacturing Department, including on-site leased workers of Kelly Services, Inc. and Express Personnel, Wixom, Michigan (TA–W–64,327); Jatco USA, Inc., Quality Investigations Department, including on-site leased workers of Kelly Services, Inc. and Express Personnel, Wixom, Michigan (TA–W–64,327A); and Jatco USA, Inc., Administrative Department, including on-site leased workers of Kelly Services, Inc. and Express Personnel, Wixom, Michigan (TA–W–64,327B), who became totally or partially separated from employment on or after October 30, 2007, through November 18, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 8th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29940 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of December 1 through December 5, 2008.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of section 222(a)(2)(A) (increased imports) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,345; Sunspring America, Inc., Henderson, KY: October 25, 2007.

TA–W–64,464; Times Fiber Communications, A Division of Amphenol Corporation, Liberty, NC: November 15, 2007.

TA–W–64,478; Broyhill Furniture Industries, Inc., Corporate Office, Lenoir, NC: November 18, 2007.

TA–W–64,052; Arkansas Extrusions, LLC, Hot Springs, AR: September 12, 2007.

TA–W–64,286; MTD Acquisition, Chisholm, MN: October 24, 2007.

TA–W–64,324; Chrysler LLC, Mack Avenue Engine Plant, Power Train Division, Detroit, MI: October 30, 2007.

TA–W–64,529; Broyhill Furniture Industries, Lenoir Chair #5, aka Lenoir Plant, Lenoir, NC: November 17, 2007.

TA–W–63,675; Kerry Group, Inc., Germantown, WI: July 9, 2007.

TA–W–64,308; DLJ Production, Inc., Brooklyn, NY: October 27, 2007.

The following certifications have been issued. The requirements of section 222(a)(2)(B) (shift in production) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,087; Affymetrix, Inc., West Sacramento, CA: September 18, 2007.

TA–W–64,100; Ark II Manufacturing, LLC, Amweld Building Products, Stow, OH: September 22, 2007.

TA–W–64,217A; ICG Berrien, Inc., Bridgman, MI: September 15, 2007.

TA–W–64,217; ICG Castings, Inc., Dowagiac, MI: September 15, 2007.

TA–W–64,263; Celanese Emulsions Corp., Emulsion Polymers Division, Emulsion Polymers Division, Meredosia, IL: October 9, 2007.

TA–W–64,297; Hewlett-Packard Company, Minnetonka, MN: October 22, 2007.

TA–W–64,306; Ainsworth Engineered LLC, Bemidji, MN: October 29, 2007.

TA–W–64,339; Tenneco, Elastomers, Napoleon, OH: October 31, 2007.

TA–W–64,379; Chole Hersee Company, South Boston, MA: May 12, 2008.

TA–W–64,380; Alcoa, Inc., U.S. Primary Metals Division, Rockdale, TX: November 6, 2007.

TA–W–64,447; Vibracoustic North America, Ligonier Division, Ligonier, IN: November 13, 2007.

TA–W–64,454; Alcatel-Lucent, Global Supply Chain, Charlotte, NC: November 17, 2007.

TA–W–64,488; Robertshaw Controls Company, dba Invensys Controls, Holland, MI: November 17, 2007.

TA–W–64,317; Callaway Golf Company, Carlsbad, CA: October 30, 2007.

TA–W–64,340; A. B. Carter, Inc., Gastonia, NC: October 31, 2007.

The following certifications have been issued. The requirements of section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,295; Coupled Products, LLC, Formerly Known as Dana Corp., Upper Sandusky, OH: October 23, 2007.

TA–W–64,487; Advanced Urethane Technologies, Dubuque, IA: November 19, 2007.

The following certifications have been issued. The requirements of section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,263A; Celanese Emulsions Corp., Solid Adhesives Division, Solid Adhesives Division, Meredosia, IL.

TA–W–64,500; Fortune Swimwear LLC, Design Studio, New York, NY.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,314; Town of Forest City, Wastewater Treatment Department, Forest City, NC.

TA–W–64,328; E. Toman and Company, Lyons, IL.

TA–W–64,510; Ford Motor Company, Chicago Assembly Plant, Chicago, IL.

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–64,314A; Town of Forest City, Wastewater Treatment Department, Forest City, NC.

TA–W–64,314B; Town of Forest City, Public Works Dept., Water Maintenance Division, Sewer Maintenance Division, Forest City, NC.

TA–W–64,314C; Town of Forest City, Parks and Recreation Department, Forest City, NC.

TA–W–64,314D; Town of Forest City, Police Department, Forest City, NC.

TA–W–64,314E; Town of Forest City, Fire Department, Forest City, NC.

TA–W–64,314F; Town of Forest City, Public Works Department, Electric Distribution Division, Forest City, NC.

TA–W–64,314G; Town of Forest City, Administration Department, Forest City, NC.

TA–W–64,338; Pine Island Sportswear, Ltd, Monroe, NC.

TA–W–64,369; ABX Air, Inc., Wilmington, OH.

TA–W–64,381; MetLife Group, Inc., Shared Services Division, Tulsa, OK.

TA–W–64,412; United Airlines, Inc., United Airlines Maintenance Base, San Francisco, CA.

TA–W–64,418; Blockbuster, Inc., Information Technology, McKinney, TX.

The investigation revealed that criteria of section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of December 1 through December 5, 2008. Copies of these determinations are available for inspection in Room N–5428, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: December 11, 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29930 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,359]

Alcatel-Lucent, Plano, TX; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 5, 2008 in response to a petition filed on behalf of workers of Alcatel-Lucent, Plano, Texas.

The petition regarding the investigation has been deemed invalid. The petition was signed by one dislocated worker. A petition filed by workers requires three signatures. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 11th day of December 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29941 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,282]

Allied Systems, Ltd., Moraine, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 27, 2008 in response to a worker petition filed by the International Brotherhood of Teamsters, Local 957, on behalf of workers of Allied Systems, Ltd., Moraine, Ohio.

The petitioning group of workers is covered by an active certification, (TA–W–63,344, amended) which expires on June 5, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 11th day of December 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29938 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,229; TA–W–64,229A]

Hanesbrands, Inc., Formerly Known as Sara Lee Branded Apparel, Including On-Site Leased Workers from Diversco Integrated Services, Eden, NC; Hanesbrands, Inc., Formerly Known as Sara Lee Branded Apparel, Including On-Site Leased Workers From Diversco Integrated Services, Forest City, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 16, 2008 in response to a worker petition filed by a company official on behalf of workers of Hanesbrands, Inc., Eden, North Carolina (TA–W–64,229) and Hanesbrands, Inc., Forest City, North Carolina (TA–W–64,229A).

Due to existing certifications issued for Hanesbrands, Inc., Eden, North Carolina (TA–W–64,229) and Hanesbrands, Inc., Forest City, North Carolina (TA–W–64,229A), these certifications have been terminated.

Signed at Washington, DC this 9th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29937 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,287]

Logistics Services, Inc., Fenton, MO; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 27, 2008 in response to a petition filed by an International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Region 5 official on behalf of workers of Logistics Services, Inc., Fenton, Missouri.

The petitioning group of workers is covered by an active certification (TA–W–63,052 as amended) which expires on April 14, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 9th day of December 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29939 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,415]

St. Louis Music a Division of LOUD Technologies, Inc., St. Louis, MO; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 13, 2008 in response to a petition filed by a company official on behalf of the workers at St. Louis Music, a Division of LOUD Technologies, Inc., St. Louis, Missouri.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 11th day of December 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–29929 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Wireless Communications and Electronic Tracking Systems Guidance

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of availability of Program Policy Letter; request for comments.

SUMMARY: This notice is announcing the issuance of a Program Policy Letter (PPL) to provide mine operators guidance for implementing the Mine Improvement and New Emergency Response Act (MINER Act) requirements for wireless communications and electronic tracking systems. Material in the guidance does not constitute a regulation.

DATES: All comments must be received by Midnight Eastern Standard Time on January 8, 2009.

ADDRESSES: Comments may be sent by any of the following methods:

(1) *Electronic mail:* zzMSHA-Standards—Comments to Fed Reg Group@dol.gov.

(2) *Electronic mail: GoodGuidance@dol.gov.*

(3) *Regular mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

Comments can be accessed electronically at *http://www.msha.gov/currentcomments.asp.* MSHA will post all comments on the Internet without change, including any personal information provided. Comments may also be reviewed at the Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, *patricia.silvey@dol.gov* (E-mail), 202–693–9440 (Voice).

SUPPLEMENTARY INFORMATION:

I. Background

On June 15, 2006, the President signed the MINER Act of 2006 (Pub. L. 109–236). The MINER Act requires that each underground coal mine operator have an approved Emergency Response Plan (ERP) that includes post-accident communications and post-accident tracking. Further, the MINER Act requires that by June 15, 2009, each operator must submit a plan that provides for ''a post-accident communication system between underground personnel and surface personnel via a wireless two-way medium and an electronic tracking system that permits surface personnel to determine the location of any persons trapped underground, or set forth within the plan the reasons such provisions can not be adopted''.

II. Overview

As of December 12, 2008, approved electronic tracking systems are available. However, fully wireless communications technology is not sufficiently developed at this time, nor is it likely to be technologically feasible by June 15, 2009.

In accordance with Executive Order (EO) 12866 on Regulatory Planning and

Review, as amended by EO 13422 (January 18, 2007), and the Bulletin for Agency Good Guidance Practices (Good Guidance Bulletin), adopted by the Office of Management and Budget, MSHA has issued a PPL to provide mine operators guidance for implementing MINER Act requirements for wireless communications and electronic tracking systems by June 15, 2009. Specifically, the guidance addresses electronic tracking systems and acceptable alternatives to fully wireless communication systems for use in mine emergencies. The guidance represents MSHA's current thinking with respect to two-way communication and electronic tracking for use in mine emergencies.

In accordance with the Good Guidance Bulletin, MSHA has made the PPL on ''Guidance for Compliance with Post-Accident Two-Way Communications and Electronic Tracking Requirements of the MINER Act'' publicly available on the Agency's Web site for comment. MSHA is also making available on the Agency's website preliminary estimates of costs associated with implementing the MINER Act requirements under the guidance in the PPL. MSHA invites the public to comment on the guidance in the PPL, as well as the preliminary cost estimates. MSHA's draft PPL and preliminary cost estimates are posted on the Internet at *http://www.msha.gov/regs/complian/pplmen.htm.* You may view all comments on the Agency's Web site at *http://www.msha.gov/currentcomments.asp.*

MSHA will consider initiating rulemaking on requirements for wireless post-accident communication systems and electronic tracking systems in the future. In the interim, MSHA is issuing the PPL to respond to underground coal mine operators' requests for guidance to assist them in implementing these requirements of the MINER Act in a timely and effective manner. MSHA will use comments received to help the Agency determine the most appropriate course of action.

Richard E. Stickler,

Acting Assistant Secretary for Mine Safety and Health.

Effective Date: _____

Expiration Date: _____

Program Policy Letter No. P08-

From: Kevin Stricklin, Administrator for Coal Mine Safety and Health; Mark Skiles, Director of Technical Support.

Subject: Guidance for Compliance with Post-Accident Two-Way Communications and Electronic Tracking Requirements of the Mine Improvement and New Emergency Response Act (MINER Act).

Scope

This program policy letter (PPL) is intended for Mine Safety and Health Administration (MSHA) personnel, equipment manufacturers, repair facilities, underground coal mine operators and independent contractors, miners' representatives, and other interested parties.

Purpose

This PPL is a general statement of policy that provides mine operators guidance in implementing: (1) Alternatives to fully wireless post-accident two-way communication between underground and surface personnel and (2) electronic tracking systems, both of which are required by the MINER Act. The two-way communication alternatives (or ''partially wireless'' systems) include infrastructure underground to provide untethered communications with miners.

Policy

The following guidance is provided to assist mine operators in developing post-accident two-way communication between underground and surface personnel and electronic tracking for their Emergency Response Plans (ERPs), as required by the MINER Act. The MINER Act requires, by June 15, 2009, a plan be submitted that provides for a post-accident communication system between underground personnel and surface personnel via a wireless two-way medium and an electronic tracking system that permits surface personnel to determine the location of any persons trapped underground. If these provisions cannot be adopted, the MINER Act requires that ERPs must set forth an alternative means of compliance that approximates, ''as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system'' referenced.

With respect to tracking, because electronic systems currently are available and MSHA approved, new ERPs and revisions to existing ERPs should provide for electronic tracking of persons underground.

However, because fully wireless communications technology is not sufficiently developed at this time, nor is it likely to be technologically feasible by June 15, 2009, this guidance addresses acceptable alternatives to fully wireless communication systems. New ERPs and revisions to existing ERPs should provide for alternatives to fully wireless communication systems.

This guidance represents MSHA's current thinking with respect to two-way communication and electronic tracking for use in mine emergencies. It does not create or confer any rights for any person and it does not operate to bind mine operators or any other members of the public. Mine operators can use an alternative approach or system to provide two-way communication or electronic tracking, if the approach or system satisfies the requirements of applicable statutes and regulations. If you are a mine operator, miners' representative, or miner and want to discuss another approach or system, you may contact the MSHA District Manager for the area in which the mine is located. Other interested parties may contact the individuals identified in this PPL. References to the District Manager in this PPL refer to the Agency's existing consultative process for approving mine plans, as opposed to the process for enforcement decisions related to citations.

Two-Way Communication System

By June 15, 2009, in accordance with Section 2 of the MINER Act, until fully wireless systems are available, operators must set forth in their Emergency Response Plans the reasons that they are proposing alternative systems, that is, that wireless systems are not available, and provide an alternative that approximates, as closely as possible, the degree of functional utility and safety protection provided by a wireless two-way communications system. While operators and District Managers must consider mine-specific circumstances in determining appropriate two-way communications systems, this guidance outlines the features MSHA believes would best approximate the functional utility and safety protections of a fully wireless system, given the limitations of current technology. As noted, operators and others may propose other approaches or systems, and the District Manager will exercise his discretion in evaluating them. Communications systems that are already in use may need to be updated to comply with the MINER Act requirements to approximate the utility and safety protections of a fully wireless system.

1. General Considerations—An alternative to a fully wireless communications system used to meet the requirements of the MINER Act for post-accident communication either can be a system used for day-to-day operations or a stored system used in the event of an accident. Examples of currently available technologies that

may be capable of best approximating a fully wireless communications system include, but are not limited to, leaky feeder, mesh and medium frequency systems. Any alternative system generally should:

a. Have an untethered device that miners can use to communicate with the surface. The untethered device should be readily accessible to each group of miners working or traveling together and to any individual miner working or traveling alone.

b. Provide communication in the form of two-way voice and/or two-way text messages. If used, pre-programmed text messages should be capable of providing information to the surface necessary to determine the status of miners and the conditions in the mine, as well as providing the necessary emergency response information to miners.

c. Provide an audible, visual, and/or vibrating alarm that is activated by an incoming signal. The alarm should be distinguishable from the surrounding environment.

d. Be capable of sending an emergency message to each of the untethered devices.

e. Be installed to prevent interference with blasting circuits and other electrical systems.

2. Coverage Area

a. The system must provide coverage for each working section in a mine including all intersections.

b. The system also generally should provide continuous coverage along the escapeways and a coverage zone both inby and outby strategic areas of the mine, such as belt drives and transfer points, power centers, loading points, refuge alternatives, SCSR caches and other areas identified by the District Manager. While a coverage zone of 200 feet inby and 200 feet outby strategic areas normally should be adequate, the District Manager may require longer or shorter distances given circumstances specific to the mine.

i. The District Manager may approve alternative coverage areas to those areas identified in 2(b), such as adjacent entries, for reasons such as radio frequency interference or other factors that may reduce the coverage area at the identified strategic areas.

ii. Miners should follow an established check-in/check-out procedure or an equivalent procedure when assigned to work in bleeders or other remote areas of the mine that are not provided with communications coverage.

3. Permissibility—The communication system must be approved by MSHA to comply with 30 CFR part 23 and applicable policies.

4. Standby Power for Underground Components and Devices

a. Stationary components (infrastructure) generally should be equipped with a standby power source capable of providing sufficient power to facilitate evacuation and rescue in the event the line power fails or is cut off. In many mining situations, at least 24 hours of standby power based on a 5% transmit time, 5% receive time, and 90% idle time duty cycle (denoted as 5/5/90) generally should be adequate, but mine-specific conditions may warrant more or less standby power capability.

b. Portable devices, such as hand-held radios, generally should provide sufficient power to facilitate evacuation and rescue following an accident. In many mining situations, at least 4 hours of operation in addition to the normal shift duration (12-hour minimum total duration) based on a 5/5/90 duty cycle generally should be adequate, but mine-specific conditions may warrant more or less capability.

5. Surface Considerations

a. The communication system generally should include a line-powered surface component with a standby power source to ensure continued operation in the event the line power is interrupted.

b. The surface components of the communication system should be located at the communication facility required under 30 CFR 75.1600–1 where a person who is always on duty when persons are underground can receive incoming messages and respond immediately in the event of an emergency. The person should be trained in the operation of the communication system and knowledgeable of the mine's Emergency Response Plan.

6. Survivability

a. The post-accident communication system generally should provide redundant signal pathways to the surface component.

b. Redundancy can be achieved by multiple systems installed in multiple entries, or one system with multiple pathways to the surface; provided that a failure in one system or pathway does not affect the other system or pathway.

c. Redundancy means that the system can maintain communications with the surface when a single pathway is disrupted. Disruption can include major events in an entry or component failure.

d. If system components must be installed in areas vulnerable to damage (such as in front of seals), protection against forces that could cause damage should be provided.

7. Maintenance

a. The equipment manufacturer generally should provide a maintenance schedule and checklist to the mine operator.

b. The mine operator generally should:

i. Establish and follow a procedure to provide communications during system or component failures in the event that an accident occurs before the failure can be corrected.

ii. Check the standby power and functionality of the system and the untethered devices on a weekly basis as required by 30 CFR 75.512–2.

iii. Follow the manufacturer's maintenance recommendations.

Electronic Tracking System

Approved electronic tracking systems are available. While operators and District Managers must consider mine-specific circumstances in determining an appropriate electronic tracking system, this guidance outlines features MSHA believes would provide the protection contemplated in the MINER Act in many underground coal mining environments. As noted, operators and others may propose alternative approaches or systems, and the District Manager will exercise his discretion in evaluating them.

1. By June 15, 2009, a plan must be submitted that provides for determining the location of persons underground using an electronic tracking system pursuant to 30 U.S.C. 876(b)(2)(F)(ii).

2. Performance

a. While the required capabilities of a particular tracking system will depend on mine-specific circumstances, an effective electronic tracking system generally should be capable of:

i. Determining the location of miners on a working section including all intersections to within 200 feet.

ii. Determining the location of miners in escapeways at intervals not exceeding 2,000 feet.

iii. Determining the location of miners within 200 feet of strategic locations such as belt drives and transfer points, power centers, loading points, refuge alternatives, SCSR caches, and other areas deemed appropriate by the District Manager (example: A reader is placed 200 feet or less from each strategic location).

iv. Determining direction of travel at key junctions in escapeways.

b. Electronic tracking systems generally should be installed to prevent interference with blasting circuits and other electrical systems.

3. Permissibility—The tracking system must be approved by MSHA under 30 CFR part 23 and applicable policies.

4. Standby Power for Underground Components

a. Stationary components (infrastructure) should be capable of tracking persons underground during evacuation and rescue efforts, even upon loss of mine power. In many circumstances, the capacity to provide a minimum of 24 hours of continuous tracking operation after a power loss generally should be sufficient.

b. An individually-worn/carried tracking device (e.g., a tag) generally should provide a low power warning. To facilitate evacuation and rescue efforts, the individually-worn/carried tracking device generally should provide at least 4 hours of operation in addition to the normal shift duration (12-hour total minimum duration).

5. Capacity—Tracking system components (readers) must be capable of tracking the maximum number of persons, including visitors, expected to be in a coverage area.

6. Scanning rate—In order to provide timely and relevant information, the tracking system generally should be capable of updating (refreshing) location data at least every 60 seconds.

7. Surface Considerations

a. The surface component of a tracking system should be located at the communication facility required under 30 CFR 75.1600–1 where a person is always on duty when miners are underground and should include a line-powered interface that can display the location of all miners underground. The person should be trained in the operation of the tracking system.

b. The surface tracking component should be equipped with standby power to ensure continuous operation in the event the line power is interrupted.

c. The tracking system interface should display the last known location of a miner when the tracking device is not communicating with the system.

d. Each miner should be uniquely identified.

e. Location data should be associated with a time stamp.

f. Location data should be stored for two weeks so that it will be available for evacuation and rescue of persons underground, as well as for accident investigations.

8. Survivability

a. If system components must be installed in areas vulnerable to damage (such as in front of seals), protection against forces that could cause damage should be provided. For example, protection could be provided by installing enclosures in recessed areas, around corners, or other areas that reduce potential for damage, or routing and protecting cables such that potential for damage is minimized.

b. Data storage should not be impacted by interruption of the data link between underground and surface components.

9. Maintenance

a. The equipment manufacturer generally should provide a maintenance schedule and checklist to the mine operator.

b. The mine operator generally should:

i. Establish and follow a procedure to provide tracking during system or component failures in the event that an accident occurs before the failure can be corrected.

ii. Check the standby power and functionality of the system and the devices worn by the miner on a weekly basis as required by 30 CFR 75.512–2.

iii. Follow the manufacturer's maintenance recommendations.

Background

The MINER Act of 2006 included the following requirement for communications and tracking systems:

> Not later than 3 years after the date of enactment of the Mine Improvement and New Emergency Response Act of 2006, a [n emergency response] plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

Since fully wireless communication systems technology is not currently available to mine operators, alternative means of compliance using partially wireless two-way communication is warranted.

In addition, the MINER Act requires:

> Consistent with available technology and with the physical constraints, if any, of the mine, the plan shall provide for above ground personnel to determine the current, or immediately pre-accident, location of all underground personnel. Any system so utilized shall be functional, reliable, and calculated to remain serviceable in a post-accident setting.

As of the date of this PPL, electronic tracking is available and MSHA approved. As technological advances are made and become available, MSHA will update this guidance, and District Managers will review existing Emergency Response Plans to consider the manner in which intervening advances in electronic tracking systems may enhance miners' ability to evacuate or otherwise survive in an emergency.

Authority

Section 316 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. 876; 30 CFR part 23 and 75.1600.

Filing Instructions

This program policy letter should be filed behind the tab marked ''Program Policy Letters'' at the back of Volume II of the Program Policy Manual.

Internet Availability

This program policy letter may be viewed on the World Wide Web by accessing the MSHA home page (*http://www.msha.gov*) and choosing ''Compliance Info'' and ''Program Policy Letters.'' A list of MSHA-approved two-way communications systems and a list of MSHA-approved electronic tracking systems may be found at *http://www.msha.gov/techsupp/PEDLocating/MSHAApprovedPEDproducts.pdf.*

Issuing Offices and Contact Persons

MSHA, Approval and Certification Center, David Chirdon, (304) 547–2026, E-mail: *chirdon.david@dol.gov.*

Coal Mine Safety and Health, Salwa El-Bassioni, (202) 693–9525, E-mail: *el-bassioni.salwa@dol.gov.*

Distribution

MSHA Program Policy Manual Holders;

Manufacturers of Mining Equipment and Mine Equipment Repair Facilities;

Miners' Representatives;

Underground Mine Operators;

Underground Independent Contractors;

Special Interest Groups.

[FR Doc. E8–29943 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0049]

Hazardous Waste Operations and Emergency Response (HAZWOPER); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Standard on Hazardous Waste Operations and Emergency Response (HAZWOPER) (29 CFR 1910.120). Section 126(e) of the ''Superfund Amendments and Reauthorization Act of 1986'' (SARA) (Pub. L. 99–499) which became law on October 17, 1986, required the Secretary of Labor, pursuant to Section 6 of the Occupational Safety and Health Act of 1970 (the Act), to promulgate standards for the safety and health protection of employees engaged in hazardous waste operations and emergency response. Section 126(b) lists 11 employee protection provisions that the Secretary of Labor had to include in OSHA's final standard. Those provisions require OSHA to address the preparation of various written programs, plans and records; the training of employees; the monitoring of airborne hazards; the conduct of medical surveillance; and the distribution of information to employees. The provisions also require the collection of information from employers engaged in hazardous waste operations and their emergency response to such operations. The final standard covers the provisions mandated in SARA.

DATES: Comments must be submitted (postmarked, sent, or received) by February 17, 2009.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0049, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2008–0049) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard specifies a number of collection of information (paperwork) requirements. Each provision is described in detail in the Information Collection Request. Employers can use the information collected under the HAZWOPER rule to develop the various programs the standard requires and to ensure that their employees are trained properly about the safety and health hazards associated with hazardous waste operations and emergency response to hazardous waste releases. OSHA will use the records developed in response to this Standard to determine adequate compliance with the Standard's safety and health provisions. The employer's failure to collect and distribute the information required in this standard will affect significantly OSHA's effort to control and reduce injuries and fatalities. Such failure would also be contrary to the direction Congress provided in SARA.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Standard on Hazardous Waste Operations and Emergency Response (HAZWOPER) (29 CFR 1910.120). OSHA is proposing to decrease the existing burden hour estimate for the collection of information requirements specified by the Standard from 1,235,602 hours to 1,199,205 hours. This decrease is primarily a result of a decline in the number of sites to be remediated. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Hazardous Waste Operations and Emergency Response (29 CFR 1910.120).

OMB Number: 1218–0202.

Affected Public: Business or other for-profits; not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 34,812.

Frequency of Response: On occasion.

Average Time Per Response: Varies from one minute (.02 hour) to maintain a certification record to 24 hours for initial employee training.

Estimated Total Burden Hours: 1,199,205.

Estimated Cost (Operation and Maintenance): $3,111,762.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0049). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, on December 5, 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–30063 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0050]

Longshoring and Marine Terminal Operations; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment; correction.

SUMMARY: The Occupational Safety and Health Administration (OSHA) published a document in the **Federal Register** on December 8, 2008, soliciting public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in OSHA's Standards on Longshoring (29 CFR part 1918) and Marine Terminal Operations (29 CFR part 1917). The document contains an incorrect OMB Control Number.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

Correction

In the **Federal Register** of December 8, 2008 (73 FR 74527–74528), on page 74528, in the first column under ''III. Proposed Actions,'' correct the line which reads: OMB Number: 1218–0106 to read: OMB Control Number: 1218–0196.

Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, on December 12, 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–30064 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Maritime Advisory Committee for Occupational Safety and Health (MACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: MACOSH membership, notice of.

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C., App. 2), and after consultation with the General Services Administration, the Secretary of Labor announced on September 22, 2008, her intention to re-charter the Maritime Advisory Committee for Occupational Safety and Health (MACOSH) as being in the public interest (73 FR 54624). She signed the MACOSH charter on September 23, 2008, which, pursuant to FACA, will expire after two years on September 23, 2010. On November 12, 2008, the Secretary of Labor selected and approved 15 members to serve on the Committee. The Committee is diverse and balanced, both in terms of segments of the maritime industry represented (e.g., shipyard, longshoring and marine terminal, and fishing industries), and in the views or interests represented by the members. MACOSH will contribute to OSHA's performance of the duties imposed by the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*).

FOR FURTHER INFORMATION CONTACT: For general information about MACOSH, contact: Joseph V. Daddura, Director,

Office of Maritime, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693–2086; Fax: (202) 693–1663.

SUPPLEMENTARY INFORMATION:

I. Background

The maritime industry has historically experienced a high incidence of work-related fatalities, injuries, and illnesses. OSHA has targeted this industry for special attention due to that experience. This targeting has included development of guidance or outreach materials specific to the industry, rulemaking to update requirements, and other activities. MACOSH will advise OSHA on matters relevant to the safety and health of employees in the maritime industry. The Committee's advice will result in more effective enforcement, training and outreach programs, and streamlined regulatory efforts. The Committee will function solely as an advisory body, in compliance with the provisions of FACA and OSHA's regulations covering advisory committees (29 CFR part 1912).

II. Appointment of Committee Members

OSHA received nominations of highly qualified individuals in response to the Agency's request for nominations. The Secretary has selected to serve on the Committee the following individuals who have broad experience relevant to the issues to be examined by the Committee. The MACOSH members are:

Stewart Adams, U.S. Department of the Navy, Naval Sea Systems Command (NAVSEA);

Alan Davis, American Seafoods Company;

Michael J. Flynn, International Association of Machinists and Aerospace Workers;

Alton H. Glass, Sr., United Steelworkers;

Lesley E. Johnson, International Brotherhood of Electrical Workers;

Kenneth W. Killough, South Carolina Stevedores Association;

Charles R. Lemon, Washington State Department of Labor and Industries; Jennifer M. Lincoln, National Institute of Occupational Safety and Health (NIOSH);

George S. Lynch, Jr., International Longshoremen's Association;

Marc MacDonald, Pacific Maritime Association;

Tim Podue, International Longshore and Warehouse Union;

Donald Raffo, General Dynamics;

Barry E. Richardson, MTS Technologies, Inc.;

Kenneth A. Smith, U.S. Coast Guard, Vessel and Facility Operating Standards; and

James R. Thornton, Northrop Grumman, Newport News Shipyard.

III. Authority

This notice was prepared under the direction of Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 6(b)(1) and 7(b) of the OSH Act (29 U.S.C. 655, 656), 29 CFR part 1912, and FACA (5 U.S.C., App. 2).

Signed at Washington, DC, this 12 day of December, 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–30065 Filed 12–17–08; 8:45 am]

BILLING CODE 4510–26–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Meetings; Sunshine Act

December 10, 2008.

TIME AND DATE: 10 a.m., Thursday, January 8, 2009.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Nelson Quarries, Inc.*, Docket Nos. CENT 2006–151–M, CENT 2006–203–M, and CENT 2006–201–M. (Issues include whether the Administrative Law Judge properly concluded that certain individuals were agents of the operator and therefore their negligence was imputable to the operator for unwarrantable failure and penalty assessment purposes, that the operator's violation of 30 CFR 56.6130(a) was significant and substantial, and that the operator violated 30 CFR 56.6300(b).)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Dockets Clerk.

[FR Doc. E8–30209 Filed 12–16–08; 4:15 pm]

BILLING CODE 6735–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Community Development Revolving Loan Fund for Credit Unions

AGENCY: National Credit Union Administration.

ACTION: Notice of application period.

SUMMARY: The National Credit Union Administration (NCUA) will accept applications for participation in the Community Development Revolving Loan Fund's [Fund] Loan Program in the last quarter of 2009, subject to availability of funds. The Fund's total appropriation is $13.4 million. Because the CDRLF will be fully loaned in early 2009, new loans will be awarded from loan repayments made throughout the year in 2009. Based on the CDRLF's aggregate loan amortization schedule, approximately $3.1 million will be repaid and available for loans in late 2009. Therefore, the loan application period will open in the last quarter of 2009. Application procedures for the 2009 Fund Loan Program will be posted to the NCUA Web site.

ADDRESSES: Applications for participation may be obtained from and should be submitted to: NCUA, Office of Small Credit Union Initiatives, 1775 Duke Street, Alexandria, VA 22314–3428.

DATES: Applications can be submitted starting on October 1, 2009, and closing on November 30, 2009.

FOR FURTHER INFORMATION CONTACT: Tawana James, Director, Office of Small Credit Union Initiatives at the above address or telephone (703) 518–6610.

SUPPLEMENTARY INFORMATION: Part 705 of the NCUA Rules and Regulations implements the Community Development Revolving Loan Fund (Fund) for Credit Unions. The purpose of the Fund is to assist officially designated ''low-income'' credit unions in providing basic financial services to residents in their communities that result in increased income, home ownership, and employment. The Fund makes available low interest loans in the aggregate amount of $300,000 to qualified participating ''low-income'' designated credit unions. Interest rates are currently set at one percent, subject

to change depending on market interest rates.

Specific details regarding availability and requirements for technical assistance grants from the Fund will be published in a Letter to Credit Unions and on NCUA's website at *http://www.ncua.gov/*. Fund participation is limited to existing credit unions with an official ''low-income'' designation.

This notice is published pursuant to Section 705.9 of the NCUA Rules and Regulations that states NCUA will provide notice in the **Federal Register** when funds in the program are available.

By the National Credit Union Administration Board on December 11, 2008.

Mary F. Rupp,

Secretary, NCUA Board.

[FR Doc. E8–30031 Filed 12–17–08; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; *Arts Advisory Panel*

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that six meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506 as follows (ending times are approximate):

State & Regional (Regional Arts Organization Partnership Agreements: Mid America Arts Alliance, New England Foundation for the Arts): January 14, 2009 by teleconference. This meeting, from 3 p.m. to 4:30 p.m., will be open.

State & Regional (Regional Arts Organization Partnership Agreements: Mid-Atlantic Arts Foundation, Southern Arts Federation): January 22, 2009 by teleconference. This meeting, from 3 p.m. to 4:30 p.m., will be open.

State & Regional (National Services): January 21, 2009 by teleconference. This meeting, from 3 p.m. to 4 p.m., will be open.

State & Regional (State Partnership Agreements): January 28–29, 2009 in Room 716. This meeting, from 9:30 a.m. to 6 p.m. on January 28th, and from 9:30 a.m. to 4 p.m. on January 29th, will be open.

State & Regional (State Partnership Agreements/Folk Infrastructure): January 30, 2009 in Room 716. This meeting, from 9 a.m. to 6:30 p.m. will be open.

Media Arts (application review): January 29–30, 2009 in Room 730. This meeting, from 9 a.m. to 6 p.m. on January 29th, and from 9 a.m. to 4:30 p.m. on January 30th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202–682–5532, TDY–TDD 202–682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202–682–5691.

Dated: December 12, 2008.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. E8–29928 Filed 12–17–08; 8:45 am]

BILLING CODE 7537–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–034 and 52–035]

Luminant Generation Company LLC; Comanche Peak Nuclear Power Plant Units 3 and 4 Combined License Application; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

Luminant Generation Company LLC (Luminant) has submitted an application for two combined licenses (COLs) to build Units 3 and 4 at its Comanche Peak Nuclear Power Plant (CPNPP) site, located on approximately 7,950 acres in Somervell and Hood Counties, Texas. CPNPP is located on Squaw Creek Reservoir, approximately 5.2 miles (mi) north of Glen Rose, Texas. Luminant submitted the application for the COL to the U.S. Nuclear Regulatory Commission (NRC) by letter dated September 19, 2008, pursuant to Title 10 of the Code of Federal Regulations (10 CFR) Part 52. A notice of receipt and availability of the application for the COLs, including the Environmental Report (ER), was published in the **Federal Register** on November 7, 2008 (73 FR 66276). A notice of acceptance for docketing of the application for the COLs was published in the **Federal Register** on December 10, 2008 (73 FR 75141). A notice of hearing and opportunity to petition for leave to intervene in the proceeding will be published at a later date. The purposes of this notice are (1) to inform the public that the NRC staff will be preparing an Environmental Impact Statement (EIS) as part of the review of the application for the COLs; and (2) to provide the public with an opportunity to participate in the environmental scoping process as defined in 10 CFR 51.29.

In addition, as outlined in 36 CFR 800.8(c), ''Coordination with the National Environmental Policy Act,'' the NRC staff plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) with steps taken to meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA). Pursuant to 36 CFR 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth in 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.45 and 51.50, Luminant submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Parts 51 and 52 and is available for public inspection at the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, or from the Publicly Available Records component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible at *http://www.nrc.gov/reading-rm/adams.html*, which provides access through the NRC's Electronic Reading Room link. The accession number in ADAMS for the environmental report included in the application is ML083240374. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–800–397–4209/301–415–4737 or by e-mail to *pdr@nrc.gov*. The application may also

be viewed on the Internet at *http://www.nrc.gov/reactors/new-reactors/col/comanche-peak.html*. In addition, the Somervell County Library located at 108 Allen Drive, Glen Rose, Texas 76043, and the Hood County Library located at 222 North Travis Street, Granbury, Texas 76048, have agreed to maintain a copy of the ER and make it available for public inspection.

The following key reference documents related to the application and the NRC staff's review processes are available through the NRC's Web site at *http://www.nrc.gov*:

a. 10 CFR Part 51, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Function;

b. 10 CFR Part 52, Licenses, Certifications, and Approvals for Nuclear Power Plants;

c. 10 CFR Part 100, Reactor Site Criteria;

d. NUREG–1555, Standard Review Plans for Environmental Reviews for Nuclear Power;

e. NUREG/BR–0298, Brochure on Nuclear Power Plant Licensing Process;

f. Regulatory Guide 4.2, Preparation of Environmental Reports for Nuclear Power Stations;

g. Regulatory Guide 4.7, General Site Suitability Criteria for Nuclear Power Stations;

h. Fact Sheet on Nuclear Power Plant Licensing Process;

i. Regulatory Guide 1.206, Combined License Applications for Nuclear Power Plants; and

j. Nuclear Regulatory Commission Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions.

The regulations, NUREG-series documents, regulatory guides, and the fact sheet can be found under Document Collections in the Electronic Reading Room on the NRC Web page. The environmental justice policy statement can be found in the **Federal Register**, 69 FR 52040, August 24, 2004.

This notice advises the public that the NRC intends to gather the information necessary to prepare an EIS as part of the review of the application for the COLs at the CPNPP site. Possible alternatives to the proposed action (issuance of the COLs for the CPNPP Units 3 and 4) include no action, reasonable alternative energy sources, and alternate sites. As set forth in 10 CFR 51.20(b)(2), issuance of a COL under 10 CFR Part 52 is an action that requires an EIS. This notice is being published in accordance with NEPA and the NRC's regulations in 10 CFR Part 51.

The NRC will first conduct a scoping process for the EIS and, as soon as practicable thereafter, will prepare a draft EIS for public comment. Participation in this scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the draft EIS will be used to accomplish the following:

a. Define the proposed action that is to be the subject of the EIS;

b. Determine the scope of the EIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant;

d. Identify any environmental assessments and other EISs that are being or will be prepared that are related to but are not part of the scope of the EIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Identify parties consulting with the NRC under the NHPA, as set forth in 36 CFR 800.8(c)(1)(i);

g. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule;

h. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the EIS to the NRC and any cooperating agencies; and

i. Describe how the EIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in the scoping process:

a. The applicant, Luminant Generation Company LLC;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC will hold two identical public scoping meetings for the EIS regarding the Luminant COL application. The scoping meetings will be held at the Glen Rose Expo Center, 202 Bo Gibbs Blvd., Glen Rose, Texas 76043, on Tuesday, January 6, 2009. The first meeting will convene at 1 p.m. and will continue until approximately 4 p.m. The second meeting will convene at 7 p.m., with a repetition of the overview portions of the first meeting, and will continue until approximately 10 p.m. The meetings will be transcribed and will include the following: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the EIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the EIS. Additionally, the NRC staff will host informal discussions for one hour prior to the start of each public meeting. No formal comments on the proposed scope of the EIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing, as discussed below.

Persons may register to attend or present oral comments at the meeting on the scope of the NEPA review by contacting Mr. Michael Willingham or Mr. John Fringer by telephone at 1–800–368–5642, extension 3924 or 6208. In addition, persons can register via e-mail to the NRC at *Comanche.COLEIS@nrc.gov* no later than December 30, 2008.

Members of the public may also register to speak at the meeting prior to of the start of the session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Public comments will be considered in the scoping process for the EIS. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Willingham's attention no later than December 23, 2008, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the scope of the CPNPP COL environmental review to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington,

DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. To be considered in the scoping process, written comments must be postmarked or delivered by February 17, 2009. Electronic comments may be sent by e-mail to the NRC at *Comanche.COLEIS@nrc.gov*. Electronic submissions must be sent no later than February 17, 2009, to be considered in the scoping process. Comments will be made available electronically and will be accessible through the NRC's Electronic Reading Room link *http://www.nrc.gov/reading-rm/adams.html*.

Participation in the scoping process for the EIS does not entitle participants to become parties to the proceeding to which the EIS relates. A notice of a hearing and opportunity to request leave to petition to intervene in the proceeding on the application for the COL, will be published in a future **Federal Register** notice.

At the conclusion of the scoping process, the NRC staff will prepare a concise summary of the determination and conclusions reached on the scope of the environmental review. The summary will include the significant issues identified. The NRC staff will send this summary to each participant in the scoping process for whom the staff has an address. The staff will then prepare and issue for comment the draft EIS, which will be the subject of a separate **Federal Register** notice and a separate public meeting. Copies of the draft EIS will be available for public inspection at the PDR through the above-mentioned address and one copy per request will be provided free of charge. After receipt and consideration of comments on the draft EIS, the NRC will prepare a final EIS, which will also be available to the public.

Information about the proposed action, the EIS, and the scoping process may be obtained from Mr. Michael Willingham at 301–415–3924, by e-mail at *michael.willingham@nrc.gov*, or by mail to the U.S. Nuclear Regulatory Commission, Mail Stop T6–E38M, Washington, DC 20555–0001 and from Mr. John Fringer at 301–415–6208 or by e-mail at *john.fringer@nrc.gov*.

Dated at Rockville, Maryland, this 12th day of December, 2008.

For the Nuclear Regulatory Commission.

Scott Flanders,

Director, Division of Site and Environmental Reviews, Office of New Reactors.

[FR Doc. E8–30052 Filed 12–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No 52–037]

Union Electric Company d/b/a Amerenue; Acceptance for Docketing of an Application for Combined License for Callaway Plant Unit 2 Nuclear Power Plant

By letter dated July 28, 2008, as supplemented by letters dated September 24, 2008, November 14, 2008, and November 25, 2008, Union Electric Company d/b/a AmerenUE (AmerenUE), submitted an application to the U.S. Nuclear Regulatory Commission (NRC) for a combined license (COL) for a single unit of the U.S. Evolutionary Power Reactor (U.S. EPR) in accordance with the requirements contained in 10 CFR Part 52, ''Licenses, Certifications and Approvals for Nuclear Power Plants.'' This reactor will be identified as Callaway Plant Unit 2 and is to be located at the current Callaway County, Missouri site of the Callaway Power Plant. A notice of receipt and availability of this application was previously published in the **Federal Register** (73 FR 59677) on October 9, 2008, as corrected in **Federal Register** (73 FR 61444 on October 16, 2008).

The NRC staff has determined that AmerenUE has submitted information in accordance with 10 CFR Part 2, ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders,'' and 10 CFR Part 52 that is acceptable for docketing. The Docket Number established for Unit 2 is 52–037.

The NRC staff will perform a detailed technical review of the application. Docketing of the application does not preclude the NRC from requesting additional information from the applicant as the review proceeds, nor does it predict whether the Commission will grant or deny the application. The Commission will conduct a hearing in accordance with Subpart L, ''Informal Hearing Procedures for NRC Adjudications,'' of 10 CFR Part 2 and will receive a report on the COL application from the Advisory Committee on Reactor Safeguards in accordance with 10 CFR 52.87, ''Referral to the Advisory Committee on Reactor Safeguards (ACRS).'' If the Commission finds that the COL application meets the applicable standards of the Atomic Energy Act and the Commission's regulations, and that required notifications to other agencies and bodies have been made, the Commission will issue a COL, in the form and containing conditions and limitations that the Commission finds appropriate and necessary.

In accordance with 10 CFR Part 51, the Commission will also prepare an environmental impact statement for the proposed action. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding this meeting will be included in a future **Federal Register** notice.

Finally, the Commission will announce in a future **Federal Register** notice the opportunity to petition for leave to intervene in the hearing required for this application by 10 CFR 52.85.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and will be accessible electronically through the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room link at the NRC Web site *http://www.nrc.gov/reading-rm/adams.html*. The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.html*. Persons who do not have access to ADAMS or who encounter problems in accessing documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 12th day of December 2008.

For the Nuclear Regulatory Commission.

Joseph Colaccino,

Chief, U.S. EPR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8–30058 Filed 12–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–29462]

Notice of Availability of Environmental Assessment and Finding of no Significant Impact for License Amendment to Materials License No. 45–23645–01na, to Incorporate the Decommissioning Plan for the Naval Surface Warfare Center at Dahlgren, Virginia

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No

Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Orysia Masnyk Bailey, Health Physicist, Decommissioning Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406; telephone (864) 427–1032; fax number (610) 680–3497; or by e-mail: *orysia.masnykbailey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Materials License No. 45–23645–01NA. The license is held by the Department of the Navy (Navy). This is a Master Materials License and covers many sites around the country. The proposed action pertains to Building 200 and adjacent grounds (the Facility) at the Navy's Naval Surface Warfare Center Dahlgren Division in Dahlgren, Virginia. Issuance of the amendment would incorporate the Decommissioning Plan into the license to allow completion of decommissioning activities at the site and eventual unrestricted release of the Facility. The NRC has evaluated and approved the Navy's Decommissioning Plan. The findings of this evaluation are documented in a Safety Evaluation Report which will be issued along with the license amendment. The Navy requested this action in a letter dated March 4, 2008. The NRC has prepared an Environmental Assessment in support of this proposed action in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR Part 51). Based on the Environmental Assessment, the NRC has concluded that a Finding of No Significant Impact is appropriate with respect to the proposed action. The license amendment will be issued to the Navy following the publication of this Finding of No Significant Impact and Environmental Assessment in the **Federal Register**.

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Navy's March 4, 2008, license amendment request to incorporate the Decommissioning Plan into the license, resulting in final decommissioning of the Facility and subsequent release of the Facility for unrestricted use. Test firing of depleted uranium rounds at the facility began in the early 1970s under NRC Materials License No. SMB–1145. The Navy issued Navy Radioactive Materials Permit No. 45–00178–S1NP authorizing the test firing of depleted uranium rounds at the Facility in 1987 when the Master Materials License was issued to the Navy. The Navy initiated decommissioning of the facility in 1993 and work is ongoing. In January 2002, the permit was converted to decommissioning permit, NRMP No. 45–00178–Y1NP. The Decommissioning Plan submitted by the Navy addresses the residual contamination in Bay 4 in Building 200 and adjacent soil outside of the building.

The facility is the largest tenant at the Naval Support Facility Dahlgren, which is located in King George County, Virginia, approximately 40 miles south of Washington, DC, and 25 miles east of Fredericksburg, Virginia. The Naval Support Facility Dahlgren encompasses approximately 4,300 acres on the western bank of the Potomac River. The region surrounding Naval Support Facility Dahlgren is sparsely populated.

Bay 4 in Building 200 consists of the target bay and gun bay. The target bay is 14.5 feet wide, 9 feet high, and 106 feet in length; and the gun bay is 14.5 feet wide, 9 feet high, and 138 feet in length. Building 200, Bay 4 is an indoor firing range where single shot tests on 20–40 millimeter depleted uranium and tungsten energy penetrators were fired. It is estimated that between 2,000 and 3,000 depleted uranium rounds were fired in Bay 4.

Need for the Proposed Action

The proposed action is to approve the Decommissioning Plan that the Navy may complete Facility decommissioning activities. Completion of the decommissioning activities will reduce residual radioactivity at the facility. The NRC's regulations require licensees to begin timely decommissioning of their sites, or any separate buildings that contain residual radioactivity, upon cessation of licensed activities, in accordance with 10 CFR 30.36(d). The proposed licensing action will support such a goal. The NRC is fulfilling its responsibilities under the Atomic Energy Act to make a decision on a proposed license amendment for decommissioning that ensures protection of the public health and safety.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the facility shows that such activities involved the test firing of depleted uranium rounds and the storage of contaminated targets and debris.

The NRC staff has reviewed the Navy's amendment request for the Facility and examined the impacts of this license amendment request. Potential impacts include water resource impacts (e.g., water may be used for dust control), air quality impacts from dust emissions, temporary local traffic impacts resulting from transporting debris, human health impacts, noise impacts from equipment operations, scenic quality impacts, and waste management impacts.

Based on its review, the staff has determined that no surface or ground water impacts are expected from the decommissioning activities. Additionally, the staff has determined that significant air quality, noise, land use, and off-site radiation exposure impacts are also not expected. No significant air quality impacts are anticipated because of the contamination controls that will be implemented by the Navy during decommissioning activities. The environmental impacts associated with the decommissioning activities are bounded by impacts evaluated by NUREG–1496, ''Generic Environmental Impact Statement in Support Rulemaking on Radiological Criteria for License Termination of NRC Licensed Nuclear Facilities.'' Generic impacts for this type of decommissioning process were previously evaluated and described in the ''Generic Environmental Impact Statement in Support Rulemaking on Radiological Criteria for License Termination of NRC Licensed Nuclear Facilities,'' which concludes that the environmental consequences are small. The risk to human health from the transportation of all radioactive material in the United States was evaluated in NUREG–0170, ''Final Environmental Statement on the Transportation of Radioactive Materials by Air and Other Modes.'' The principal radiological environmental impact during normal transportation is direct radiation exposure to nearby persons from radioactive material in the package. The average annual individual dose from all radioactive material transportation in the United States was calculated to be approximately 0.5 mrem, which is well below the 10 CFR 20.1301 limit of 100 mrem for a member of the public. Additionally, the Navy estimates that approximately 78 cubic yards of solid radioactive waste will be generated during decommissioning activities. This proposed action 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, and there

is no significant increase in occupational or public radiation exposure. Thus, waste management and transportation impacts from the decommissioning will not be significant.

Occupational health was also considered in NUREG–0170, ''Final Environmental Impact Statement of the Transportation of Radioactive Material by Air and Other Modes.'' Shipment of these materials would not affect the assessment of environmental impacts or the conclusions in NUREG–0170.

The staff also finds that the proposed license amendment will meet the radiological criteria for unrestricted release as specified in 10 CFR 20.1402. The Navy demonstrated this through the development of building surface derived concentration guideline limits for its Facility. The Navy conducted site specific dose modeling using parameters specific to the Facility that adequately bounded the potential dose. The release limits for soil at the Facility will be those published in the **Federal Register** on December 7, 1999 (Volume 64, Number 234, Pages 68395–68396).

The Navy will maintain an appropriate level of radiation protection staff, procedures, and capabilities; and will implement an acceptable program to keep exposure to radioactive materials as low as reasonably achievable (ALARA). Work activities are not anticipated to result in radiation exposures to the public in excess of 10 percent of the 10 CFR 20.1301 limits.

The NRC also evaluated whether cumulative environmental impacts could result from an incremental impact of the proposed action when added to other past, present, or reasonably foreseeable future actions in the area. The proposed NRC approval of the license amendment request, when combined with known effects on resource areas at the site, including further site remediation, are not anticipated to result in any cumulative impacts at the site.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The no action alternative would keep radioactive material on-site without disposal. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the Virginia Bureau of Radiological Health for review on August 1, 2008. On October 30, 2008, the Virginia Bureau of Radiological Health responded by email. The Commonwealth agreed with the conclusions of the Environmental Assessment, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this Environmental Assessment in support of the proposed action. On the basis of this Environmental Assessment, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of the NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance;''
2. Title 10 Code of Federal Regulations, Part 20, Subpart E, ''Radiological Criteria for License Termination;''
3. Title 10, Code of Federal Regulations, Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;''
4. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities;''
5. NUREG–1720, ''Re-evaluation of the Indoor Resuspension Factor for the Screening Analysis of the Building Occupancy Scenario for NRC's License Termination Rule—Draft Report;''
6. NRC License No. 45–23645–01NA inspection and licensing records;
7. Department of the Navy, Decommissioning Building 200, Bay 4 Depleted Uranium (DU) Indoor Test Range at Naval Surface Warfare Center Dahlgren Division (NAVSURFWARCEN), dated November 15, 2006 (ML063340558);
8. Department of the Navy, Naval Surface Warfare Center Dahlgren Division Building 200 Decommissioning Plan, dated March 4, 2008 (ML080980180); and
9. New World Technology, Final Decommissioning Plan Building 200, Bay 4, Dahlgren Laboratory, Dahlgren, Virginia, dated January 10, 2008.

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The Public Document Room reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia, PA this 11th day of December 2008.

For the Nuclear Regulatory Commission.

Eugene Cobey,

Chief, Decommissioning Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E8–30055 Filed 12–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Board Meeting

Board meeting: January 28, 2009-Las Vegas, Nevada; The U.S. Nuclear Waste Technical Review Board will meet to discuss repository tunnel stability and ''burnup'' credit related to Department of Energy plans for a proposed repository for spent nuclear fuel and high level radioactive waste at Yucca Mountain in Nevada.

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act of 1987, the U.S. Nuclear Waste Technical Review Board will meet in Las Vegas, Nevada, on Wednesday, January 28, 2009. The focus of the meeting is expected to be repository tunnel stability and issues related to burnup credit. Burnup is the amount of energy produced in a nuclear reactor per unit weight of nuclear fuel. The Board will review U.S. Department of Energy (DOE) activities related to these and other issues as part of the Board's ongoing technical evaluation of DOE's proposed plans for disposing of spent nuclear fuel and high-level radioactive waste (HLW) in a permanent repository at Yucca Mountain in Nevada.

The Board was charged in the Nuclear Waste Policy Amendments Act of 1987 with conducting an independent review of the technical and scientific validity of DOE activities related to the implementation of the Nuclear Waste Policy Act, including transporting, packaging, and disposing of spent nuclear fuel and HLW.

The Board meeting will be held at the Marriott Suites Convention Center; 325 Convention Center Drive; Las Vegas, Nevada 89109; (tel) 702–650–2000, (fax) 702–6509466.

A detailed meeting agenda will be available on the Board's Web site, *http://www.nwtrb.gov*, approximately one week before the date of the meeting. The agenda also may be obtained by telephone request at that time. The meeting will be open to the public, and opportunities for public comment will be provided.

Board Chairman B. John Garrick will call the meeting to order at 8 a.m. Dr. Garrick's remarks will be followed by a DOE program overview and science update. The balance of the morning agenda will be devoted to discussions of drift stability, thermal conductivity of drift collapse material, and the effects of the presence of drift collapse material on waste package temperatures. After lunch, issues related to the allowance of burnup credit will be discussed, and an update of the Welding-Closure Cell work will be presented.

Time will be set aside at the end of the day for public comments. Those wanting to speak are encouraged to sign the ''Public Comment Register'' at the check-in table. A time limit may have to be set on individual remarks, but written comments of any length may be submitted for the record.

Transcripts of the meeting will be available on the Board's Web site, by e-mail, on computer disk, and on a library-loan basis in paper format from Davonya Barnes of the Board's staff no later than February 16, 2009.

A block of rooms has been reserved for meeting attendees at the Marriott Suites. When making a reservation, please state that you will be attending the Nuclear Waste Technical Review Board meeting, Group Code: NWT. Reservations should be made by Monday, January 5, 2009, to ensure receiving the meeting rate. To make reservations, call 1–800–228–9290.

For more information, contact Karyn Severson, NWTRB External Affairs; 2300 Clarendon Boulevard, Suite 1300; Arlington, VA 22201–3367; (tel) 703–235–4473; (fax) 703–235–4495.

Dated: December 12, 2008.

William D. Barnard,

Executive Director, Nuclear Waste Technical Review Board.

[FR Doc. E8–29909 Filed 12–17–08; 8:45 am]

BILLING CODE 6820–AM–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 15c2–1, SEC File No. 270–418, OMB Control No. 3235–0485.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for approval of extension on the following rule: Rule 15c2–1.

Rule 15c2–1 (17 CFR 240.15c2–1) prohibits the commingling under the same lien of securities of margin customers (a) with other customers without their written consent and (b) with the broker or dealer. The rule also prohibits the rehypothecation of customers' margin securities for a sum in excess of the customer's aggregate indebtedness. *See* Securities Exchange Act Release No. 2690 (November 15, 1940); Securities Exchange Act Release No. 9428 (December 29, 1971). Pursuant to Rule 15c2–1, respondents must collect information necessary to prevent the rehypothecation of customer securities in contravention of the rule, issue and retain copies of notices of hypothecation of customer securities in accordance with the rule, and collect written consents from customers in accordance with the rule. The information is necessary to ensure compliance with the rule and to advise customers of the rule's protections.

There are approximately 126 respondents (*i.e.*, broker-dealers that carry or clear customer accounts that also have bank loans) that require an aggregate total of 2835 hours to comply with the rule. Each of these approximately 126 registered broker-dealers makes an estimated 45 annual responses. Each response takes approximately 0.5 hours to complete. Thus, the total compliance burden per year is 2835 burden hours.

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 control number.

Comments regarding the estimated burden hours should be directed to: (i) The Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: December 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29966 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor

Education and Advocacy, Washington, DC 20549–0213.

Extension: Form 20–F; OMB Control No. 3235–0288; SEC File No. 270–156.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form 20–F (17 CFR 249.220f) is used by foreign private issuers to either register a class of securities under the Securities Exchange Act of 1934 pursuant to section 12(b) or 12(g) (15 U.S.C. 78*l*(b) or 78*l*(g)) or to satisfy their annual report obligation pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)). The information collected is intended to enable investors in foreign private issuers to make informed investment decisions. Form 20–F takes approximately 2,611 hours per response to prepare and is filed by 942 foreign private issuers annually. We estimate that 25% of the 2,611 hours per response (652.75 hours) is prepared by the issuer for an annual reporting burden of 614,891 hours (652.75 hours per response × 942 responses).

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 control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

December 11, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–29968 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Form N–54A, SEC File No. 270–182, OMB Control No. 3235–0237.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

• Form N–54A (17 CFR 274.53) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Act''); Notification of Election to be Subject to Sections 55 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a–54 through 64) Filed Pursuant to Section 54(a) of the Act (15 U.S.C. 80a–53(a)).

Form N–54A is the notification to the Commission of election to be regulated as a business development company. A company making such an election only has to file a Form N–54A once.

It is estimated that approximately 6 respondents per year file with the Commission a Form N–54A. Form N–54A requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–54A would be 3.0 hours per year in the aggregate. The estimated annual burden of 3.0 hours represents a decrease of 20.0 hours over the prior estimate of 23.0 hours. The decrease in burden hours is attributable to a decrease in the number of respondents from 46 to 6.

The estimate of average burden hours for Form N–54A is made solely for the purposes of the PRA and is not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Form N–54A is mandatory. The information provided by the Form is not kept confidential. 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 control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29969 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Regulation AC, OMB Control No. 3235–0575, SEC File No. 270–517.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

• Regulation Analyst Certification (AC) (17 CFR 242.500–505).

Regulation AC requires that research reports published, circulated, or provided by a broker or dealer or covered person contain a statement attesting that the views expressed in each research report accurately reflect the analyst's personal views and whether or not the research analyst received or will receive any compensation in connection with the views or recommendations expressed in the research report. Regulation AC also requires broker-dealers to, on a quarterly basis, make, keep, and maintain records of research analyst statements regarding whether the views expressed in public appearances accurately reflected the analyst's personal views, and whether any part of the analyst's compensation is related to the specific recommendations or views expressed in the public appearance. Regulation AC also requires that research prepared by

foreign persons be presented to U.S. persons pursuant to Securities Exchange Act Rule 15a–6 and that broker-dealers notify associated persons if they would be covered by the regulation. Regulation AC excludes the news media from its coverage.

The Commission estimates that Regulation AC imposes an aggregate annual time burden of approximately 28,538 hours on 5,186 respondents, or approximately 5.5 hours per respondent. The Commission estimates that the total annual internal cost of the 28,538 hours is approximately $10,525,642.00, or approximately $2,030.00 per respondent, annually.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 60 days of this notice.

Dated: December 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29970 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 12a–5, OMB Control No. 3235–79, SEC File No. 270–85.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in: Rule 12a–5 (17 CFR 240.12a–5) and Form 26 (17 CFR 249.26) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Section 12(a) of the Exchange Act generally makes it unlawful for any security to be traded on a national securities exchange unless such security is registered on the exchange in accordance with the provisions of the Exchange Act and the rules and regulations thereunder.

Rule 12a–5 (the ''Rule'') under the Exchange Act and Form 26 (the ''Form'') were adopted by the Commission in 1936 and 1955, respectively, pursuant to Sections 3(a)(12), 10(b), and 23(a) of the Exchange Act. Subject to certain conditions, Rule 12a–5 affords a temporary exemption (generally for up to 120 days) from the registration requirements of Section 12(a) of the Exchange Act for a new security when the holders of a security admitted to trading on a national securities exchange obtain the right (by operation of law or otherwise) to acquire all or any part of a class of another or substitute security of the same or another issuer, or an additional amount of the original security. The purpose of the exemption is to avoid an interruption of exchange trading to afford time for the issuer of the new security to list and register it, or for the exchange to apply for unlisted trading privileges.

Under paragraph (d) of Rule 12a–5, after an exchange has taken action to admit any security to trading pursuant to the provisions of the Rule, the exchange is required to file with the Commission a notification on Form 26. Form 26 provides the Commission with certain information regarding a security admitted to trading on an exchange pursuant to Rule 12a–5, including: (1) The name of the exchange, (2) the name of the issuer, (3) a description of the security, (4) the date(s) on which the security was or will be admitted to when-issued and/or regular trading, and (5) a brief description of the transaction pursuant to which the security was or will be issued.

The Commission generally oversees the national securities exchanges. This mission requires that, under Section 12(a) of the Exchange Act specifically, the Commission receive notification of any securities that are permitted to trade on an exchange pursuant to the temporary exemption under Rule 12a–5. Without the Rule and the Form, the Commission would be unable fully to implement these statutory responsibilities.

There are currently eleven national securities exchanges subject to Rule 12a–5. The Commission staff estimates that there could be one Form 26 filed every five years. The reporting burdens are not typically spread evenly among the exchanges. For purposes of this analysis of burden, however, the Commission staff has assumed that each exchange files an equal number of Form 26 notifications. Each notification requires approximately 20 minutes to complete. Accordingly, the Commission staff estimates the annual aggregate compliance burden for all respondents in a given year would be approximately 4 minutes (20 minutes/report x .2 reports/year = 4 minutes), and for each respondent the annual compliance burden would be approximately .36 minutes (4 minutes/respondent ÷ 11 respondents = .36 minutes), or .006 hours.

Based on the most recent available information, the Commission staff estimates that the cost to respondents of completing a notification on Form 26 is, on average, $43.23 per response. Therefore, the Commission staff estimates that the total annual related reporting cost per respondent is $.86 (.02 responses/respondent/year × $43.23 cost/response), for a total annual related cost to all respondents of $9.46 ($.86 cost/respondent × 11 respondents).

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 control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: nfraser@omb.eop.gov; and (ii) Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: December 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29971 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59086; File No. SR–CBOE–2008–124]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase the Class Quoting Limit in One Option Class

December 11, 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 December 9, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' 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 CBOE. The Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act,[3] and Rule 19b–4(f)(1) thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to increase the class quoting limit in one option class. The text of the proposed rule change is available on CBOE's Web site (*http://www.cboe.org/legal*), at the CBOE'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 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE Rule 8.3A, *Maximum Number of Market Participants Quoting Electronically per Product*, establishes class quoting limits (''CQLs'') for each class traded on the Hybrid Trading System.[4] A CQL is the maximum number of quoters that may quote electronically in a given product and Rule 8.3A, Interpretation .01(a) provides that the current levels are generally established at 50.

In addition, Rule 8.3A, Interpretation .01(b) provides a procedure by which the President of the Exchange may increase the CQL for an existing or new product. In this regard, the President of the Exchange may increase the CQL in a particular product when he deems it appropriate. The effect of an increase in the CQL is procompetitive in that it increases the number of market participants that may quote electronically in a product. The purpose of this filing is to increase the CQL in the American-style option class on the Standard & Poor's 100 Index (OEX) from its current limit of 50 to 100.

Given the impending transition of OEX to the Hybrid Trading System Platform (''Hybrid''), which is currently planned for December 9, 2008, CBOE's President has determined that it would be appropriate to increase the CQL in OEX. With a current limit of 50, we anticipate that there will be a wait-list when OEX moves to Hybrid. Increasing the CQL to 100 will accommodate Market-Makers interested in trading OEX when it moves to Hybrid and will enable the Exchange to enhance the liquidity offered, thereby offering deeper and more liquid markets. Lastly, CBOE represents that it has the systems capacity to support this increase in the CQL.

2. Statutory Basis

CBOE believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements 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. As indicated above, the Exchange believes that increasing the CQL in this option class will enable the Exchange to enhance the liquidity offered, thereby offering deeper and more liquid markets.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither received nor solicited written comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act[7] and Rule 19b–4(f)(1) thereunder,[8] because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

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.

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–2008–124 on the subject line.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] *See* Rule 8.3A.01.

[5] 15 U.S.C. 78(f)(b).

[6] 15 U.S.C. 78(f)(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b–4(f)(1).

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–2008–124. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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–2008–124 and should be submitted on or before January 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–30068 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59096; File No. SR–FINRA–2008–044]

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to the Supervision of Market Letters

December 12, 2008.

I. Introduction

On September 4, 2008, 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 relating to the supervision of market letters. The proposed rule change was published for comment in the **Federal Register** on October 1, 2008.[3] The Commission received four comment letters on the proposal.[4] This order approves the proposed rule change.

II. Description of the Proposal

FINRA proposed to amend NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and Incorporated New York Stock Exchange (''NYSE'') Rule 472 (Communications with the Public) to address the supervision of market letters.[5] Among other things, the proposed rule change would amend the definition of ''sales literature'' in NASD Rule 2210 to exclude market letters that qualify as ''correspondence'' and would define ''correspondence'' in NASD Rule 2211 to include market letters distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period.

NASD Rule 2210 (Communications with the Public) requires a registered principal of a member to approve prior to use any item of sales literature. The term ''sales literature'' does not include any item distributed or made available only to institutional investors.[6] ''Sales literature'' includes ''market letters.'' Incorporated NYSE Rule 472 similarly requires a qualified person to approve in advance of distribution any market letter, but contains no exception for market letters sent only to institutional investors. FINRA is concerned that the pre-approval requirements may, in some circumstances, inhibit the flow of information to traders and other investors who base their investment decisions on timely market analysis.

To address this concern, FINRA proposed to amend the definition of ''sales literature'' in NASD Rule 2210 to exclude market letters that qualify as a ''correspondence'' and further to amend ''correspondence'' in NASD Rule 2211 to include market letters (as well as any written letter or electronic mail message) distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period. Pursuant to NASD Rule 2211(b)(1)(A), correspondence does not require approval by a registered principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes a financial or investment recommendation or otherwise promotes a product or service of the member. The proposed rule change also would amend Incorporated NYSE Rule 472 to eliminate the requirement that a qualified person approve market letters in advance of distribution.

Thus, under the proposed rule change, all FINRA members would be permitted under FINRA rules to distribute market letters to institutional investors (as defined in NASD Rule 2211(a)(3)) without requiring prior approval by a registered principal or qualified person. In addition, under the proposed rules, a member also could distribute without prior approval by a registered principal a market letter that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58648 (September 25, 2008); 73 FR 57177, 57179 (October 1, 2008).

[4] William A. Jacobson, The Cornell Securities Law Clinic (October 20, 2008) (the ''Cornell Letter''); Neal E Nakagiri, NPB Financial Group LLC (October 20, 2008); Dale E. Brown, Financial Services Institute (October 22, 2008); Michael Mungenast, president, ProEquities (Nov. 7, 2008).

[5] The FINRA rulebook currently includes (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to members of both FINRA and the NYSE, referred to as Dual Members.

[6] Pursuant to NASD Rule 2211(a)(2), communications of any kind sent only to institutional investors (as defined in NASD Rule 2211(a)(3)) are considered to be ''institutional sales material.'' NASD Rule 2210 does not require approval of institutional sales material by a registered principal prior to use. However, institutional sales material remains subject to the supervision and review requirements of NASD Rule 2211(b)(1)(B).

is sent only to existing retail customers and fewer than 25 prospective retail customers within a 30 calendar-day period. However, prior principal approval would be required if the market letter both (1) is sent to 25 or more existing retail customers and (2) makes a financial or investment recommendation or otherwise promotes a product or service of the member. In addition, similar to the manner in which other forms of correspondence (i.e., written letters and electronic mail messages) are addressed by NASD Rules 2210 and 2211, if a market letter were sent to 25 or more prospective retail customers within a 30-calendar day period, the market letter would fall within the definition of sales literature and have to be supervised as such, including approval by a registered principal prior to use.

As correspondence, market letters would remain subject to the supervision and review requirements of NASD Rule 3010, which requires each firm to establish written procedures that are appropriate to its business, size, structure and customers for the review of outgoing correspondence. If these procedures do not require review of all correspondence prior to use or distribution, they must provide for the education and training of associated persons as to the firm's procedures governing correspondence, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.[7]

The proposed rule changes would allow firms to distribute most market letters in a timely manner without requiring a registered principal to review each market letter prior to distribution, but would maintain investor protection by requiring firms to review such correspondence in accordance with mandated supervisory policies and procedures.

The proposal also would create a new definition of the term ''market letter'' in NASD Rule 2211—and modify the existing definition in Incorporated NYSE Rule 472—to mean any communication specifically excepted from the definition of ''research report'' under NASD Rule 2711(a)(9)(A) and Incorporated NYSE Rule 472.10(2)(a), respectively. This exception consists of:

- Discussions of broad-based indices;
- Commentaries on economic, political or market conditions;
- Technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price;
- Statistical summaries of multiple companies' financial data, including listings of current ratings;
- Recommendations regarding increasing or decreasing holdings in particular industries or sectors; and
- Notices of ratings or price target changes (subject to certain disclosure requirements).

FINRA proposed to define market letters by reference to an exception from the definition of ''research report'' in NASD Rule 2711 and Incorporated NYSE Rule 472 to make clear that a firm may not supervise as correspondence communications that fall within the definition of ''research report.'' The proposed rule change would, however, increase a firm's flexibility in supervising market letter communications that do not qualify as research reports.

III. Comment Letters

The Commission received four comment letters on the proposal, all of which expressed support for the proposed rule change.[8] For example, one commenter stated that it supported the effort to provide more timely information to a subset of investors while retaining procedures for review and supervision of correspondence and maintaining consistency across NASD and NYSE rules.[9]

IV. 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.[10] In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] 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 concludes that the proposed rule would increase the flow of timely information to investors while providing appropriate safeguards from potential abuse and fraud.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–FINRA–2008–044) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–30066 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

[7] *See also* Incorporated NYSE Rule 342. FINRA has proposed to amend the current requirements governing the supervision and review of correspondence. *See* Regulatory Notice 08–24 (May 2008) (Proposed Consolidated FINRA Rules Governing Supervision and Supervisory Controls). That proposal reorganized the supervision rules and codify existing guidance with respect to the supervision and review of correspondence. Thus, FINRA does not anticipate any significant changes to the supervision standards on which the proposed rule change is predicated.

[8] *See* footnote 3.

[9] *See* Cornell Letter.

[10] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78o–3(b)(6).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59091; File No. SR–FINRA–2008–031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Amend the Arbitration Uniform Submission Agreement and Related Rules

December 12, 2008.

I. Introduction

The Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') on June 19, 2008, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Uniform Submission Agreement (''USA''), which parties must sign prior to entering into arbitration, and certain rules of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and the Code of Arbitration Procedure for Industry Disputes (''Industry Code'') that contain references to the agreement. The proposed rule change was published for comment in the **Federal Register** on July 16, 2008.[3] The Commission received five comments in response to the proposed rule change. This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58124 (July 9, 2008), 73 FR 40890 (July 16, 2008) (SR–FINRA–2008–031) (notice).

II. Description of the Proposed Rule Change

The USA is an agreement that claimants and respondents (hereinafter, collectively referred to as ''parties'') must sign prior to entering into arbitration. Rule 12302(a) of the Customer Code and Rule 13302(a) of the Industry Code require a claimant to file a signed and dated USA and a statement of claim to initiate an arbitration. Similarly, Rule 12303(a) of the Customer Code and Rule 13303(a) of the Industry Code require a respondent to directly serve each other party with a signed and dated USA and an answer within 45 days of receipt of the statement of claim. By signing the USA, the parties agree to submit to the arbitration process, and to be bound by the determination that may be rendered by the arbitrator(s).

FINRA proposed to amend the USA to: (1) Clarify what the parties are attesting to when they execute the agreement; (2) require parties to indicate in what capacity they are signing the agreement; (3) convert it to a FINRA-specific agreement; and (4) use plain English to make the agreement easier to read. FINRA also proposed to amend the rules of the Customer Code and the Industry Code that refer to the USA.

First, FINRA proposed to amend paragraph 2 of the USA to clarify what the parties are attesting to when they execute the agreement. Currently, this section states that the parties have read the procedures and rules relating to arbitration. FINRA stated that it understands that few investors who are represented by counsel actually read the relevant self-regulatory organization (SRO) rules (such as the Customer Code). Rather, in most cases, these investors are relying on their attorneys or other representatives to know the rules. Thus, some investors have been reluctant to sign a statement that they have read all the relevant rules. In light of these concerns, FINRA proposed to amend paragraph 2 to permit parties to certify that they or their representatives have read the relevant procedures and rules and that the parties agree to be bound by them. FINRA stated that it believes that the provision as proposed to be amended would reflect more accurately what the parties are attesting to when they execute the USA. The new language would make clear that the parties themselves are bound by the procedures and rules, regardless of whether they have read them personally.

Second, FINRA proposed to require that parties indicate in what capacity they are signing the agreement. Because the USA is a contract between the parties and FINRA's dispute resolution forum, FINRA must ensure that the parties entering into the agreement have the authority or standing to sign the agreement. In those cases in which the signatory is not a named party, the signatory must state the capacity in which he or she is acting if other than an individual and sign in that capacity, so that FINRA can determine from the statement of claim and other supporting information whether he or she is authorized to enter the agreement. For example, a person signing as the trustee of a family trust would sign his or her name exactly as shown on the trust documents and then write ''Trustee'' on the line below the instruction ''State Capacity if other than individual (example: Executor, Trustee, Corporate Officer).'' According to FINRA, this change would formalize an existing practice. Currently, if a party fails to sign the USA in the capacity in which he or she is submitting the claim, FINRA classifies the claim as deficient, which can delay the arbitration and increase the party's costs. FINRA stated that it believes that the proposed change would clarify how the agreement must be signed, and should help expedite the processing of claims, thereby minimizing unnecessary delays and expenses that parties could incur.

Third, FINRA proposed to convert the USA into a FINRA-specific agreement. The USA was designed by the Securities Industry Conference on Arbitration (SICA) [4] a number of years ago and was intended to be used by the ten SROs that offered an arbitration forum at that time. Thus, the language is generic and references to rules or procedures include broad terms to encompass the rules from the various SROs. Over the years, most SROs have closed their arbitration forums and contracted with FINRA to handle their arbitrations. In addition, on August 6, 2007, FINRA consolidated its dispute resolution program with that of the New York Stock Exchange, Inc.[5] As a result, FINRA now handles over 99 percent of all arbitrations filed with SROs. In light of these changes, FINRA proposed to convert the USA to a FINRA-specific agreement by removing references to ''sponsoring organization'' and replacing them with references to FINRA; expressly referencing the FINRA Code of Arbitration Procedure; [6] and removing the term ''Uniform'' from the title of the agreement. FINRA stated that it believes these changes would minimize confusion for parties concerning the applicability of the form and would clarify which FINRA rules apply in the arbitration context.

Fourth, FINRA proposed to make minor stylistic changes to the document, such as defining ''undersigned parties'' as ''parties'' after the first usage, moving the reference to cross-claims and dividing a long sentence in paragraph 4 into two sentences.[7] FINRA stated that it believes these changes will make the agreement easier to read.

Finally, FINRA proposed to amend Rules 12100(x), 12100(y), 12302(a)(1), (b), and (d), 12303(a) and (c), 12306(a) and (c), and 12307(a) of the Customer Code to conform the references to the USA to the proposed changes to the agreement. FINRA proposed to amend Rules 13100(z)–(bb), 13302(a)(1), (b), and (d), 13303(a) and (c), 13306(a) and (c), and 13307(a) of the Industry Code for the same reason.

III. Comments

The SEC received five comments,[8] as well as FINRA's response to comments,[9] which are discussed below. Two

[4] SICA was formed in 1977 to develop and maintain a Uniform Code of Arbitration and to provide a forum for the discussion of new developments in securities arbitration among SRO arbitration forums and participants in those forums. The membership currently includes representatives of each securities SRO that currently sponsors an arbitration forum, three ''public'' members, and representatives from the Securities Industry and Financial Markets Association (SIFMA) and the North American Securities Administrators Association (NASAA).

[5] *See* Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007) (SR–NASD–2007–023) (approval order).

[6] The Submission Agreement's use of the term ''FINRA Code of Arbitration Procedure'' means the Customer Code or the Industry Code, as applicable.

[7] In the proposed definition of ''Submission Agreement'' (proposed NASD Rules 12100(x) and 13100(z)), FINRA did not propose to replace references to ''NASD Submission Agreement'' with ''FINRA Submission Agreement'' as part of this rule filing, because those changes were proposed as part of a separate rule filing (FINRA's Proposed Rule Change to Adopt NASD Rules 4000 Through 1000 Series and the 12000 Through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook (SR–FINRA–2008–021) (*See* Exhibit 5 at pp. 530 and 550–551)), which was approved by the Commission but has not yet been implemented. *See* Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (SR–FINRA–2008–021) (approval order). This change, as set forth in SR–FINRA–2008–021, will take effect on December 15, 2008. *See* FINRA Regulatory Notice 08–57 (SEC Approves New Consolidated FINRA Rules) (October 2008).

[8] *See* Letter from Seth E. Lipner, Professor of Law, Baruch College, August 6, 2008 (''Lipner Letter''); Letter from Lawrence S. Schultz, President, Public Investors Arbitration Bar Association, August 6, 2008 (''PIABA Letter''); Letter from Daniel S. Wilkerson, July 30, 2008 (''Wilkerson Letter''); Letter from Philip M. Aidikoff, Attorney, July 23, 2008 (''Aidikoff Letter''); and Letter from Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C., July 16, 2008 (''Caruso Letter'').

[9] Letter from Mignon McLemore, FINRA, dated October 29, 2008 (''FINRA Letter'').

commenters supported the proposed rule change;[10] three opposed it.[11] Two commenters who opposed the proposed rule change, however, raised concerns that are outside the scope of the proposal.

Detailed Discussion of Comments and Finra Response

Certifying that Party's Representative Read the Rules

Under the proposed rule change, parties would be permitted to rely on their representatives to be familiar with the rules and procedures of the forum. Two commenters stated that this is a positive change.[12]

Removing References to Certain Rules and Corporate Documents

FINRA proposed to make the USA specific to FINRA and to remove language that is overly broad or that is generic to encompass the rules of the various self-regulatory organizations. A commenter who opposed the proposed rule change argued that amending paragraph three of the USA to remove the requirement that the arbitration be conducted pursuant to the Constitution, By-Laws, Rules and Regulations of the sponsoring organization may eliminate FINRA's authority under its Conduct Rules to enforce or collect on an arbitration settlement or award.[13]

FINRA stated that it disagrees with the commenter's argument for several reasons. Firms and associated persons are subject to FINRA's jurisdiction under FINRA By-Laws, regardless of whether they sign a USA.[14] In addition, firms and associated persons agree again to be bound by the By-Laws in paragraph one of the USA. Therefore, FINRA stated that similar references in paragraph three of the USA are redundant, and that their removal will make the document easier to read and understand for users of its dispute resolution forum. Moreover, the focus in paragraph three is on the procedures under which the arbitration will be conducted, and the proper reference in this context is the FINRA Code of Arbitration Procedure. For these reasons, FINRA declined to amend paragraph three.

One commenter contended that the proposed amendments to the USA do not define explicitly the rules and procedures to which the document refers, thereby making it difficult for parties to review them and agree to be bound by them.[15] In particular, the commenter seeks ''specific document names, section names, page numbers, [and] web URLs * * * where these rules can be found.''[16]

FINRA responded that one of the goals of the proposal is to streamline the USA by using plain English to make the document easier to read. In keeping with this goal, FINRA eliminated redundant and generic references to corporate documents as described above. FINRA stated that inserting a detailed list of all rules and procedures that might possibly apply to any arbitration proceeding would make the USA unduly lengthy and complex for the average user of the dispute resolution forum. More importantly, the nature of a particular claim determines which rules and procedures would apply in the forum. A listing of all rules and procedures available in the forum may be confusing to investors when only some of the rules and procedures may apply to a particular claim. Thus, the proposed changes to the USA incorporate by reference the relevant rules and procedures of the forum, which are readily accessible on FINRA's Web site at *http://www.finra.org* or in hard copy upon request. FINRA stated that most investors will find that the Code of Arbitration Procedure and the packet of materials provided for claimants will provide them with all the necessary rules and procedures applicable to their arbitration proceedings. For these reasons, FINRA declined to amend the proposal to address this issue at this time.

Comments Outside the Scope of Proposed Rule Change

Four commenters expressed concerns over alleged disparate treatment of claimants and respondents with regard to executing a USA.[17] Specifically, they stated that respondents are frequently permitted to participate in arbitrations without ever having signed the USA, and that FINRA does not enforce its rules with respect to those respondents who fail to submit a signed USA by barring participation, or otherwise imposing sanctions.

FINRA determined that these comments are outside the scope of the rule filing, because FINRA is not proposing to amend the provisions of the Codes that address the execution requirements concerning the USA.[18] FINRA responded that it does believe it is important, however, to correct misconceptions expressed by the commenters concerning the accountability of respondents when they do not execute a USA. First, as noted previously, firms and associated persons or registered representatives are subject to FINRA's jurisdiction under FINRA By-Laws,[19] which means that they are bound to arbitrate in the forum and are subject to the forum's rules and procedures. Second, Rules 12303(a) and 13303(a) of the Customer and Industry Codes, respectively, require respondents to serve each other party with a signed and dated USA. In addition, Rules 12307(c) and 13307(c) prohibit a panel from considering any counterclaim, cross claim or third party claim that is deficient, which includes a USA that is not properly signed and dated.[20] Third, if respondents fail to submit a signed USA or otherwise object to jurisdiction within 30 days, arbitrators are instructed in the initial pre-hearing conference script to impose sanctions as provided in the Codes.[21] Last, FINRA trains its arbitrators extensively on how its rules and procedures should be applied. With regard to respondents' failure to submit a USA, FINRA recently published an article in *The Neutral Corner* that addressed this issue and reminded arbitrators of their ability to issue sanctions for noncompliance.[22] Therefore, FINRA concluded that its rules, procedures, and arbitrator training programs address effectively the instances in which respondents fail to submit a USA.

[10] Aidikoff and Caruso Letters.

[11] PIABA, Lipner, and Wilkerson Letters.

[12] Aidikoff and PIABA Letters.

[13] PIABA Letter.

[14] *See* By-Laws of the Corporation, Article IV, Membership, and Article V, Registered Representatives and Associated Persons. For a firm to become a member of FINRA, it must agree to comply with the FINRA By-Laws, the Rules of the Corporation, and all rulings, orders, directions, and decisions issued and sanctions imposed under the Rules of the Corporation. Article IV, Sec. 1(a)(1) of By-Laws. Article V, Sec. 2(a)(1) of the By-Laws contains a similar requirement for registered representatives and associated persons. The Code of Arbitration Procedure is included in the Rules of the Corporation. Article I, Sec. (w) of the By-Laws states, '' 'Rules of the Corporation' or 'Rules' means the numbered rules set forth in the manual of the Corporation beginning with the Rule 0100 Series, as adopted by the Board pursuant to these By-Laws, as hereafter amended or supplemented.''

[15] Wilkerson Letter.

[16] *Id.*

[17] Aidikoff, Caruso, PIABA and Lipner Letters.

[18] Rules 12302 and 12303 of the Customer Code and Rules 13302 and 13303 of the Industry Code.

[19] *See supra* note 14.

[20] Also under Rules 12307(c) and 13307(c), FINRA notifies the party making the counterclaim, cross claim or third party claim of any deficiencies in writing and copies the panel.

[21] Rule 12212 of Customer Code and Rule 13212 of the Industry Code. Sanctions also can be imposed under the FINRA By-Laws if the matter is referred for regulatory action. *See* Article XIII, Powers of Board to Impose Sanctions.

[22] *See The Neutral Corner,* Volume 1–2008, *available at http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/P037817* (last visited Oct. 17, 2008).

IV. Discussion and Findings

After careful review of the proposed rule change, the comments and FINRA's response to the comments, 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.[23] In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[24] 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 believes that the proposed rule change would enhance the efficiency of the forum in processing claims, by clarifying the terms of the agreement and improving its readability. Moreover, the Commission believes the proposed rule change is consistent with FINRA's statutory obligations under the Act to prevent fraudulent and manipulative practices by requiring that signers of the agreement indicate in what capacity they are signing, so that FINRA can ensure that signers of the agreement are authorized to do so.

The Commission believes that FINRA has adequately responded to the comments regarding removal of references to certain rules and corporate documents. As stated above, one of the purposes of the proposed rule change is to convert the USA to a FINRA-specific document. In order to do this, FINRA proposed to remove language that is overly broad or that is generic to encompass the rules of the various self-regulatory organizations. By citing to relevant provisions of its By-Laws, FINRA has sufficiently explained why the removal of the requirement that the arbitration be conducted pursuant to the ''Constitution, By-Laws, Rules and Regulations'' of the sponsoring organization would not eliminate FINRA's authority to enforce or collect on an arbitration settlement or award.

The Commission carefully considered the comment suggesting that the agreement should contain an explicit definition of the ''procedures and rules'' to which the parties agree to be bound, under paragraph two of the agreement. However, as noted above, another principal goal of the proposed rule change is to make the agreement easier to read. Since the Commission's oversight of the securities arbitration process is directed at ensuring that it is fair and efficient, the Commission agrees with FINRA's determination that inserting a detailed list of all rules and procedures that might possibly apply to any arbitration proceeding would make the agreement unduly lengthy and complex for the average user of the dispute resolution forum, and consequently, would hinder the goals of fairness and efficiency. Furthermore, the Commission believes that the commenter's concerns are addressed by the fact that, as FINRA pointed out, claimants can refer to the Code of Arbitration Procedure and the packet of materials provided for claimants to find all the necessary rules and procedures applicable to their arbitration proceedings.

With respect to the comments regarding the alleged disparate treatment of claimants and respondents with regard to executing an agreement, the Commission believes that FINRA has adequately responded, by highlighting the rules, procedures, and arbitrator training programs that address the instances in which respondents fail to submit an agreement.

V. Conclusions

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that the proposed rule change (SR–FINRA–2008–031) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Florence E. Harmon,

Acting Secretary.

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[23] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78o–3(b)(6).

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59087; File No. SR–NASDAQ–2008–093]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Bid Price Required for Initial Listing on the Nasdaq Global and Global Select Markets from $5 to $4

December 11, 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 December 1, 2008, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and III below, which Items have been prepared by Nasdaq. Nasdaq has filed this proposal pursuant to Exchange Act Rule 19b–4(f)(6)[3] and requests that the Commission waive the 30-day pre-operative waiting period contained in Exchange Act Rule 19b–4(f)(6)(iii).[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

Nasdaq proposes to modify the bid price required for initial listing on the Nasdaq Global and Global Select Markets from $5 to $4.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.[5]

4420. Quantitative Listing Criteria

In order to be listed on the Nasdaq National Market, an issuer shall be required to substantially meet the criteria set forth in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) or (o) below. Nasdaq may extend unlisted trading privileges to any security for which Nasdaq has in effect rules providing for transactions in such class or type of security. Provisions of Rule 4420 that govern trading hours and surveillance procedures, and that relate to information circulars and prospectus delivery, shall apply to securities traded on an unlisted trading privileges basis.

(a) Entry Standard 1—First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1)–(3) No change.

(4) The bid price per share is [$5] *$4* or more.

(5)–(7) No change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] 17 CFR 240.19b–4(f)(6)(iiii).

[5] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaqomx.cchwallstreet.com.*

(b) Entry Standard 2—First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

(1)–(3) No change.

(4) The bid price per share is [$5] *$4* or more.

(5)–(7) No change.

(c) Entry Standard 3—First Class of Common Stock, Shares or Certificates of Beneficial Interest of Trusts, Limited Partnership Interests in Foreign or Domestic Issues and American Depositary Receipts

An issuer listed under this paragraph does not also need to be in compliance with the quantitative criteria for initial listing in the Rule 4300 series.

(1)–(2) No change.

(3) The bid price per share is [$5] *$4* or more.

(4)–(6) No change.

(d)–(j) No change.

(k) Quantitative Listing Criteria—Preferred Stock and Secondary Classes of Common Stock

For initial listing, if the common stock or common stock equity equivalent security of the issuer is listed on Nasdaq or another national securities exchange, the issue shall have:

(1)–(2) No change.

(3) A minimum bid price per share of [$5] *$4*;

(4)–(5) No change.

Alternatively, in the event the issuer's common stock or common stock equivalent security is not listed on either Nasdaq or another national securities exchange, the preferred stock and/or secondary class of common stock may be traded on Nasdaq so long as the security satisfies the listing criteria for common stock.

* * * * *

4426. Nasdaq Global Select Market Listing Requirements

(a)–(c) No change.

(d) Price. For inclusion in the Nasdaq Global Select Market, an issuer not listed on the Nasdaq Global Market shall have a minimum bid price of [$5] *$4* per share.

(e)–(f) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to change the minimum bid price required for initial listing on the Nasdaq Global and Global Select Markets from $5 to $4. Nasdaq believes that this change will permit the listing of more companies on Nasdaq, thereby enhancing investor protection by allowing these companies, and their investors, to benefit from Nasdaq's liquid and transparent marketplace, supported by strong regulation including Nasdaq's listing and market surveillance and FINRA's independent regulation.

Nasdaq believes that companies satisfying the proposed minimum $4 price requirement, along with all of Nasdaq's other listing requirements, are suitable for listing. Nasdaq notes that the proposed $4 minimum price meets the criteria from the definition of a penny stock contained in Rule 3a51–1 under the Act.[6] In addition, the proposed $4 price is the same as the requirement recently adopted for listing on the New York Stock Exchange.[7]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general and with Sections 6(b)(5) of the Act,[9] 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 transactions in securities, 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 proposed rule change removes an impediment for certain otherwise qualified companies to list on Nasdaq, and thereby benefit from Nasdaq's liquid and transparent marketplace and strong regulation.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of filing.[12] However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. In making this determination, the Commission notes that it recently approved a substantially similar rule proposal for the NYSE.[14] The

[6] *See* 17 CFR 240.3a51–1(a)(2)(i)(C).

[7] *See* Section 102.01B (applicable to domestic companies) and Section 103.01A (applicable to non-U.S. companies) of the NYSE Listed Company Manual, which require a $4 minimum price for initial listing. Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (approving SR–NYSE–2008–17).

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) under the Act requires that a self-regulatory organization submit to the Commission 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 satisfied this notice requirement.

[12] 17 CFR 240.19b-4(f)(6)(iii).

[13] *Id.*

[14] *See supra* note 7.

Commission believes that the Nasdaq's proposed rule change raises no new regulatory issues that were not previously considered by the Commission in approving the NYSE's similar proposal. In approving the NYSE proposal, the Commission found that adopting a $4 price requirement for initial listing was consistent with the requirements of the Act and that this requirement meets the criteria from the definition of penny stock contained in Rule 3a51–1 under the Act.[15] Further, the Commission notes that the NYSE's proposal was subject to full notice and comment, and the Commission received no comments on the price requirement portion of the NYSE's rule proposal. Accordingly, for the reasons discussed above, the Commission finds that the Exchange's proposal is consistent with the protection of investors and the public interest and therefore designates the proposed rule change operative immediately upon filing.[16]

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–NASDAQ–2008–093 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–093. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–093 and should be submitted on or before January 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29967 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

[15] *Id.*

[16] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59082; File No. SR–NYSEArca–2008–135]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending Rule 6.47A To Reduce the Order Exposure Period from Three Seconds to One Second

December 11, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 9, 2008, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') 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 prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules governing order exposure requirements on the OX system. This proposal will revise Rule 6.47A. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.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 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

The purpose of the proposed rule change is to reduce the exposure period contained in Rule 6.47A, Order Exposure Requirements—OX, from three seconds to one second.

Rule 6.47A provides that with respect to orders routed to OX, Users may not execute as principal orders they represent as agent unless (i) Agency orders are first exposed on the Exchange for at least three (3) seconds or (ii) the User has been bidding or offering on the Exchange for at least three (3) seconds prior to receiving an agency order that is executable against such bid or offer.

Specifically, order entry firms may not execute as principal, orders they represent as agent unless: (i) the agency order has first exposed on the NYSE Arca OX trading system for at least three seconds; (ii) the order entry firm has been bidding or offering for at least three seconds prior to receiving the agency order that is executable against such bid or offer. During this three-second exposure period, other market participants may enter orders to trade

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

against the exposed order. Under this proposal, the exposure periods contained in Rule 6.47A would be reduced to one second.

The Exchange notes that in incorporating a three-second order exposure period in Rule 6.47A, it recognized that three seconds would not be long enough to allow human interaction with the exposed orders. Rather, market participants on NYSE Arca are sufficiently automated that they can react to these orders electronically. In this context, NYSE Arca believes it would be in all market participants' best interest to minimize the exposure period to a time frame that continues to allow adequate time for market participants to electronically respond, while at the same time reducing any market risk associated with the longer exposure period. In this respect, the Exchange states that its experience with the three-second exposure time period indicates that one second would provide an adequate response time.[4] Accordingly, the Exchange does not believe it is necessary or beneficial to the orders being exposed to continue to subject them to market risk for a full three seconds.

When adopting the existing three-second order exposure period, the Exchange realized that, in today's electronic trading environment, a three-second exposure period could provide timely executions of orders while still providing market participants with an adequate opportunity to compete for exposed bids and offers. Continuing on that same logic, the Exchange believes that reducing its order exposure period from three seconds to one second will benefit market participants. Since market participants have the ability to react to these orders electronically, and regularly do so in less than one second, the Exchange believes that reducing the time period to one second will continue to afford sufficient time to ensure effective interaction with orders. At the same time, NYSE Arca believes that reducing the time period to one second will allow it to provide investors and other market participants with more timely executions, thereby reducing market risk.

A shortened exposure period would be fully consistent with the electronic nature of the NYSE Arca OX trading system. In order to substantiate that market participants on NYSE Arca would not be disadvantaged by a reduced exposure period, the Exchange conducted a survey of OTP Firms to find out whether they had the systems capability available that would allow them to respond in a meaningful way within the proposed timeframe. The Exchange surveyed twenty-six (26) OTP Firms, representing fifty-one (51) different OTP Holders, that regularly access the Exchange on an electronic basis,[5] regarding the proposed change to Rule 6.47A, specifically the Exchange asked; 1. ''What is the approximate turnaround time for your firm to take in, process and respond to trading interest posted on NYSE Arca Options?'' and 2. ''Do you foresee any problems if NYSE Arca Options reduces the exposure time from three seconds to one second?'' Of the nine OTP Firms that responded to the Exchange's survey, all but one indicated that their approximate turnaround time for responding to trading interest was equal to, or less than, 100 milliseconds. The other responding OTP Firm simply stated that their turnaround time was ''less than one second''. None of the responding OTP Firms anticipated any problems related to order processing, if the Exchange was to reduce the exposure period to one second.

Based on the findings of the survey, the Exchange believes that the proposed exposure period will continue to provide market participants with sufficient time to respond, and compete for orders, while also reducing some of the risks associated with a prolonged exposure period.

2. Statutory Basis

NYSE Arca believes that the proposed rule change is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In particular, the Exchange believes that the proposed rule change will provide investors with more timely execution of their options orders, while ensuring that there is an adequate exposure of all orders on NYSE Arca.

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

The Exchange solicited comments from a broad cross section of OTP Holders. As previously stated, the Exchange received no negative comments on the proposed rule change.[8]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice in the **Federal Register**. The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.

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–2008–135 on the subject line.

[4] There are numerous market participants on NYSE Arca that have the capability and already opt to respond within the first one-second of the present three second exposure period, currently in force for the OX trading system.

[5] The twenty-six (26) surveyed collectively accounted for slightly more than 90% of all electronically executed transactions on the NYSE Arca OX system, during the month of October 2008.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Form 19b–4 and e-mail from Glenn Gsell, Managing Director, NYSE Regulation, to Kristie Diemer, Special Counsel, Commission, dated December 10, 2008 (requesting that language from Item 5 of Form 19b–4 replace language in Item II, Part C of Exhibit 1).

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–2008–135. 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 Section, 100 F Street, NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office. 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–2008–135 and should be submitted on or before January 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–30067 Filed 12–17–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[License No. 03/03–0247]

Solutions Capital I, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Solutions Capital I, L.P., 1100 Wilson Blvd, Suite 3000, Arlington, VA 22209, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest, of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Solutions Capital I, L.P., proposes to provide equity/debt security financing to Jet Plastica Industries, Inc., 1100 Schwab Road, Hatfield, PA 19440. The financing is contemplated for working capital and general corporate purposes.

The financing is brought within the purview of § 107.73 0(a)(1) of the Regulations because MCG Capital Corporation, an Associate of Solutions Capital I, L.P., owns more than ten percent of Jet Plastica Industries, Inc.; therefore Jet Plastica Industries, Inc. is considered an Associate of Solutions Capital I, L.P., as defined in Sec. 105.50 of the regulations.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

December 1, 2008.

A. Joseph Shepard,

Associate Administrator for Investment.

[FR Doc. E8–29725 Filed 12–17–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 6459]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Three Summer Institutes for 2009, Including a Summer Institute for Norwegian Students in the Sciences, a Summer Institute for European Student Leaders, and a Summer Institute for European Student Leaders in Education

Announcement Type: Three new Cooperative Agreements.

Funding Opportunity Number: ECA/A/E/EUR 09–05.

Catalog of Federal Domestic Assistance Number: 00.000.

Key Dates: April 1, 2009–July 1, 2010.

Application Deadline: February 26, 2009.

Executive Summary: The Office of Academic Exchange Programs, European and Eurasian Programs Branch (ECA/A/E/EUR) announces an open competition for three (3) Summer Institutes for European undergraduate students to take place during the summer of 2009. The Institutes vary in focus, the number of participants, length, timing, and funding. Accredited, post-secondary educational institutions in the United States may submit proposals to administer one or more of the Institute programs. Institutions must submit separate proposals for each Institute. All Institutes will be funded in FY2009 pending the availability of funds.

I. Funding Opportunity Description

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through legislation.

Purpose of each Summer Institute: Please refer to the Project Objectives, Goals, and Implementation (POGI) document for a complete program description for all three Institutes.

The Summer Institute for Norwegian Students in the Sciences will introduce twelve (12) undergraduate students who have completed at least two years of university studies in the natural sciences at Norwegian institutions to the scientific research being conducted on the polar regions. Proposals should interweave the themes and issues being examined by the International Polar Year (IPY) program into the Institute plan. For example, topics covered in the academic program may include climate change, the influence of the polar regions on the global system, community and environmental sustainability in the polar regions, and and/or other issues being examined by the IPY program.

The six-week Institute is also intended to introduce Norwegian students to the U.S. university classroom and lab, campus life, and offer them opportunities to interact with their U.S. peers.

The U.S.-Norway Fulbright Commission for Educational Exchange will recruit and nominate the participants. The Institute will take place during a six-week period between late June and mid-August, preferably

July 5–August 15, 2009. Funding for this Institute will be up to $200,000, pending the availability of FY2009 funds.

Guidelines: The program should be designed to support the following components:

(a) An academic program that focuses on polar studies, with particular relevance to the circumpolar region, also known as the ''High North''. The academic program can be a mix of lectures, seminars, and/or special projects and should include lab and/or field research at the host institution or other sites.

(b) A cultural component that allows participants to explore their host city and region and have full participation in campus life at the host institution.

(c) It is anticipated that all participants will be fluent in English. However, the host institution should be prepared to offer English language support as necessary.

(d) A U.S. peer mentor component. The host institution should retain three (3) qualified upper division or graduate U.S. students majoring in science who exhibit cultural sensitivity and an understanding of the Institute's objectives to accompany the participants throughout the academic and cultural components of the program.

2. The Summer Institute for European Student Leaders will offer a group of twenty-four (24) European undergraduate students from a broad range of ethnic, religious and socio-economic backgrounds the opportunity to learn about the United States and build leadership skills during a five-week program on an American campus. The Fulbright Commissions in Denmark, France, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom will recruit participants who are first- or second-year undergraduate students or recent high school graduates who will enter university in fall 2009. The Institute will promote study and learning about the United States, civic engagement, and leadership development through academic coursework and participatory activities that will serve the participants in their academic and professional careers and to promote mutual understanding between the United States and their home countries. ECA anticipates that the five-week Institute will begin mid-July 2009. Funding for this Institute will be up to $215,000, pending the availability of FY 2009 funds.

Guidelines: The program should be designed to support the following components:

(a) An academic program that will introduce participants to the important events, people, and documents that have shaped the United States and contemporary American life. The host institution is encouraged to identify or develop an academic course that Institute participants can take together with American students at the university.

(b) A cultural component that complements and reinforces the academic component. Activities should include visits to historical and cultural sites of interest and participation in extra-curricular activities that will allow an optimal level of interaction with American peers. This component should include plans for participants to be engaged in a community service activity one to two hours per week.

(c) An English language component designed to strengthen the English proficiency of all participants. While all program activities should aim to promote English-language learning, preparations should be in place to assist students through one-on-one or small group tutorials. The tutorials should be held several times a week throughout the duration of the Institute and will be mandatory for those participants deemed to require additional language instruction based on their English language assessment.

(d) A U.S. peer mentor program. The host institution should retain four qualified upper division or graduate U.S. students who exhibit cultural sensitivity and an understanding of the Institute's objectives to serve as cultural interpreters and accompany the participants throughout the program. The mentors should reside in the dormitories or other campus housing with the participants.

Applicants should take into account that the participants may not be familiar with the American student-centered classroom approach and will have varying degrees of experience in expressing their opinions in a classroom environment. In this respect, all aspects of the Institute program should be designed to encourage the students to interact with each other and American counterparts.

3. The Summer Institute for European Student Leaders in Education will offer a group of twelve (12) European undergraduate students from a broad range of ethnic, religious and socio-economic backgrounds the opportunity to learn about the U.S. system of education at the primary, secondary and higher education levels through an integrated and uniquely designed program that focuses on the U.S. education system, American pedagogical practices, U.S. education policy, the openness of the U.S. higher education system, and integration and diversity in American schools. Participants will have completed at least two years of university studies in an education-related field. Recruitment and nomination of the participants will be managed by the Fulbright Commission in France, Germany, Spain, and the United Kingdom. ECA anticipates that the five-week Institute will begin mid-July 2009. Funding for the Education Institute will be up to $110,000, pending the availability of FY 2009 funds.

Guidelines: The program should be designed to support the following components:

(a) An academic program that will introduce participants to the U.S. system of education as described above, while interweaving the perspectives, experiences and current challenges facing the local educational system wherever appropriate. A component focused on familiarizing the participants with the United States should also be included that will require the students to explore key documents and important events and periods that have shaped the United States.

(b) A cultural component that complements and reinforces the academic component. Activities should include visits to schools, historical, and cultural sites of interest. This component should include plans for participants to be engaged in a community service activity one to two hours per week.

(c) An English language component designed to strengthen the English proficiency of all participants. While all program activities should aim to promote English-language learning, preparations should be in place to assist students through one-on-one or small group tutorials. The one-on-one and/or small group tutorials should be held several times a week throughout the duration of the Institute and will be mandatory for those participants deemed to require additional language instruction based on their English language assessment.

(d) A U.S. peer mentor program. The host institution should retain three (3) qualified upper division or graduate U.S. students who exhibit cultural sensitivity and an understanding of the Institute's objectives to serve as cultural interpreters and accompany the participants throughout the program.

Each of the three Institutes will be funded through a Cooperative Agreement. Please note that in a Cooperative Agreement, ECA/A/E/EUR is substantially involved in program

activities above and beyond routine monitoring. ECA/A/E/EUR's activities and responsibilities for all three Institutes are as follows:

○ ECA will select participants who are nominated by the participating Fulbright Commissions.

○ ECA will facilitate sending pre-arrival orientation materials electronically to participants via the participating Fulbright Commissions.

○ ECA will enroll all participants in the Accident and Sickness and Sickness Program for Exchanges (ASPE). This health benefits program will be of no cost to the host institutions. The host institutions will be responsible for the co-pays for medical treatment.

○ ECA will issue DS–2019s for the participants to enter the United States on J-visas.

○ ECA will organize debriefing sessions in Washington, DC, at the conclusion of the Institutes. All costs for the debriefing (travel to Washington, lodging, meals) will be the responsibility of the host institution and should be included in the proposal budget.

○ ECA will provide the host institution with biographical information about the participants and their travel itineraries.

Proposal Contents: Applicants should submit a complete and thorough proposal describing the Institute in a convincing and comprehensive manner. Please clearly indicate which Institute the proposal is being submitted for. Since there is no opportunity for applicants to meet with reviewing officials, the proposal should respond to the criteria set forth in the solicitation and other guidelines as clearly as possible.

II. Award Information

Type of Awards: Cooperative Agreements.

Fiscal Year Funds: 2009.

Approximate Total Funding:

Summer Institute for Norwegian Students in the Sciences: $200,000.

Summer Institute for European Student Leaders: $215,000.

Summer Institute for European Student Leaders in Education: $110,000.

Approximate Number of Awards: 3.

Anticipated Award Date: April 1, 2009.

Anticipated Project Completion Date: July 1, 2010.

Additional Information: Pending successful implementation of each program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew the cooperative agreement for the Summer Institute for European Student Leaders and Summer Institute for European Student Leaders in Education for two additional fiscal years, before openly competing them again. **Please note that at this time,** the Summer Institute for Norwegian Students in the Sciences is a one-time opportunity.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements:

(a) Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates awarding three cooperative agreements, all in an amount excessive of $60,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

(b) Accredited, post-secondary educational institutions in the United States may submit proposals to administer one or more of the Institute programs but must submit separate proposals for each Institute.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1 Contact Information To Request an Application Package: Please contact the Office of Academic Exchange Programs, European and Eurasian Programs, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, 202–453–8524 to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/E/EUR 09–05 located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Carolina Chavez, Program Officer, and refer to the Funding Opportunity Number (ECA/A/E/EUR 09–05) located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/grants/open2.html,* or from the Grants.gov Web site at *http://www.grants.gov.*

Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. *''Application Deadline and Methods of Submission'' section below.*

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–

866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget. Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. **Please note:** Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V–A, ''Current Officers, Directors, Trustees, and Key Employees'' of their most recent Internal Revenue Service (IRS) Form 990, ''Return of Organization Exempt From Income Tax.'' If an applicant does not file an IRS Form 990, but instead files Schedule A (Form 990 or 990–EZ)—''Organization Exempt Under Section 501(c)(3),'' applicants must include with their application a copy of Page 1, Part 1, ''Compensation of the Five Highest Paid Employees Other Than Officers, Directors and Trustees,'' of their most recent Internal Revenue Service (IRS) Form—Schedule A (Form 990 or 990–EZ).

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1 Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements. ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203–5029, FAX: (202) 453–8640.

Please refer to Solicitation Package for further information.

IV.3d.2 Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to, ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are ''smart'' (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program outputs and outcomes. Outputs are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. Outcomes, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.

2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. Budget requests may not exceed the amounts stated in Section I. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: February 26, 2009.

Reference Number: ECA/A/E/EUR 09–05.

Methods of Submission: Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (*i.e.*, DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(2) Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to ''ECA/EX/PM''.

The original and 6 copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/A/E/EUR–09–05, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants submitting hard-copy applications must also submit the ''Executive Summary'' and ''Proposal Narrative'' sections of the proposal in a Microsoft Word format on a CD–ROM.

IV.3f.2—Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the ''Find'' portion of the system. Please follow the instructions available in the ''Get Started'' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support,

Contact Center Phone: 800–518–4726,

Business Hours: Monday—Friday, 7a.m.–9p.m. Eastern Time, E-mail: *support@grants.gov.*

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the Grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from Grants.gov upon the successful submission of an application. ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for cooperative

agreements resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of Program Idea/Plan: Your proposal should exhibit originality, substance, precision, and relevance to the Bureau's mission. Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity.

2. Ability to Achieve Overall Program Objectives: Objectives should be reasonable, feasible, and flexible. Your proposal should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Support for Diversity: Your proposal should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of presenters, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings and resource materials).

4. Evaluation and Follow-Up: Your proposal should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. Your proposal should also discuss provisions made for follow-up with returned grantees as a means of establishing longer-term individual and institutional linkages.

5. Cost-effectiveness/Cost-sharing: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Your proposal should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

6. Institutional Track Record/Ability: Your proposal should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants. Proposed personnel and institutional resources should be fully qualified to achieve the project's goals.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2 Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, ''Cost Principles for Nonprofit Organizations.''

Office of Management and Budget Circular A–21, ''Cost Principles for Educational Institutions.''

OMB Circular A–87, ''Cost Principles for State, Local and Indian Governments''.

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants; http://fa.statebuy.state.gov.*

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

(3) A SF–PPR, ''Performance Progress Report'' Cover Sheet with all program reports.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Carolina Chavez, ECA/A/E/EUR, Room 246, ECA/A/E/EUR 09–05, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, 202–453–8524, *ChavezCC@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/E/EUR 09–05.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice: The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Goli Ameri,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–30128 Filed 12–17–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6458]

Policy of Denial Regarding ITAR Regulated Activities of EP Investments, LLC (a/k/a Blackwater)

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of State has imposed a policy of denial with certain exceptions concerning EP Investments, LLC pursuant to section 38 of the Arms Export Control Act (AECA) (22 U.S.C. 2778) and section 126.7 of the International Traffic in Arms Regulations (ITAR). The Department of State is providing this information as a matter of courtesy to interested parties given the specific circumstances presented.

DATES: *Effective Date:* December 2, 2008.

FOR FURTHER INFORMATION CONTACT: David C. Trimble, Director, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2807.

SUPPLEMENTARY INFORMATION: Section 126.7 of the ITAR provides that any application for an export license or other approval under the ITAR may be disapproved, and any license or other approval or exemption granted may be revoked, suspended, or amended without prior notice whenever, among other things, the Department of State believes that 22 U.S.C. 2778, any regulation contained in the ITAR, or the terms of any U.S. Government export authorization (including the terms of a manufacturing license or technical assistance agreement, or export authorization granted pursuant to the Export Administration Act, as amended) has been violated by any party to the export or other person having a significant interest in the transaction; or whenever the Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable.

The Department of State has determined that a policy of denial regarding EP Investments, LLC (a/k/a Blackwater and hereafter referred to as EPI), including its subsidiaries or associated companies, is necessary to provide the U.S. Government with assurance that EPI is both capable and willing to comply with the AECA and ITAR and will do so. The Department recognizes the recent steps taken by EPI to improve its compliance program, for example setting up the Export Compliance Committee (ECC), and has tailored the policy of denial accordingly to leverage these measures by permitting certain exceptions to be made. The policy of denial is as follows:

(1) There is a presumption of denial for all new authorizations submitted by EPI, except concerning applications for licenses and other approvals that are in direct support to the U.S. Government, provided that EPI, or one of its subsidiaries listed in its registration, has a direct contract with the U.S. Government, and:

(a) Along with each application, EPI's Export Compliance Committee (ECC) submits a letter certifying to the accuracy of the information in the submission, and that the training and internal controls necessary to implement the authorization are in place;

(b) For each authorization, the ECC must provide reports to the Office of Defense Trade Controls Compliance (DTCC) thirty (30) and then sixty (60) days after export activities have commenced certifying that all provisions of the approval have been complied with, all training necessary to implement the authorization was done, and that appropriate internal controls are in place.

(2) All other new authorizations, those that are not in direct support of a U.S. Government contract, are subject to a presumption of denial. Transaction exception requests will be considered on a case by case basis as follows:

(a) The request for an exception to the denial policy must address why the request is based on overriding U.S. national security, foreign policy or law enforcement grounds or present other compelling reasons;

(b) Along with the request for an exception, the ECC must submit a letter certifying to the accuracy of the information in the application submission, and that the training and internal controls necessary to implement the authorization are in place; and

(c) If the transaction exception is granted, for each authorization, the ECC must provide reports to DTCC thirty (30) and then sixty (60) days after export activities have commenced certifying that all provisions of the approval have been complied with, all training necessary to implement the authorization was done, and that the appropriate internal controls are in place.

(3) EPI, including all of its subsidiaries, are considered ineligible to use ITAR exemptions. Transaction exception requests to use ITAR exemptions will be accepted and considered on a case by case basis.

(4) Current authorizations, licenses in support of current authorizations and minor amendments to existing authorizations will not be subject to a policy of denial.

Dated: December 11, 2008.

Frank J. Ruggiero,

Acting Assistant Secretary of State for Political Military Affairs, Department of State.

[FR Doc. E8–30127 Filed 12–17–08; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of Draft Advisory Circulars, Other Policy Documents and Proposed Technical Standard Orders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Availability.

SUMMARY: The FAA's Aviation Safety, an organization responsible for the certification, production approval, and continued airworthiness of aircraft, and certification of pilots, mechanics, and others in safety related positions, publishes proposed non-regulatory documents that are available for public comment on the Internet at *http://www.faa.gov/aircraft/draft_docs/*.

DATES: We must receive comments on or before the due date for each document as specified on the Web site.

ADDRESSES: Send comments on proposed documents to the FAA at the address specified on the Web site for the document you comment on, to the attention of the individual and office identified as point of contact for the document.

FOR FURTHER INFORMATION CONTACT: The individual or FAA office identified on the Web site for the specified document.

SUPPLEMENTARY INFORMATION: Final Advisory Circulars (ACs), other policy documents, and Technical Standard Orders (TSOs), including final documents published by the Aircraft Certification Service, are available on FAA's Regulatory and Guidance Library (RGL) at *http://rgl.faa.gov/*.

Comments Invited

You will find draft ACs, other policy documents, and proposed TSOs currently offered by Aviation Safety on FAA ''Aviation Safety Draft Documents Open for Comment'' Web site at *http://www.faa.gov/aircraft/draft_docs/*. We do not publish an individual **Federal**

Register Notice for each document we make available for public comment on the Web site. The FAA invites comments on these draft documents. When commenting on draft ACs, other policy documents or proposed TSOs, you should identify the document by its number. The Aviation Safety organization will consider all comments received on or before the closing date before issuing a final document. For Internet retrieval assistance, contact the AIR Web Content Program Manager at (202) 267–3074.

To obtain a paper copy of the draft document or proposed TSO, contact the individual or FAA office responsible for the document as identified on the Web site.

Background

This is a recurring Notice of Availability, and request for comments, on draft ACs, other policy documents, and proposed TSOs currently offered by Aviation Safety on the Web site at *http://www.faa.gov/aircraft/draft_docs/*. On the Web site, you may subscribe to receive e-mail notification when new draft documents are made available. This notice of availability and request for comments on FAA Aviation Safety draft documents will appear again in 180 days.

Issued in Washington, DC on December 10, 2008.

Jennifer Arquilla,

Manager, Planning and Program Management Division, Aircraft Certification Service.

[FR Doc. E8–30070 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Public Availability of an Environmental Assessment (EA) and Finding of No Significant Impact/ Record of Decision (FONSI/ROD) for Proposed Northeast Cargo Area Improvements at Chicago O'Hare International Airport (ORD) Located in Chicago, IL

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

ACTION: Notice of Availability of an EA and FONSI/ROD for Proposed Northeast Cargo Area Improvements at Chicago O'Hare International Airport.

SUMMARY: The FAA is making available the EA and FONSI/ROD for Proposed Northeast Cargo Area Improvements at Chicago O'Hare International Airport. The EA was prepared in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, FAA Orders 1050.1E, ''Environmental Impacts: Policies and Procedures'' and FAA Order 5050.4B, ''NEPA Implementing Instructions for Airport Actions''. The FONSI/ROD contains FAA's findings that no significant environmental impacts would result from the project and contains all needed approvals for the action to proceed.

Point of Contact: Ms. Amy Hanson, Environmental Protection Specialist, CHI–603, Federal Aviation Administration, Chicago Airport District Office, 2300 East Devon Avenue, Des Plaines, IL 60018. Telephone number: 847–294–7354.

SUPPLEMENTARY INFORMATION: The FAA is making an EA and FONSI/ROD for the evaluation of environmental impacts associated with the proposed Northeast Cargo Area Improvements for the Chicago O'Hare International Airport (the Airport), located in Chicago, Illinois. The proposed project consists of developing a consolidated cargo complex that groups multiple cargo warehouses around a shared apron with airfield access, parking/truck docks, and landside access over approximately 122 acres in the Northeast Quadrant/former military area of the existing airfield. The project is proposed to be completed in three phases (Phases 1, 2, and 3). The Proposed Action would consolidate the proposed collateral development parcels identified on the Approved ALP in the Northeast Quadrant and maintain the current alignment of Bessie Coleman Drive (different from the approved ALP) to provide a contiguous area for cargo facility development. The proposed project would not cause significant impacts to any of the environmental resources evaluated in the EA and the FONSI/ROD contains all needed approvals for the action to proceed. Further information is available from the point of contact listed above. These documents will be available for public review during normal business hours at the Chicago Airport District Office, 2300 East Devon Avenue, Des Plaines, IL 60018. Please call the point of contact prior to visiting this office.

Issued in Des Plaines, Illinois, November 26, 2008.

James G. Keefer,

Manager, Chicago Airport District Office, FAA, Great Lakes Region.

[FR Doc. E8–29828 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at Ellington Field, Houston, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invites public comment on the release of land at the Ellington Field under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before January 20, 2009.

ADDRESSES: Comments on this application may be mailed or delivered to the following address: Mr. Mike Nicely, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW–650, Fort Worth, Texas 76193–0650.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Richard Vacar, Director of Aviation, at the following address: City of Houston, Department of Aviation, 16930 JFK Blvd., Houston, Texas 77032.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Guttery, Senior Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–650, 2601 Meacham Boulevard, Fort Worth, Texas 76193–0650, Telephone: (817) 222–5614, E-mail: *ben.guttery@faa.gov*, Fax: (817) 222–5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at Ellington Field under the provisions of the AIR 21.

On December 9, 2008, the FAA determined that the request to release property at Ellington Field, submitted by the City, met the procedural requirements of the Federal Aviation Regulations, Part 155.

The following is a brief overview of the request: The City of Houston requests the release of 12.00 acres of non-aeronautical use airport property. The land was part of two General Services Administration deeds of property and a sale to the City in 1984. The funds generated by the release will be used for upgrading, maintenance,

operation and development of the airport.

Any person may inspect the request in person at the FAA Office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at Ellington Field in Houston, Texas, telephone number 713–847–4200.

Issued in Fort Worth, Texas on December 9, 2008.

Kelvin L. Solco,

Manager, Airports Division.

[FR Doc. E8–30006 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Third Meeting—RTCA Special Committee 217/EUROCAE WG 44—Airport Mapping Databases

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 217 meeting: Airport Mapping Databases.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 217 meeting: Airport Mapping Databases

DATES: The meeting will be held on January 26–30, 2009, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Honeywell, 21111 N. 19th Avenue, Phoenix, AZ 85036–1111, Contact: Allan Hart, Telephone: Office: 602–436–1098, Cell: 602–317–5414, Fax: 602–822–7333.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036–5133; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 217 meeting. The agenda will include:

26 January

- Opening Plenary (Chairmen's remarks and introductions)
- Review and approve meeting agenda
- Review and approval of meeting minutes of previous meeting
- Discussion
- Schedule for this week
- Schedule for next meetings
- Action Items
- Presentations
- Final Review and Comments (FRAC) process

27 January

- Final Review and Comments (FRAC) process

28 January

- Final Review and Comments (FRAC) process
- Begin work on revisions to DO–272, DO–276 and DO–291
- Review new Terms of Reference for application to new work
- Determine need for subgroups
- Presentations as appropriate

29 January

- Work on revisions to DO–272, DO–276, and DO–291

30 January

- Work on revisions to DO–272, DO–276, and DO–291
- Plenary Session
- Summarize action items
- Determine and agree on action plan
- Closing Plenary (Meeting Plans and Dates, Other Business)

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 11, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–30034 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

1st Meeting—Special Committee 222—Inmarsat Aeronautical Mobile Satellite (Route) Services

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 222 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 222: Inmarsat Aeronautical Mobile Satellite (Route) Services.

DATES: The meeting will be held January 15–16, 2009 from: 1 p.m. to 5:30 p.m. January 15 and 8 a.m. to Noon on January 16.

ADDRESSES: The meeting will be held at Cocoa Beach Hilton, Cocoa Beach, FL. (This meeting is held in conjunction with the AEEC Air-Ground Communications Subcommittee meeting.) For hotel information and driving directions see *http://www.aviation-ia.com/events/AirGroundAnnounce.pdf*

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW, Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 222, Inmarsat Aeronautical Mobile Satellite (Route) Services. The agenda will include:

January 15

- Opening Plenary Session (Greetings and Introductions).
- RTCA specific information: Presented by Dr. LaBerge.
- Overview of activity background.
- Background on ICAO/RTCA NGSS process.
- Background on MSV Auxiliary Terrestrial Component (ATCt) technology.
- Background on DO–210D issues.
- Review of Authorizing Document (Terms of Reference) as approved by Program Management Committee on October 2, 2008.
- Discussion of and action on committee planning items in Terms of Reference (TOR).
- Discussion of technical items as developed in Agenda Item 4.
- Technical approach to ATCt assessment: basic methodology, structure, effect on and input to RTCA documents.
- Technical approach to Swift Broadband AMS(R)S: basic methodology, structure, documents to be prepared, etc.

Discussions continued on Friday, as necessary.

January 16

- SC–222 work task organization and working groups, if necessary
- Discussion of proprietary issues, if any. RTCA, Inc. has specific policies regarding the inclusion of proprietary technology in an RTCA Standard document. This discussion will provide a preliminary look at whether the

proprietary policies of RTCA will be relevant to the SC–222 deliberations.

• Discussion of meeting summary, if necessary

• Schedule next meeting, adjourn (No later than January 16, Noon)

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC on December 11, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–30033 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Membership Availability in the National Parks Overflights Advisory Group Aviation Rulemaking Committee—Representative of Native American Tribes

ACTION: Notice.

SUMMARY: The National Park Service (NPS) and the Federal Aviation Administration (FAA), as required by the National Parks Air Tour Management Act of 2000, established the National Parks Overflights Advisory Group (NPOAG) in March 2001. The NPOAG was formed to provide continuing advice and counsel with respect to commercial air tour operations over and near national parks and adjacent tribal lands. This notice informs the public of a vacancy (due to completion of membership on April 2, 2009) on the NPOAG (now the NPOAG Aviation Rulemaking Committee (ARC) for a representative of Native American tribal concerns and invites interested persons to apply to fill the vacancy. A previous notice was published in the **Federal Register** on October 16, 2008. but did not draw adequate response from any interested individuals. This notice is being re-published to identify qualified candidates to fill the position.

DATES: Persons interested in serving on the NPOAG ARC should contact Mr. Barry Brayer in writing and postmarked or e-mailed on or before February 10, 2009.

FOR FURTHER INFORMATION CONTACT: Barry Brayer, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los Angeles, CA 90009–2007, telephone: (310) 725–3800, e-mail: *Barry.Brayer@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106–181. The Act required the establishment of the advisory group within 1 year after its enactment. The advisory group was established in March 2001, and is comprised of a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

The advisory group provides ''advice, information, and recommendations to the Administrator and the Director—

(1) On the implementation of this title [the Act] and the amendments made by this title;

(2) On commonly accepted quiet aircraft technology for use in commercial air tour operations over a national park or tribal lands, which will receive preferential treatment in a given air tour management plan;

(3) On other measures that might be taken to accommodate the interests of visitors to national parks; and

(4) At the request of the Administrator and the Director, safety, environmental, and other issues related to commercial air tour operations over a national park or tribal lands.''

Members of the advisory group may be allowed certain travel expenses as authorized by section 5703 of Title 5, United States Code, for intermittent Government service.

By FAA Order No. 1110–138, signed by the FAA Administrator on October 10, 2003, the NPOAG became an Aviation Rulemaking Committee (ARC). FAA Order No. 1110–138, was amended and became effective as FAA Order No. 1110–1 38A, on January 20, 2006.

The current NPOAG ARC is made up of one member representing general aviation, three members representing the air tour industry, four members representing environmental concerns, and two members representing Native American interests. Current members of the NPOAG ARC are: Randy Kenagy, Aircraft Owners and Pilots Association; Alan Stephen, fixedwinged air tour operator representative; Elling Halvorson, Papillon Airways, Inc.; Matthew Zuccaro, Helicopters Association International; Chip Dennerlein, Siskiyou Project; Gregory Miller, American Hiking Society; Kristen Brengel, The Wilderness Society; Don Barger, National Parks Conservation Association; Rory Majenty, Hualapai Nation; and Richard Deertrack, Taos Pueblo.

Public Participation in the NPOAG ARC

In order to retain balance within the NPOAG ARC, the FAA and NPS invite persons interested in serving on the ARC to represent Native American tribes, to contact Mr. Barry Brayer (contact information is written above in **FOR FURTHER INFORMATION CONTACT**).

Requests to serve on the ARC must be made to Mr. Brayer in writing and postmarked or e mailed on or before February 10, 2009. The request should indicate whether or not you are a member of an association or group related to Native American tribal issues or concerns or have another affiliation with issues relating to air tour flights over national parks and adjacent tribal lands The request should also state what expertise you would bring to the NPOAG ARC as related to tribal concerns. The term of service for NPOAG ARC members is 3 years.

Issued in Hawthorne, CA on December 8, 2008.

Barry Brayer,

NPOAG Chairman, Manager, Special Programs Staff, Western-Pacific Region.

[FR Doc. E8–30005 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2008–0176]

Agency Information Collection Activities: Notice of Request for Renewal of Two Previously Approved Information Collections

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval to renew two information collections, which are summarized below under **SUPPLEMENTARY INFORMATION**. We

published a **Federal Register** Notice with a 60-day public comment period on this information collection on October 30, 2008. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 20, 2009.

ADDRESSES: You may submit comments identified by Docket ID Number FHWA–2008–0176 by any of the following methods:

Web Site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title 1: A Guide to Reporting Highway Statistics.

OMB Control Number: 2125–0032.

Abstract: A Guide to Reporting Highway Statistics provides for the collection of information by describing policies and procedures for assembling highway related data from the existing files of State agencies. The data includes motor-vehicle registration and fees, motor-fuel use and taxation, driver licensing, and highway taxation and finance. Federal, State, and local governments use the data for transportation policy discussions and decisions. Motor-fuel data are used in attributing receipts to the Highway Trust Fund and subsequently in the apportionment formula that are used to distribute Federal-Aid Highway Funds. The data are published annually in the FHWA's Highway Statistics. Information from Highway Statistics is used in the joint FHWA and Federal Transit Administration required biennial report to Congress, Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance, which contrasts present status to future investment needs.

Respondents: State and local governments of the 50 States, the District of Columbia and the Commonwealth of Puerto Rico.

Estimated Average Burden per Response: The estimated average reporting burden per response for the annual collection and processing of the data is 825 hours for each of the States (including local governments), the District of Columbia and the Commonwealth of Puerto Rico.

Estimated Total Annual Burden: The estimated total annual burden for all respondents is 42,900 hours.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph Erickson, (202) 366–9235, Department of Transportation, Federal Highway Administration, Office of Policy, Office of Highway Policy Information, Highway Funding and Motor Fuels Division (HPPI–10), 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

Title 2: Highway Performance Monitoring System (HPMS).

OMB Control Number: 2125–0028.

Abstract: The HPMS data that is collected is used for management decisions that affect transportation, including estimates of the Nation's future highway needs and assessments of highway system performance. The information is used by the FHWA to develop and implement legislation and by State and Federal transportation officials to adequately plan, design, and administer effective, safe, and efficient transportation systems. This data is essential to the FHWA and Congress in evaluating the effectiveness of the Federal-aid highway program. The HPMS also provides miles, lane-miles and travel components of the Federal-Aid Highway Fund apportionment formulae. The data that is required by the HPMS is continually reassessed and streamlined by the FHWA.

Respondents: State governments of the 50 States, the District of Columbia and the Commonwealth of Puerto Rico.

Estimated Average Burden per Response: The estimated average burden per response for the annual collection and processing of the HPMS data is 1,440 hours for each State, the District of Columbia and the Commonwealth of Puerto Rico.

Estimated Total Annual Burden: The estimated total annual burden for all respondents is 74,880 hours.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rozycki, (202) 366–5059, Department of Transportation, Federal Highway Administration, Highway Systems Performance (HPPI–20), Office of Highway Policy Information, Office of Policy & Governmental Affairs, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:30 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

Public Comments Invited

You are asked to comment on any aspect of these information collections, including: (1) Whether the proposed collections are necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burdens could be minimized, including use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of these information collections.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Ch. 35, as amended; and 49 CFR 1.48.

Issued on: December 12, 2008.

Tina Campbell,

Acting Chief, Management Programs and Analysis Division.

[FR Doc. E8–30048 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on State Highway 99 (Segment F–1) 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 F–1, from United States Highway 290 (U.S. 290) to State Highway 249 (S.H. 249) 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 June 16, 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., Texas Department of Transportation, Environmental Affairs Division, 118 E. Riverside Drive, Austin, Texas 78704; telephone: (512) 416–2734; e-mail: *dnoble@dot.state.tx.us.* The Texas Department of Transportation's 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 F–1 from U.S. 290 to S.H. 249 in Harris County; FHWA Project Reference Number: FHWA–TX–EIS–03–01–F. The project will be a 19.3 km (12.0 mi) long, four-lane controlled access toll road with intermittent frontage roads, grade-separated intersections with exit and entrance ramps at four intersecting roadways, and elevated directional interchanges at State Highway 99 and U.S. 290 and State Highway 99 and U.S. 249. It will begin in northwestern Harris County at U.S. 290. It will then proceed north then west through Harris County and end at U.S. 249. 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 April 18, 2008, in the FHWA Record of Decision (ROD) issued on November 20, 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/f-1/.*

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)–(11)]; 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: December 12, 2008.

Gregory S. Punske,

District Engineer, Austin.

[FR Doc. E8–30040 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0189]

Notice of Cancelation of Public Meeting; BMW Mini Cooper S Vehicles; Exhaust Pipe Tips

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of cancelation of public meeting.

SUMMARY: This notice announces a cancelation of NHTSA's December 17, 2008, public meeting regarding its Initial Decision that model year (MY) 2007 and certain MY 2008 BMW Mini Cooper S vehicles (subject vehicles) contain a defect related to motor vehicle safety in the vehicle's exhaust pipe tips.

FOR FURTHER INFORMATION CONTACT: AnnaLisa Nash, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–5263.

SUPPLEMENTARY INFORMATION: NHTSA's public meeting regarding its Initial Decision that model year (MY) 2007 and certain MY 2008 BMW Mini Cooper S vehicles (subject vehicles) contain a defect related to motor vehicle safety in the vehicle's exhaust pipe tips, previously scheduled for Wednesday, December 17, 2008,[1] is now canceled. The matter is moot. On December 12, 2008, BMW of North America, LLC (BMW) submitted a Defect and Noncompliance Information Report to NHTSA under 49 CFR 573.6. BMW has thus initiated a safety recall on the subject vehicles within the meaning of the 49 U.S.C. 30118–30120 and 49 CFR Part 573.

Authority: 49 U.S.C. 30118(a), (b); delegations of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: December 12, 2008.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E8–29957 Filed 12–12–08; 4:15 pm]

BILLING CODE 4910–59–P

[1] The agency published notice of the meeting on Friday, December 5, 2008 (Initial Decision That Certain BMW Mini Cooper S Vehicles Contain a Safety-Related Defect Regarding the Exhaust Pipe Tips; and Scheduling of a Public Meeting, 73 FR 235 (noticed Dec. 5, 2008)).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0184; Notice 1]

Goodyear Tire and Rubber Company, Receipt of Petition for Decision of Inconsequential Noncompliance

Goodyear Tire and Rubber Company (Goodyear), has determined that certain passenger car tires manufactured from June 2, 2008 through July 10, 2008 did not fully comply with paragraphs S5.5(e) and S5.5(f) of Federal Motor Vehicle Safety Standards (FMVSS) No. 139 *New Pneumatic Radial Tires for Light Vehicles.* Goodyear has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Goodyear has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Goodyear's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 112 size P265/60R18 109S Dunlop Rover AT passenger car tires manufactured from June 2, 2008 through July 10, 2008.

Paragraphs S5.5(e) and S5.5(f) of FMVSS No. 139 require in pertinent part:

S5.5 Tire markings. Except as specified in paragraphs (a) through (i) of S5.5, each tire must be marked on each sidewall with the information specified in S5.5(a) through (d) and on one sidewall with the information specified in S5.5(e) through (i) according to the phase-in schedule specified in S7 of this standard. The markings must be placed between the maximum section width and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area that is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, those markings must appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings must be in letters and numerals not less than 0.078 inches high and raised above or sunk below the tire surface not less than 0.015 inches * * *

(e) The generic name of each cord material used in the plies (both sidewall and tread area) of the tire;

(f) The actual number of plies in the sidewall, and the actual number of plies in the tread area, if different * * *

Goodyear explains that the noncompliance is that, due to a mold labeling error, the sidewall marking incorrectly describes the plies in the tread area of the tires.

Specifically, the tires in question were inadvertently manufactured with ''Tread 2 Polyester + 2 Steel + 1 Nylon'' marked on the sidewall. The labeling should have been ''Tread 2 Polyester + 2 Steel.''

Goodyear makes the argument that this noncompliance is inconsequential to motor vehicle safety because the noncompliant sidewall marking does not affect the safety of the tire and that the tires were built as designed and all other sidewall identification markings and safety information is correct.

Goodyear points out that NHTSA has previously granted petitions for sidewall marking noncompliances that it believes are similar to the instant noncompliance.

Goodyear also stated that it has corrected the problem that caused these errors so that they will not be repeated in future production.

In summation, Goodyear states that it believes that because the noncompliances are inconsequential to motor vehicle safety that no corrective action is warranted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to vehicles and equipment that have already passed from the manufacturer to an owner, purchaser, or dealer.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 20, 2009.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: December 10, 2008.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E8–30018 Filed 12–17–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Modification of Special Permit.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Request of modifications of special permits (e.g., to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before January 2, 2009.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590. Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://dms.dot.gov*.

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 11, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
11526–M		Linde North America, Inc., Murray Hill, NJ.	49 CFR 172.302(c), (2), (3), (4), (5); 173.34(e)(1), (3), (4), (8); 173.34(15)(vi).	To modify the special permit to permit to authorize UE examination of certain cylinders manufactured under other specified special permits.
12399–M		Linde North America, Inc., Murray Hill, NJ.	49 CFR 73.34(e)(1); 173.34(e)(3); 173.34(e)(4); 173.34(e)(8); 173.34(e)(14); 173.34(e)(15)(vi).	To modify the special permit to authorize removal of a test procedure for cylinders no longer in use by the applicant.
12930–M		Roeder Cartage Company, Inc., Lima, OH.	49 CFR 180.407(c), (e) and (f).	To modify the special permit to add an additional cargo tank.
14283–M		U.S. Department of Energy (DOE), Washington, DC.	49 CFR Part 172, Subparts E, F; 171.15; 171.16; 172.202; 172.203(c)(1)(i); 172.203(d)(1); 172.310; 172.316(a)(7); 172.331(b)(2); 172.332; 173.403(c); 173.425(c)(1)(iii); 173.425(c)(5); 173.443(a); 174.24; 174.25; 174.45; 174.59; 174.700; 174.715; 177.807; 177.843(a).	To modify the special permit to clarify the use of flat rail cars with capacity of four intermodal containers and maximum capacity of 160 tons.
14429–M		Schering-Plough, Summit, NJ.	49 CFR 173.306(a)(3)(v)	To modify the special permit to authorize an alternative testing method for bag-on-valve spray packaging similar to an aerosol container.
14437–M		Columbiana Boiler Company (CBCo) LLC, Columbiana, OH.	49 CFR 179.300	To modify the special permit to remove the requirement to report all repairs made to pressure vessels.
14544–M		DS Containers, Inc., Batavia, IL.	49 CFR 173.306(a)(3)(v)	To modify the special permit to authorize cargo aircraft as an approved mode of transportation.
14562–M		The Lite Cylinder Company, Franklin, TN.	49 CFR 173.304a(a)(1)	To modify the special permit to authorize larger cylinders.
14661–M		FIBA Technologies, Inc., Millbury, MA.	49 CFR 180.209(a); 180.209(b).	To modify the special permit to authorize smaller cylinders to be UE tested under this special permit.
14700–M		Fleck Controls, LLC, Chardon, OH.	49 CFR 173.302(a) and 173.306(g).	To modify the special permit to authorize an increase to the tank's maximum operating pressure from 100 psig to 125 psig.

MODIFICATION SPECIAL PERMITS—Continued

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
14772–M	.....	Alpha-Omega Services, Inc., Bellflower, CA.	49 CFR 173.413	To reissue the special permit originally issued on an emergency basis to authorize use of Type B packages for transportation in commerce of radioactive materials.

[FR Doc. E8–29827 Filed 12–17–08; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Saul Ewing on behalf of Trinity Industries, Inc. (WB605–4—9/10/08) for permission to use certain data from the Board's Carload Waybill Samples. A copy of the requests may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Scott Decker, (202) 245–0330.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–30007 Filed 12–17–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Mayer Brown LLP on behalf of The Burlington Northern and Santa Fe Railway Company (BNSF) (WB461–15—10/6/2008) for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

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[FR Doc. E8–30011 Filed 12–17–08; 8:45 am]

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Federal Register

Thursday,
December 18, 2008

Part II

Department of Labor

Employment and Training Administration
20 CFR Part 655
Wage and Hour Division
29 CFR Parts 501, 780, and 788

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Parts 501, 780, and 788

RIN 1205–AB55

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement

AGENCY: Employment and Training Administration, and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or Department) is amending its regulations regarding the certification for the temporary employment of nonimmigrant workers in agricultural occupations on a temporary or seasonal basis, and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.

This final rule re-engineers the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2A (agricultural temporary worker) status. The final rule utilizes an attestation-based application process based on pre-filing recruitment and eliminates duplicative H–2A activities currently performed by State Workforce Agencies (SWAs) and the Department. The rule also provides enhanced enforcement, including more rigorous penalties, to complement the modernized certification process and to appropriately protect workers.

DATES: This final rule is effective January 17, 2009.

FOR FURTHER INFORMATION CONTACT: For further information about 20 CFR part 655, subpart B, contact William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For further information regarding 29 CFR part 501, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

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I. Background Leading to the NPRM

A. Statutory Standard and Current Department of Labor Regulations

The H–2A visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) (8 U.S.C. 1101(a)(15)(H)(ii)(a)) defines an H–2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) mandates that the Secretary of DHS consult with the Secretary of the Department of Labor (the Secretary) with respect to adjudication H–2A petitions, and, by cross-referencing Section 218 of the INA (8 U.S.C. 1188), with determining the availability of U.S. workers and the effect on wages and working conditions. Section 218 also sets forth further details of the H–2A application process and the requirements to be met by the agricultural employer.

Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the INA (Pub. L. 82–144), of the ''H–2 program''—a reference to the INA subparagraph that established the program. Today, the H–2A nonimmigrant visa program authorizes the Secretary of DHS to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if the need for foreign labor is first certified by the Secretary.

Section 218(a)(1) of the INA (8 U.S.C. 1188(a)(1)) states that a petition to import H–2A workers may not be approved by the Secretary of Homeland Security unless the petitioner has applied to the Secretary for a certification that:

(a) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(b) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The INA specifies conditions under which the Secretary must deny certification, and establishes specific timeframes within which employers must file—and the Department must process and either reject or certify—applications for H–2A labor certification. In addition, the statute contains certain worker protections, including the provision of workers' compensation insurance and housing as well as minimum recruitment standards to which H–2A employers must adhere. *See* 8 U.S.C. 1188(b) and (c). The INA does not limit the number of foreign workers who may be accorded H–2A status each year or the number of labor certification applications the Department may process.

The Department has regulations at 20 CFR part 655, subpart B—''Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H–2A Workers),'' governing the H–2A labor certification process, and at 29 CFR part 501 implementing its enforcement responsibilities under the H–2A program. Regulations relating to employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR 1910.142 (standards set by the Occupational Safety and Health Administration); *see* also 20 CFR 651.10, and part 653, subparts B and F.

The Department was charged with reviewing the efficiency and effectiveness of its H–2A procedures in light of the increasing presence of undocumented workers in agricultural occupations and because of growing concern about the stability of the agricultural industry given its difficulty in gaining access to a legal workforce.[1] The Department reviewed its administration of the program and, in light of its extensive experience in both the processing of applications and the enforcement of worker protections, proposed measures to re-engineer the H–2A program in a Notice of Proposed Rulemaking on February 13, 2008 (73 FR 8538) (NPRM or Proposed Rule).

B. Overview of the Proposed Redesign of the System

The NPRM described a pre-filing recruitment and attestation process as part of a re-engineered H–2A program. The Department proposed a process by which employers, as part of their application, would attest under threat of penalties, including debarment from the program, that they have complied with and will continue to comply with all applicable program requirements. In addition, employers would not be required to file extensive documentation with their applications but would be required to maintain all supporting documentation for their application for a period of 5 years in order to facilitate the Department's enforcement of program requirements. The Department's proposal also contained new and enhanced penalties and procedures for invoking those penalties against employers as well as their attorneys or agents who fail to perform obligations imposed under the H–2A program. The program also eliminates duplicative administration and processing by the State Workforce Agencies (SWAs) and the Department by requiring filing of the application only with the Department's National Processing Center (NPC) in Chicago, Illinois. This program would also enable the SWAs to better perform their mandated functions in processing H–2A agricultural clearance orders, by enhancing their ability to conduct housing inspections well in advance of the employer's application date. The SWAs would also continue to clear and post intrastate job orders, circulate them through the Employment Service interstate clearance system and refer potential U.S. workers to employers.

Finally, the Department proposed additional processes for penalizing employers or their attorneys or agents who fail to perform obligations required under the H–2A program, including provisions for debarring employers, agents, and attorneys and revoking approved labor certifications.

C. Severability

The Department declares that, to the extent that any portion of this Final Rule is declared to be invalid by a court, it intends for all other parts of the Final Rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this Final Rule resulted in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of the Final Rule would continue to operate, if at all possible, in tandem with the reverted provisions.

II. Discussion of Comments on Proposed Rule

The Department received over 11,000 comments in response to the proposed rule, the vast majority of them form letters or e-mails repeating the same contentions. Commenters included individual farmers and associations of farmers, agricultural associations, law firms, farmworker advocates, community-based organizations, and individual members of the public. The Department has reviewed these comments and taken them into consideration in drafting this Final Rule.

We do not discuss here those provisions of the NPRM on which we received no comments. Those provisions were adopted as proposed. We have also made some editorial changes to the text of the proposed regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations.

A. Revisions to 20 CFR Part 655 Subpart B

Section 655.93 Special Procedures

The Department proposed to revise the current regulation on special procedures to clarify its authority to establish procedures that vary from those procedures outlined in the regulations. We received numerous comments about this revised language on special procedures.

[1] Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007); see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. (August 13, 2007).

Several commenters questioned the effect the proposed language would have on special procedures currently in use. Section 655.93(b) of the current regulations provides for special procedures, stating that: ''the Director has the authority to establish special procedures for processing H–2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary.'' The proposed rule provides that ''the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary.''

Four associations of growers/producers specifically requested clarification of the phrase ''in the form of variances.'' These associations asked the Department to confirm that the proposed language does not pose a threat to the continued use of the special procedures for sheepherders currently in place. One association expressed concern that this revised language would require hundreds of employers engaged in the range production of livestock to annually document their need for special procedures.

The addition of the phrase ''in the form of variances'' is intended to clarify that special procedures differ from those processes set out in the regulation, which otherwise apply to employers seeking to hire H–2A workers. The special procedures for sheepherders, for example, arise from decades of past practices and draw upon the unique nature of the activity that cannot be completely addressed in the generally applicable regulations. The establishment of special procedures recognizes the peculiarities of an industry or activity, and provides a means to comply with the underlying program requirements through an altered process that adequately addresses the unique nature of the industry or activity while meeting the statutory and regulatory requirements of the program. The special procedures do not enable industries and employers to evade their statutory or regulatory responsibilities but rather establish a feasible and tailored means of meeting them while recognizing the unique circumstances of that industry. The language in § 655.93(b) affirms the Department's authority to develop and/or revise special procedures. The Department does not intend to require any industry currently using special procedures to seek ratification of their current practice, nor does the Department intend to require annual or periodic justifications of an industry's need for special procedures. The Department does reserve the right to make appropriate changes to those procedures after consultation with the industry involved.

Section 655.93(b) in the NPRM enables the Administrator/OFLC ''to establish or revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary.'' In contrast, the current rule states that the subpart permits the Administrator/OFLC to ''continue and * * * revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.''

The Department received several comments about the proposed language, universally expressing concern that the new language provides the Department with broader authority for changing or revoking existing special procedures without providing due process with respect to altering the procedures. An association of growers/producers stated that the proposed rule uses ''more ominous terms'' and gives the impression that the Administrator/OFLC has unilateral authority to make changes without safeguards, review, or democratic procedures. One association of growers and producers expressed the view that the revocation language gives the Department authority to revoke the procedures without advance notice and opportunity for comment and is, therefore, a violation of the Administrative Procedure Act.

A law firm that provides counsel to agricultural employers stated that the new language does not adequately solidify the Department's commitment to existing special procedures and recommended that the Department amend the regulation to affirm its commitment to continuing such long-standing special procedures by providing that any proposed changes to the existing special procedures and policies can be made only after publication in the **Federal Register** with at least a 120-day period for public comment. The firm also commented that the proposal to empower the Administrator/OFLC to revoke special procedures would violate Section 218(c)(4) of the INA, which requires the Secretary of Labor to issue regulations addressing the specific requirements of housing for employees principally engaged in the range production of livestock.

The Department has decided, following consideration of these concerns, to retain the NPRM language in the final regulation, but has added language similar to that in the current regulation, to enumerate those special procedures currently in effect as examples of the use of special procedures. It is our belief that this provision, as it now reads, provides both the Department and employers using the H–2A program essential flexibility regarding special procedures, thus permitting the Department to be far more responsive to employers' changing needs, crop mechanization, and similar concerns. In addition, the language on special procedures in the Final Rule reaffirms the Department's continuing commitment to use special procedures where appropriate. The Department has no present intent to revoke any of the special procedures that are already in place, nor does the language of the final regulation give the Department any new power to do so. While it is possible that at some time in the future the Department may need to revoke or revise existing special procedures, that step would be taken with the same level of deliberation and consultation that was employed in the creation of those procedures. To strengthen our commitment to continue the current consultative process, we have changed the word ''may'' in the last sentence of paragraph (b) to ''will.'' The provision also provides the Department with the authority to develop new procedures to meet employer needs and, additionally, provides employers with the opportunity to request that the Department consider additional procedures or revisions to existing special procedures. Proposed paragraph (c) has been deleted as unnecessarily duplicative of the language in paragraph (b).

Two associations of growers and producers requested that the Department formulate special procedures for dairy workers, stating that these requested special procedures should not be different from those already established for sheepherders. The associations stated the provisions for sheepherders have ''special relevance to the current dairy situation'' and also stated the ''special procedures relieve the sheepherding industry from having to make a showing of temporary or seasonal employment.'' The longstanding special procedures that allow sheepherders to participate in the

H–2A program have their origins in prior statutory provisions dating back to the 1950s. The Department is unaware of any comparable statutory history pertaining to the dairy industry. The Department would, of course, consider a specific request from dairy producers or their representatives for the development of special procedures that would be applicable to eligible H–2A occupations (*see* further discussion on this point in the discussion of the definition of ''agricultural labor or services'' below). The Department does not believe, however, that it would be appropriate to speculatively address the merits of a specific special procedures request in this regulation, particularly before a request making a detailed case for the appropriateness of such special procedures has been received.

An individual employer commented that those involved in discussing and considering changes to the H–2A program should preserve the special procedures for sheepherders and extend them to all occupations engaged in the range production of other livestock (cattle and horses). A private citizen provided suggestions for improving the handling of certification for sheep shearers.

The Department has previously established special procedures for open range production of livestock and sheep shearers and does not have any plans to change those procedures at this time and does not believe that it would be appropriate to address in this regulation the merits of the commenters' general suggestions for revising these special procedures. The Department would, of course, be willing to consider a specific request from livestock producers or their representatives for the revision or expansion of special procedures consistent with its authority and this regulation.

Section 655.100—Overview and definitions

(a) Overview

The Department included a provision in the NPRM, similar to a provision in the current regulation, which provides an overview of the H–2A program. This overview provides the reader, especially readers unfamiliar with the program, a general description of program obligations, requirements, and processes.

Only two commenters identified concerns with the overview as written. Both expressed concern with the proposed earlier time period for the recruitment of U.S. workers. They questioned whether U.S. workers who agreed to work on a date far in advance would then be available to work for the entire contract period. The overview, however, simply describes in broad-brush fashion the regulatory provisions that are discussed in detail later in the NPRM, and in and of itself has no legal effect. The concerns and observations expressed by commenters will be addressed in the context of the relevant regulatory provision to which they apply rather than in the overview. The overview has also been edited for general clarity and to reflect changes made throughout the regulatory text.

(b) Transition

The Department, due to past program experience, has decided to add a transition period in order to provide an orderly and seamless transition to the new system created by these regulatory revisions. This will allow the Department to make necessary changes to program operations, provide training to the NPC, SWAs and stakeholder groups, and allow employers and their agents/representatives to become familiar with the new system. Employers with a date of need for workers on or after July 1, 2009 will be obligated to follow all of the new procedures established by these regulations. Prior to that time, the Department has created a hybrid system involving elements of the old and the new regulations as delineated in the new § 655.100(b).

Even though the NPRM put current and future users of H–2A workers on some notice regarding what this Final Rule will require, the rule as a whole implements several significant changes to the administration of the program. Several commenters requested that the Department allow employers some period of time to prepare and adjust their requests for temporary agricultural workers. These regulations implement new application forms, new processes, and new time periods for conducting recruitment for domestic workers to which current and new users of the program will need to become accustomed.

The Department is accordingly adopting a transition period after the effective date of this Final Rule. The transition period establishes procedures that will apply to any application for which the first date of need for H–2A workers is no earlier than the effective date of this rule and no later than June 30, 2009.

During this transition period, the Department will accept applications in the following manner: An employer will complete and submit Form ETA–9142, *Application for Temporary Employment Certification*, in accordance with § 655.107, no less than 45 days prior to their date of need. The employer will simultaneously submit Form ETA–790 *Agricultural and Food Processing Clearance Order* (job order), with the *Application for Temporary Employment Certification* (application) directly to the Chicago NPC. Activities that are required to be conducted prior to filing an application under the Final Rule will be conducted post-filing during this transition period, much as they are under the current rule. The employer will also be expected to make attestations in its application applicable to its future recruitment activities, payment of the offered wage rate, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission to the NPC prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period.

The employer will not separately request a wage determination from the Chicago NPC. Upon receipt of Forms ETA–9142 and ETA–790, the Chicago NPC will provide the employer with the minimum applicable wage rate to be offered by the employer, and will process the application and job order in a manner consistent with § 655.107, issuing a modification for any curable deficiencies within 7 calendar days. Once the application and job order have been accepted, the Chicago NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment in a manner consistent with § 655.102. The NPC will designate labor supply States during this transition period on a case-by-case basis, applying the basic information standard for such designations that is set forth in § 655.102(i).

This transition period process will apply only to applications filed on or after the effective date of this regulation with dates of need no earlier than the effective date and no later than June 30, 2009. Employers with a date of need on or after July 1, 2009 will be expected to fully comply with all of the requirements of the Final Rule. Moreover, after the Final Rule's effective date, the requirements of the Final Rule will fully apply except for those modifications that are expressly mentioned as transition period procedures in § 655.100(b); all other

provisions of the Final Rule will apply on the effective date of the Final Rule.

These transition period procedures are designed to ensure that employers seeking to utilize the program immediately after its effective date, especially those with needs early in the planting season, will not be prejudiced by the new pre-filing requirements regarding wage determinations and recruitment, which might otherwise substantially impact employers' application timing. Because the Department's seasonal H–2A workload begins to peak in January of each year, however, the Department deems it essential to the smooth and continuous operation of the H–2A program throughout calendar year 2009 to make the rule effective as early in the year as possible.

(c) Definitions 655.100

Definition of ''agent,'' ''attorney,'' and ''representative''

The Department did not propose any changes to the definition of ''agent'' from existing regulations but added definitions for ''attorney'' and ''representative'' in the proposed rule. A major trade association commented that the definitions of, and references to, the terms ''agent,'' ''attorney'' and ''representative'' are confusing. The association found the definitions of agent and representative to be duplicative and the distinctions between these two terms, both of which encompass the authority to act on behalf of an employer, unclear. The association also commented that the definition of ''attorney'' is self-evident and appears to be a vehicle for permitting attorneys to act as ''agents'' or ''representatives.'' Further, according to the commenter, the term ''representative'' is also problematic and the Department should consider revising it or eliminating it entirely. The association believes the main purpose of the definition is to deem the person who makes the attestations on behalf of the employer a ''representative,'' but the association believes it is not clear whether the intent of the definition of ''representative'' is to also make the representative liable for any misrepresentations made in an attestation on behalf of an employer. The association recommended the proposed rule should clarify the intent of the definition of ''representative'' and also under what circumstances an agent will be liable for activities undertaken on behalf of an employer. The association recommended a clear set of standards for liability and suggested such standards should not deviate from the current standards where agents, attorneys, and representatives (under the proposed rule) are not liable if they perform the administrative tasks necessary to file labor certification applications and petitions for visas and do not make attestations that are factually based. In addition, the association recommended that the agents, attorneys, or representatives should not be liable for program violations by the employer.

The Department understands the need for clarity in determining who qualifies as a representative before the Department and what responsibilities and liabilities attach to that role and has accordingly simplified the definition of a representative. Although the Department does distinguish between the different roles of attorneys and agents, both groups are held to the same standards of ethics and honesty under the Department's rules. Under the rules, attorneys can function as agents, and either attorneys or agents can function as a representative of the employer. The Department has, in addition, replaced the word ''official'' with ''person or entity'' to parallel the definition of agent.

However, the Department disagrees with the commenter's interpretation of the extent to which an agent or attorney can be held accountable by the Department for their own and their clients' conduct in filing an application for an employer. While agents and attorneys are of course not strictly liable for all misconduct engaged in by their clients, they do undertake a significant duty in attestations to the Department regarding their employer-clients' obligations. They are, therefore, responsible for exercising reasonable due diligence in ensuring that employers understand their responsibilities under the program and are prepared to execute those obligations. Agents and attorneys do not themselves make the factual attestations and are not required to have personal knowledge that the attestations they submit are accurate. They are, however, required to inform the employers they represent of the employers' obligations under the program, including the employers' liability for making false attestations, and the prohibition on submitting applications containing attestations they know or should know are false. The debarment provisions at § 655.118 of the final regulations have accordingly been clarified to state that agents and attorneys can be held liable for their employer-clients' misconduct when they ''participated in, had knowledge of, or had reason to know of, the employer's substantial violation.''

The same association also questioned why the Department is ''singling out attorneys'' in the definition of ''representative'' by requiring an attorney who acts as an employer's representative and interviews and/or considers U.S. workers for the job offered to the foreign worker(s) to also be the person who normally considers applicants for job opportunities not involving labor certifications. The association found no apparent rationale justifying why the Department should dictate who and under what circumstances an attorney or any other person should interview U.S. job applicants. It further recommended that the rule eliminate the reference to attorneys or, at a minimum, clarify that the rule does not reach attorneys who merely advise and guide employers through the H–2A program. The Department has accordingly clarified the definition of representative by deleting the sentence limiting the role attorneys can play in interviewing and considering workers, primarily because, unlike other labor certification programs administered by the Department, the relatively simple job qualifications that apply to most agricultural job opportunities render it unlikely that U.S. workers would be discouraged from applying for those jobs by the prospect of being interviewed by an attorney.

A specialty bar association urged that the definition of ''agent'' be changed in order to prevent abuses related to foreign nationals paying recruiters' fees. The association suggested that the Department limit representation of employers to that recognized by DHS: attorneys duly licensed and in good standing; law students and law graduates not yet licensed who are working under the direct supervision of an attorney licensed in the United States or a certified representative; a reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented; and accredited representatives, who are persons representing a nonprofit organization which has been accredited by the Board of Immigration Appeals.

The Department acknowledges that its allowance of agents who are not attorneys and who do not fit into the categories recognized by DHS creates a difference of practices between the two agencies. However, the Department has for decades permitted agents who do not meet DHS's criteria to appear before it. Agents who are not attorneys have adequately represented claimants before the Department in a wide variety of

activities since long before the development of the H–2A program. To change such a long-standing practice in the context of this rulemaking would represent a major change in policy that the Department is not prepared to make at this time. The Department has, however, added language to the definition of both ''agent'' and ''attorney'' to clarify that individuals who have been debarred by the Department under § 655.118 cannot function as attorneys or agents during the period of their debarment.

Definition of ''adverse effect wage rate''

The Department proposed a revised definition of ''adverse effect wage rate,'' limiting its application to only H–2A workers. A law firm commented that the proposed definition of ''adverse effect wage rate'' appears to apply only to H–2A workers and not to U.S. workers who are employed in ''corresponding employment.'' The Department has clarified the definition to make clear that those hired into corresponding employment during the recruitment period will also receive the highest of the AEWR, prevailing wage, or minimum wage, as applicable. The firm also requested the same revision to 29 CFR Part 501 regulations. The Department believes that this requirement is adequately explained in the text of the regulations at § 655.104(l) and § 655.105(g).

Definition of ''agricultural association''

The Department added a definition for ''agricultural association'' in the proposed regulation. A major trade association commented that the proposed definition does not acknowledge that associations may be joint employers and suggests that the definition could cause confusion because other sections of the proposed regulation acknowledge that associations may have joint employer status. The association recommended the definition clarify that agricultural associations may serve as agents or joint employers and define the circumstances under which joint employer arrangements may be utilized. A professional association further commented that associations should not be exempt from Farm Labor Contractor provisions if the associations are performing the same activities as Farm Labor Contractors.

The Department agrees that agricultural associations play a vital role in the H–2A program and seeks to minimize potential confusion about their role and responsibilities. The regulation has been revised to clarify that agricultural associations may indeed serve as sole employers, joint employers, or as agents. The definition of ''H–2A Labor Contractors'' has also been revised to clearly differentiate labor contractors from agricultural associations and that an agricultural association that meets the definition in this part is not subject to the requirements attaching to H–2A Labor Contractors. Finally, the regulation has been clarified by specifying that ''processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers'' can all be encompassed by agricultural associations.

Definition of Application for Temporary Employment Certification

The Department has added to the Final Rule a definition of *Application for Temporary Labor Certification.* An Application for Temporary Labor Certification is an Office of Management and Budget (OMB)-approved form that an employer submits to DOL to secure a temporary agricultural labor certification. A complete submission is required to include an initial recruitment report.

Definition of ''date of need''

The Department slightly modified the definition of ''date of need'' to clarify that the applicable date is the one that is specified in the employer's Application for Temporary Employment Certification.

Definition of ''employ'' and ''employer''

In the NPRM, the Department added a definition for ''employ'' and made revisions to the existing definition of ''employer.'' A trade association suggested that the Department eliminate the definition of ''employ'' but retain the definition of ''employer,'' stating that the definition of ''employ'' adds nothing to clarify status or legal obligations under the H–2A program. The association believes the status of an employer under the H–2A program is defined by the labor certification and visa petition processes and that the incorporation of the broad FLSA and MSPA definitions of ''employ'' insinuate broad legal concepts that add unnecessary confusion. The association further recommended that the Department eliminate the fourth criterion related to joint employment status in its proposed definition of ''employer'' and, instead, provide a separate definition of joint employer associations and the respective liabilities of the association and its joint employer members.

The Department agrees with these comments and has, accordingly, removed the definition of ''employ'' as superfluous and created a separate definition of ''joint employment'' (using that portion of the definition of employer which discussed joint employers) to eliminate any confusion between the two terms. The definition of ''employer'' has also been revised. First, the Final Rule clarifies the proposal's statement that an employer must have a ''location'' within the U.S. to more specifically state that it must have a ''place of business (physical location) within the U.S.'' Second, out of recognition that some H–2A program users, such as H–2ALCs, are itinerant by nature, and that SWA referrals may thus occasionally need to be made to non-fixed locations, the Final Rule states that an employer must have ''a means by which it may be contacted for employment'' rather than a specific location ''to which U.S. workers may be referred.'' Finally, the Final Rule clarifies that an employer must have an employment relationship ''with respect to H–2A employees or related U.S. workers under this subpart'' rather than less specifically referring to ''employees under this subpart,'' and deletes the references to specific indicia of an employment relationship because the applicable criteria are spelled out in greater detail in the definition of ''employee.'' The definition of ''joint employer'' is modified slightly from the concept that appeared in the NPRM to clarify that the two or more employers must each have sufficient indicia of employment to be considered the employer of the employee in order to meet the test for joint employment.

Definition of ''farm labor contracting activity'' and ''Farm Labor Contractor (FLC)''

The Department proposed adding definitions for ''farm labor contracting activity'' and ''Farm Labor Contractor (FLC)'' to this section. In the Final Rule, the Department has eliminated the definition for ''farm labor contracting activity'' and revised the definition for ''Farm Labor Contractor.'' The revised definition is now contained under the heading ''H–2A Labor Contractor.''

A law firm commented that neither agents nor attorneys should be required to register as H–2A Labor Contractors. The commenter did not specifically address why it believed agents and attorneys would be required to register under the proposed definitions, so the Department is unable to respond to this point. As a general matter, however, an agent or attorney, if performing labor contracting activities as they appear in the revised definition of an H–2A Labor Contractor, would be required to register

as, and would be held to the standards of, an H–2A Labor Contractor.

A group of farmworker advocacy organizations commented that the definition proposed for Farm Labor Contractor (H–2A Labor Contractor) would exclude recruiters of foreign temporary workers from the scope of the rule, making enforcement impossible. This organization pointed out that under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), H–2A workers are not migrant or seasonal agricultural workers and, therefore, a contractor recruiting workers to become H–2A visa holders would not fit within the proposed regulatory definition. The organization also commented that the reference to ''fixed-site'' employers in the ''farm labor contracting activity'' definition could present problems in some employment situations, such as employment for a custom harvester, where the employer would not have a fixed site. An association of growers/producers suggested the MSPA definitions for ''farm labor contracting activity'' and ''Farm Labor Contractor'' should be used.

In response to the comments, the Department has deleted the definition of ''agricultural employer'' and included a separate definition for ''fixed-site employer.'' The Department also deleted the definition of ''Farm Labor Contractor'' in the final regulation and replaced it with a new definition for ''H–2A Labor Contractor.'' This will differentiate the two terms since the definition of an ''H–2A Labor Contractor'' does not match the definition of a ''Farm Labor Contractor'' as used in MSPA, and the operational differences between the H–2A program and MSPA do not allow perfect parallels to be drawn between the two statutory schemes. The definition of ''farm labor contracting activity'' has been deleted as redundant since the activities have been made part of the definitions of ''fixed-site employer'' and ''H–2A Labor Contractor.''

Definition of ''joint employment''

The Department included in its definition of ''employment'' a reference to what would constitute ''joint employment'' for purposes of the H–2A program. The Department received one comment suggesting the inclusion of the definition of ''joint employment'' within the definition of ''employment'' was confusing. The Department has accordingly removed the last phrase from the proposed definition of ''employer'' and provided a separate definition for ''joint employment.''

Definition of ''prevailing''

The Department proposed a revision to the definition of ''prevailing'' to include, ''with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H–2A and non-H–2A employers) for the occupation in the area of intended employment.'' This represented a change from the current rule, which does not refer to ''commonly provided'' practices or benefits but instead uses a percentage test (50 percent or more of employers in an area and for an occupation must engage in the practice or offer the benefit for it to be considered ''prevailing,'' and the 50 percent or more of employers must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area''). The Department received comments on the change, specifically inquiring whether the SWAs would continue to conduct prevailing wage and practice surveys, and requesting that if the Department intends to no longer require SWAs to conduct prevailing wage and practice surveys, the change should be discussed in the preamble.

The Department has determined that, to provide greater clarity and for ease of administration, the definition of ''prevailing'' will revert to the definition in the current regulation that requires that 50 percent or more of employers in an area and for an occupation engage in the practice or offer the benefit and that the 50 percent or more of the employers in an area must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area.

The Department notes it does not intend to change the provision on prevailing wage surveys currently undertaken by SWAs. The Department has included specific definitions for the terms ''prevailing piece rate'' and ''prevailing hourly rate,'' the two kinds of wage surveys that have traditionally been undertaken by SWAs, and has included express references to both types of surveys throughout the rule.

Definition of ''strike''

The Department has been added to the Final Rule a definition for the term *strike*. The definition conforms to the changes explained in the discussion of § 655.105(c), and clarifies that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individualized, position-by-position basis.

Definition of ''successor in interest''

The Department's proposal included a debarment provision allowing for debarment of a successor in interest to ensure that violators are not able to re-incorporate to circumvent the effect of the debarment provisions. A national agricultural association commented that this provision as drafted could result in an innocent third party buying the farm of a debarred farmer and being subject to debarment, even though the successor is free of any wrongdoing, and thus the rule would place roadblocks on the sale of assets to innocent parties.

The Department agrees with this commenter. We have addressed this issue by including a definition of ''successor in interest'' to make clear that the Department will consider the facts of each case to determine whether the successor and its agents were personally involved in the violations that led to debarment in determining whether the successor constitutes a ''successor in interest'' for purposes of the rule.

Definition of ''United States''

The Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII (CNRA), applies the INA to the Commonwealth of the Northern Mariana Islands (CNMI) at the completion of the transition period as provided in the CNRA, which at the earliest, would be December 31, 2014. Accordingly, the H–2A program will not apply to the CNMI until such time. However, the CNRA amends the definition of ''United States'' in the INA to include the CNMI. It should be noted that the amendment to the INA of the definition of ''United States'' does not take effect until the beginning of the transition period which could be as early as June 1, 2009, but may be delayed up to 180 days. Accordingly, the Department has included CNMI in the definition of ''United States'' with the following qualification: ''as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII.'' The Department will publish a notice in the **Federal Register** at such time that its regulations regarding the foreign labor programs described in the INA, including the H–2A program, will apply to the Commonwealth.

Definition of ''Within [number and type] days''

The Department has added to the Final Rule a definition of the term *within [number and type] days*. The definition clarifies how the Department will calculate timing for meeting filing

deadlines under the rule where that term, in some formulation, appears. The definition specifies that a period of time described by the term ''within [number and type] days'' will begin to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by the rules back to the Department, as evidenced by a postal mark or other similar receipt.

Definition of ''Work contract''

The Department has added to the Final Rule a definition of the term *work contract*. The definition was borrowed from the definition section of 29 CFR part 501 of the NPRM, with minor modifications made for purposes of clarification.

d. Definition of ''agricultural labor or services''

The Department proposed changes to the definition of ''agricultural labor or services'' to clarify, as in the current regulation, that an activity that meets either the Internal Revenue Code (IRC) or the Fair Labor Standards Act (FLSA) definition of agriculture is considered agricultural labor or services for H–2A program purposes and, more significantly, to remove limitations on the performance of certain traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA, including packing and processing.

The Department received several comments supporting these changes, with some specific suggestions for additional changes. A major trade association complimented the Department on providing ''bright line'' definitional guidance regarding the activities that constitute agricultural work to be covered by the H–2A program as distinct from the H–2B program. A number of these commenters mentioned that the Department's inclusion of packing and processing activities in work considered as agricultural provides an option for obtaining legal workers, especially in light of the numerical limitations on H–2B visas. One association of growers/producers supported the expansion of the current definition to include packing and processing but suggested that agricultural employers who have previously used the H–2B program for packing or processing operations be allowed to continue using the H–2B program. Another association of growers/producers suggested that the definition be changed to allow product that is moving from on-farm production directly to the end consumer be included as permissible work for H–2A workers, and suggested that the definition provide that it is a permissible activity for H–2A workers to work on production of a purchased crop when the crop is purchased by a farm because of weather damage to that farm's crops in a particular year.

The Department appreciates the general support for the proposed changes and has retained them in the final regulation. Regarding packing and processing activities, the proposed definition includes as agricultural activities ''handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm.'' In response to the request to allow employers who have used the H–2B program for packing or processing operations to continue using the H–2B program, the Department has revised the definition to clarify that while the Department cannot permit H–2A workers and H–2B workers to simultaneously perform the same work at the same establishment, the distinctions between establishments at which operations of this nature should be performed by H–2A workers and those at which the operations should be performed by H–2B workers are too fine for the Department to reasonably distinguish between them with sufficient precision to establish a bright line test. The Department will therefore defer to operators as to whether the ''handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering'' operations at their particular establishment are more properly governed by the H–2A or the H–2B program, but will not accept applications for both kinds of workers to simultaneously perform the same work at the same establishment.

The Department agrees with the comment that H–2A workers should be permitted to work in the production of a purchased crop, as well as work in processing or packing a farm product that is moving from on-farm production directly to the end consumer. Moreover, the Department believes such activities are permitted by the definition in the proposed rule and therefore the provision requires no additional language in the Final Rule.

The Department has clarified the Final Rule to reflect existing law, which provides that work performed by H–2A workers, or workers in corresponding employment, which is not defined as agriculture under Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. 203(f), is subject to the provisions of the FLSA as provided therein, including the overtime provisions in Section 7(a)(29 U.S.C. 207(a)).

Incidental Activities

The Department also proposed clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H–2A labor certification was approved may be performed by an H–2A worker. A number of commenters, including a professional association, a major trade association, and several associations of growers/producers supported this change, stating that it was positive and would provide more flexibility for employers. A major trade association commented this change would allow employers to include duties in H–2A certified job opportunities that reflect the actual duties performed by farm workers and further commented that, ''[p]resumably the provision will cover a farm worker who engages in incidental employment in the farm's roadside retail stand, a farm worker who assists in managing 'pick your own' activities, and a farm worker who occasionally drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have been disallowed in the past.'' This commenter's understanding of the Department's interpretation is correct.

One association of growers/producers commented that allowing H–2A workers to perform duties typically performed on a farm benefits the employee as well as the employer. A trade association commented that being able to use workers in other jobs not listed on the contract is needed, particularly when weather prevents field work.

The Department has revised the wording in the definition of ''agricultural labor or services'' provided in § 655.100(d)(1)(vi) to provide additional clarity for employers. The definition now reads: ''Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought.'' The Department recognizes that, due to the unpredictable nature of weather

conditions and agricultural work itself, employers need some flexibility in assigning tasks, and that it would be difficult if not impossible to list all potential minor and incidental job responsibilities of H–2A workers on the *Application for Temporary Employment Certification*. The proposed amendment of the definition is intended to recognize the reality of working conditions at agricultural establishments and ensure that an H–2A worker's performance of minor and incidental activity does not violate the terms and conditions of the worker's H–2A visa status. The further revision to the definition will assist employers in determining whether activities or work not included on the *Application for Temporary Employment Certification* can reasonably be considered as minor and incidental.

Inclusion of Other Occupations

The Department proposed to include logging employment in its definition of ''agricultural labor or services'' for purposes of the H–2A program. Two commenters voiced their support for this inclusion; we received no comments in opposition. The Department also sought comments as to whether there are other occupations that should be included within the definition of agriculture used in the H–2A program. The Department received several suggestions of other industries that should be considered, including livestock and dairy producers, fisheries, nurseries, greenhouses, landscapers, poultry producers, wine businesses, equine businesses, turf grass growers, mushroom producers, maple syrup producers, and employers engaging in seasonal food processing as well as growers who operate processing and packing plants.

Of those requesting expansion of the definition to include other occupations, representatives of the dairy industry submitted the most comments. A major trade association and a number of associations of growers/producers commented that the dairy industry is unable to use the H–2A agricultural worker visa program and that this exclusion is unfair. They stated dairy farmers need and deserve the same access to legal foreign workers as other sectors of the agricultural industry. The association suggested that H–2A visas for dairy workers should last at least three years rather than one. Two trade association commenters stated they understood the importance under the statutory definition of H–2A workers needing to be temporary or seasonal, but not why the jobs themselves needed to be temporary or seasonal. A farm bureau provided comments suggesting dairy and livestock operations should be allowed to designate seasonal jobs within their operations for which H–2A workers could be employed. This association commented that current worker patterns suggest typical milkers stay in their positions for 9 to 10 months and then voluntarily leave, but return to seek a job after 2 to 3 months.

The Department also received comments from an association of growers/producers and from two individual employers requesting that reforestation work be considered as agricultural labor. These commenters assert that there are reforestation activities including planting, weed control, herbicide application and other unskilled tasks related to preparing the site and cultivating the soil and that workers who perform these tasks deserve consideration for eligibility for H–2A visas, as do workers who perform the same or similar tasks in cultivating other agricultural and horticultural commodities on many of the same farms. These commenters also pointed out that workers performing reforestation tasks for farmers or on farms are clearly agricultural employees under the FLSA and, additionally, believed the Internal Revenue Code supports their position for considering reforestation work performed on a farm or for a farmer as agricultural labor or services.

Following review of the comments discussed above, the Department has decided the definition of agriculture should not be further expanded at this time and no additional activities have been selected for inclusion as agricultural activities beyond those included in the NPRM. In most cases where there was the suggestion for the inclusion of a particular industry or activity in the definition of agriculture there was not strong support for the inclusion by representatives of that industry, as indicated by the number and source of the comments received. For example, one commenter supported adding maple syrup harvesting and ancillary activities to the definition of agricultural labor. The suggestion did not come from someone actually involved in the maple syrup industry, however, but rather from a State Workforce Agency. While the Department appreciates the input of such commenters, it would be inappropriate to impose on those industries (most of which currently qualify for the H–2B program rather than the H–2A program) changes that the industry itself did not seek.

The two exceptions to this pattern in the comments were the dairy industry and the reforestation industry, both of which, as discussed above, submitted comments evidencing industry-based support. The Department's analysis of the comments from the dairy industry, however, indicates it is not the program's definition of agriculture, which already includes dairy activities, that presents a potential barrier to the industry's use of the H–2A program, but rather the statutory requirement for the work to be temporary or seasonal in nature.

The H–2A program, by statute, provides a means for agricultural employers to employ foreign workers on a *temporary* basis. Many dairy-related job needs, however, appear to be year-round and permanent in nature.

While the H–2A program is specially designed for agricultural employers, they are not limited to using only the H–2A program. The employment-based permanent visa program is also open to agricultural employers with a permanent need for which they are unable to secure U.S. workers. At the same time, year-round operations are permitted to seek certification to utilize H–2A workers for seasonal or temporary jobs within their industries when they can substantiate the temporary or seasonal nature of the jobs. The Department recognizes that an employer may have both permanent and temporary jobs in the same occupation. However, employers should be aware that the Department does not typically approve subsequent applications requesting foreign workers for the same position when, taken together, those applications would cover a continuous period of time in excess of 10 months, unless exceptional circumstances are present.

The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The Department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H–2A employer on an entire industry without significant input from that industry. While the Department is willing to further explore whether to include the reforestation industry in the definition of agriculture, it does not believe a decision to do so is warranted at this time.

''On a seasonal or other temporary basis''

The Department proposed a definition of the key terms ''on a seasonal or other temporary basis'' in the definition of

agricultural labor or services in the NPRM that continued the interpretation of the current regulation. We received several comments related to the phrase ''on a seasonal or other temporary basis.'' A trade association suggested the rule borrow the temporary and seasonal concepts from the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) definitions that are appropriate in an H–2A context without incorporating the MSPA regulations and related judicial precedent. It was the association's belief that this approach would allow an H–2A worker to be admitted for longer than a 10-month period. An association of growers/producers suggested the definition of temporary or seasonal should apply to the worker rather than the job and also that year-round farming operations/nurseries should be allowed to access a workforce to provide year-round services by rotating ''shifts'' of workers with different contract/visa periods. Another trade association also suggested the definition and interpretation of temporary and seasonal could be expanded.

The Department does not agree that the definition of temporary or seasonal should focus on the worker rather than the job. The INA is clear that the employer must have a need for foreign labor to undertake work of a temporary or seasonal nature for which it cannot locate U.S. workers. The Department's position has traditionally been that job opportunities that are permanent in nature do not qualify for the H–2A program. The controlling factor is the employer's temporary need, generally less than 1 year, and not the nature of the job duties. *See Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); *see* also *Global Horizons, Inc.* v. *DOL*, 2007–TLC–1 (November 30, 2006) (upholding the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H–2A application); *see also* 11 U.S. Op. Off. Legal Counsel 39 (1987). An H–2A worker could, however, be employed continuously by successive H–2A employers having a temporary need for the worker's services and thus be employed and remain in the U.S. for a period beyond one year.

In addition, the Department has made several edits to the Definitions section of the NPRM to provide consistency with other changes to the regulatory text and to clarify the Final Rule. For example, the definition of ''*Application for Temporary Employment Certification*'' has been amended to help ensure the public has a clear understanding of what this regulation requires. Other definitions, such as ''temporary agricultural labor certification determination'' and ''unauthorized alien,'' have been eliminated because they are not used in this regulation. We have also made non-substantive changes to provide clarity and to comport with plain English language requirements.

Section 655.101 Applications for Temporary Employment Certification in Agriculture

(a) Instituting an Attestation-based Process

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H–2A program. The Department received several comments in favor of the new process, several opposed, and others generally in favor but suggesting changes to the process as outlined in the Department's proposal.

Some commenters believed that attestations to future events should not be required, and that attestations should be made under the ''applicant's best knowledge and belief'' standard and not the ''under penalty of perjury'' standard because applicants cannot know what will happen in the future.

The Department believes that the attestations the Final Rule requires employers to make do not require employers to predict future events, but rather represent straightforward commitments to comply with program requirements. Such compliance is fully in the control of the employer. It is, therefore, not necessary to delete or modify the manner in which attestations are made.

(1) Support for an Attestation-based Process

Those commenters who favored the shift to an attestation-based process generally believed the new process would make the H–2A application more efficient and less burdensome for employers. One State government agency commented that the process would enable the SWAs to focus on job orders, referrals, and housing inspections while relieving them of the burden to review the applications themselves. Another commenter supported the shift but encouraged the Department to ensure the ''Administrator * * * acquires the agricultural expertise necessary to provide training and guidance to those who are reviewing and overseeing the operating of a program that is critical to future U.S. agricultural production.''

The Department appreciates support for its proposed process. As of June 1, 2008, the Department has centralized the Federal processing of all applications for H–2A temporary foreign workers in the Chicago National Processing Center. This centralization will enhance the Department's ability to handle the expected increases in the usage of the H–2A program and ensure consistency in application of program requirements. The Department recognizes the unique needs and timeframes associated with this program and anticipates that centralization will lead to the development of greater expertise to meet those needs and timeframes. It also believes that centralized processing of applications will facilitate the identification of areas where program training should be enhanced and that the centralized environment will maximize the effectiveness of such training.

An association of growers/producers supported the attestation-based process but found the process, as described in the proposed regulation, confusing and duplicative. This commenter requested that all of the attestation requirements be consolidated into one rule clearly stating which facts are to be verified.

The Department appreciates the commenter's suggestion about consolidation of the attestation requirements and, as provided in the proposal, has retained the comprehensive listing of the requirements in § 655.105, ''Assurances and Obligations of H–2A Employers'' and § 655.106, ''Assurances and Obligations of H–2A Labor Contractors.'' It was not clear if this commenter was requesting a consolidated listing of the attestations required by both the Departments of Labor and Homeland Security. The Department of Labor is including in the comprehensive lists only those attestations that DOL requires. The commenter did not include specific examples of duplication or confusing information and the Department, therefore, is unable to provide any further response.

(2) Legality of the Attestation-based Process

Several of the commenters who opposed the change asserted an attestation-based process conflicts with the statutory mandate in Section 218 of the INA (8 U.S.C. 1188). These commenters interpreted the INA to require the Department to make a determination based upon an active verification of the H–2A application. One group commented that the attestation process violates the statute's Congressional mandate. Two organizations expressed the belief that the certification process has always been understood to require active

oversight by the Department of the employer's recruitment and hiring of U.S. workers as well as the details of the job offer. One commenter, an advocacy organization, voiced the opinion that the statutory standard is not whether the employer has made adequate assurances that it has or will meet the obligations of the H–2A program but is whether the employer has actually met them. Another commenter opined that labor certifications were not meant to be attestation-based and that this approach will dramatically reduce government oversight of this program. These commenters believe that the Secretary will not be able to certify that wages and working conditions have not been adversely affected and that this regulation is contrary to the statute.

The attestation-based process implemented by the Final Rule is not inconsistent with any statutory requirements, but rather is a reasonable means selected by the Department to fulfill its statutory responsibilities. The Department does not interpret Section 218 of the INA to specify a particular methodology that the Department must employ to determine that all of the statutory criteria have been met, and indeed, various aspects of the Department's methodology have changed through the years. The attestation-based system, backed by audits, that is implemented by the Final Rule is an acceptable means, within the reasonable discretion of the Secretary, for the Department to ensure that the statutory criteria for certification are met and that program requirements are satisfied. Similar approaches have been used by the Department in other contexts (such as approval of permanent labor certifications) to fulfill its statutory responsibilities. Indeed, as discussed in greater detail in various sections below, under the statutory time limits for filing applications and issuing certifications the Department typically makes certification determinations on applications prior to the completion of many of the recruitment requirements and without any direct observation or inspection by the Department or its SWA agents that rental housing secured by employers complies with all of the applicable legal standards.

No system for review and approval of applications, of course, is foolproof, and the statute prescribes appropriate penalties for situations in which the terms of approved labor certifications are later violated. *See* 8 U.S.C. 1188(b)(2)(A). There will always be bad actors who attempt to circumvent program requirements. Employers sometimes violate program requirements under the current H–2A application process, and the Department has also detected violations in other foreign worker programs it administers. Under the final rule, the Department will have more enforcement tools at its disposal than ever before to deal with such violations. The Department believes that the attestation-based process fully complies with all statutory requirements and, when utilized in concert with a strong audit and review process, represents the best means for the Department to deploy its limited resources in a manner that ensures that statutory timelines are met and that the program's integrity is maintained.

(3) Protections for U.S. Workers in an Attestation-based Process

Several commenters believed the proposed attestation-based process would not provide adequate protections for U.S. and H–2A workers because it would reduce the oversight responsibilities of the Department. Some of these commenters also said the current system should be maintained to ensure that the Department oversees worker protection, especially in the areas of housing and wages. An organization commented that while this change may ease the application process for employers it ignores the damage that could be caused by false attestations and a lack of active oversight of the job terms, recruitment, and hiring of U.S. workers. A farmworker advocacy organization questioned the change to an attestation-based process claiming there is a long history of labor abuse in agriculture and saying they believed that when ''self-inspection procedures'' are implemented they are generally based upon a prior record of compliance and an accompanying determination that resources would be better utilized in another pursuit. Another farmworker advocacy organization commented that the attestation-based process, as proposed, would further remove and diminish the Department's role in assuring all reasonable efforts to locate U.S. workers had been exhausted before foreign guest workers could be certified. Another commenter voiced concern that the proposed process would eliminate the current process of follow-up correspondence that has been instrumental in ensuring that employers have actually undertaken the required recruitment steps. A worker advocacy organization commented the proposed process, with its emphasis on meeting paper requirements, would be ''ill suited to deal with the inherent disparities in bargaining power between U.S. agricultural employers and impoverished workers from the developing world.''

The Department believes these commenters' concerns, while not invalid, are substantially resolved by the safeguards that have been built into the new process. The new program model emphasizes compliance through enforcement mechanisms such as audits, revocation of approved certifications, and debarment from the program. In light of these enforcement tools, employers will have a substantial incentive to be truthful in their representations that they cannot find U.S. workers willing to engage in agricultural work at the appropriate wage, because good-faith compliance with program obligations is necessary to maintain continued access to a legal nonimmigrant workforce. Because the rule requires pre-filing recruitment, the Department will also have an opportunity to review recruitment reports and (through its SWA partners) to conduct housing inspections before applications are approved. Job orders must also be reviewed, approved, and circulated by the SWAs before labor certifications can be granted, making it impossible for even bad actor employers to entirely circumvent the program's core recruitment requirements. Finally, it is worth noting that the bulk of the program's requirements, including requirements to pay workers at prescribed rates, maintain housing conditions, and provide transportation that complies with applicable safety requirements, have always been, and must necessarily be, enforced by the Department after the labor certification has been granted.

Although not a factor in our evaluation of the comments here, the Department also notes that many commenters who opposed the attestation-based system in this rulemaking, claiming that it will adversely affect U.S. workers, have enthusiastically endorsed proposed legislation before the U.S. Congress that would in fact mandate that the Department adopt an attestation-based application system in the H–2A program. Those organizations in their comments on this rulemaking made no attempt to explain their contradictory public positions regarding the merits of an attestation-based application system.

(4) Improvements for Employers in an Attestation-based Process

Several commenters questioned whether the proposed process would yield a simplified process for employer applicants. These commenters believed the new process requires the same amount of paperwork and only relieves employers of submitting documentation while at the same time imposes

additional requirements including post-filing audits, increased penalties, and a five-year records retention requirement. Several commenters were concerned that the attestation-based process would lead to increased liabilities for employers.

The Department does not believe that employers, attorneys, and agents wishing to comply with program obligations will be adversely affected by the institution of an attestation-based process. The process is designed to give employers specific notice of the assurances they are making to the Department and what their obligations are. Once the employer is on notice of those assurances, it is better able to understand what it must do to comply with H–2A requirements and to conform its conduct to those requirements.

A trade association of agricultural employers agreed with the shift to an attestation-based process but believed the process as outlined in the proposed regulations was not a true attestation-based process and recommended the process used in the H–1B program serve as a model. Other commenters also recommended use of a process similar to the one used in the H–1B program. Several commenters also suggested that the Department combine the *Application for Temporary Employment Certification* with the I–129 petition for simultaneous submission to the Departments of Labor and Homeland Security.

In response to the proposals to convert the proposed attestation-based process into a process modeled after the H–1B labor condition application, the statutory differences between the two programs are sufficiently substantial to make such an idea impractical. In the H–1B program, the Department is statutorily limited to reviewing the attestations made by an employer for ''completeness and obvious inaccuracies.'' 8 U.S.C. 1182(n)(1)(G)(ii). The Department believes the different H–2A statutory language suggests that a different application and review process is appropriate for the H–2A program. The Department appreciates the suggestion that simultaneous submissions to the Department and DHS could lead to further application efficiencies for employers. However, the Department believes that the complexity of the current statutory requirements for the H–2A program would make it unworkable to combine the Department's application with the petition submitted to DHS. A proposal presented by the Department several years ago to employ such a process in the H–2B program for temporary nonagricultural workers was met with significant opposition. To attempt to undertake a similar process with the significantly more complex H–2A program does not appear feasible at this time.

Some commenters appeared not to understand the proposed attestation process. The Department received comments stating that it is not clear what should be included with the attestation. The Department has accordingly clarified in the Final Rule that the application must be accompanied by the prevailing wage determinations obtained in anticipation of the recruitment for the application as well as the initial recruitment report. The employer will be required to keep all other supporting documentation in case of an audit, which means the employer should keep all records relating to compliance with the H–2A program, including advertising, job orders, recruitment logs/reports, and housing inspection requests. To eliminate any lingering confusion over document retention requirements, the Department has spelled these out in a new regulatory section (§ 655.119) in this Final Rule.

(b) SWA Involvement/Application Submission

The NPRM revised the application submission requirements by proposing to have employers submit applications only to the NPC rather than to both the NPC and SWA as currently required. Most of the comments received about this proposal were in favor of it, but a few commenters expressed concerns about the reduced role for SWAs. One person commented that eliminating the SWA involvement would leave employers who seek assistance and guidance from the government in completing applications more disposed to making errors and would increase their potential liability. A farmworker advocacy organization commented that SWA knowledge has proven useful to workers in the past and that the advantage of SWA involvement is the detailed knowledge their experienced staff can bring to bear about local agricultural practices and the use of agricultural labor in their area. The commenter also believed that the proposed process, which requires the employer to place a job order with the SWA, means that the SWA must take on faith that the employer's job offer is consistent with the terms of the H–2A application because the SWA will no longer receive a copy of the application. This organization recommended that applications should be filed with the SWA as well as the NPC so the SWA could advise the NPC if the application did not appear legitimate. A growers and producers association believed retaining responsibility for the substantive review by the NPC staff could remain a problem because of their lack of expertise related to agriculture.

A State governor suggested the process could be improved by eliminating the Department from the process. The governor believes the States know their agricultural industry better, can resolve issues more quickly, and are in the best position to identify and enforce sanctions against fraud. Conversely, a professional association of immigration attorneys recommended the SWA be eliminated from the recruitment process and, alternatively, the employer handle all recruitment for the positions, including accepting applications received as a result of a job order placed by the SWA in the interstate and intrastate system.

The Department remains committed to modernizing the application process and continues to believe the submission of applications directly to the NPC is the most effective way of accomplishing this goal. Eliminating the SWAs' participation in the application review process will provide more efficient review of applications, as well as greater consistency of review. The Department disagrees that NPC staff have insufficient knowledge of the agricultural industry; to the contrary, NPC reviewers who have handled H–2A applications have, in some cases, more experience with such applications than many SWA staff.

The SWAs will, moreover, continue to play an important role in the H–2A application process. SWAs will be responsible for posting job orders, both intrastate and interstate, under § 655.102(e) and (f) and 20 CFR Part 653, thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will review the job offer, its terms and conditions, any special requirements, and the justifications therefor. As part of their duties to post job orders pursuant to 20 CFR Part 653, SWAs will also refer eligible workers to employers as well as conduct housing inspections and follow up on deficiencies in the job order. Finally, SWAs will continue an active role in conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys.

Two commenters noted potential coordination or communication issues could result when the SWA did not also receive the application. One commenter was concerned there would be no assurance that the job order posted by

the SWA would be the same as that on the application. The other commenter pointed out the proposed regulations provided that the SWA receive a copy of the notice of deficiency when one was issued, but the SWA would not have a copy of the submitted application and thus could have inadequate information to be of assistance to the involved employer. An association of growers/producers recommended the Department provide training to H–2A employers about the need to send a formal request to the SWA to request a housing inspection and also recommended the Department notify the SWA when an application was received for processing so the SWA could, in turn, contact the employer.

The Department appreciates the concerns about the need for communication between the NPC and the SWA and reiterates that there was never any intent to eliminate the SWA from all H–2A activity. As discussed above, SWAs remain an integral partner in key respects: The placing of the intrastate/interstate job orders, conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys, referring eligible workers, and conducting housing inspections, all activities for which SWAs will continue to receive grants from the Department. Moreover, nothing in the regulations precludes the Department from contacting SWAs, where there is reason to believe that it is necessary, to verify that the terms in the employer's Application for Temporary Employment Certification are consistent with the terms of the job offer.[2] However, SWAs will no longer process H–2A applications. Accordingly, to minimize confusion about roles and responsibilities, the Department has removed from § 655.107(a)(3) (§ 655.107(b) of the Final Rule) the provision requiring that SWAs be sent deficiency notices.

(c) Electronic Filing

The Department invited comments on the concept of a future electronic filing process for the H–2A program and received comments supporting the concept, although some also included suggestions for on-line training, the establishment of a toll-free help line, and an outreach and education component. A trade association recommended that a paper-based option should also remain available. One commenter noted that the Department did not provide an effective date for the electronic filing process.

The Department appreciates the support for electronic filing and is in the process of developing a system that will include the ability to complete and submit an application form online with sufficient security (PIN numbers, features to deter fraud and maintain system integrity, electronic notifications, etc.). The Department is aware of the need to provide outreach and training prior to the implementation of electronic filing and will involve user groups in these efforts. Additionally, the Department will ensure an adequate notice process and timeframe for transitioning to a new or revised electronic application system.

(d) H–2A Labor Contractor Applications

The Final Rule has been clarified slightly to more clearly state the obligations of H–2A Labor Contractors in filing applications. The proposed rule stated that H–2ALCs must have a place of business in the United States ''to which U.S. workers may be referred.'' Because H–2ALCs may be mobile, however, and because referrals during the season may need to be made to whatever location an H–2ALC is working at rather than to the physical location of the H–2ALC's place of business, the final rule has been modified to state that H–2ALCs must have a place of business in the United States ''and a means by which it may be contacted for employment.'' This slightly modified requirement will ensure that referrals can be made to H–2ALCs during the course of a season (where such referrals are provided for by the Final Rule), and that U.S. workers will have a means of contacting the H–2ALC to secure employment. All other changes made to the paragraph on filing requirements for H–2ALCs were purely stylistic and made for purposes of clarity.

(e) Master Applications

Both the current and proposed regulations require an association of agricultural producers filing an application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. Although the current regulations do not specifically describe a ''master application'' that can be filed by associations, they are clearly contemplated by 8 U.S.C. 1188(d), and the Department has permitted them to be filed as a matter of practice. *See* 52 FR 20496, 20498 (Jun. 1, 1987) (cited in ETA Handbook No. 398).

The Department received several comments objecting to the omission of a provision in the NPRM for the filing of master applications. An association of growers/producers commented that the Department should encourage agricultural employers in small commodity groups or large associations of employers to jointly participate in the H–2A program, as this will make processing more efficient for both the Department and farmers. Another association of growers/producers stated that using an association application is the only possible solution for the H–2A program to accommodate growers who need harvest workers for a short period of time (one month or less). A major trade association also commented that the master application significantly reduces the paperwork and bureaucratic burden for the associations and its members, as well as for the Department.

A major trade association and other associations of growers/producers recommended that the Department retain and improve the master application process and fully incorporate it into the H–2A regulatory structure. The association recommended the master application also be simplified as part of the new H–2A application process. It recommended the regulations include the essential components of the master application process that has been followed in practice, including the filing of one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants but without the listing of every individual employer in the advertisement as currently required, permitting referral of workers to the association, and allowing the association to place workers in the job opportunities. The association further recommended the master application process also apply to applications filed by associations acting as agents.

The statute governing the H–2A program requires that agricultural associations be permitted to file H–2A applications, *see* 8 U.S.C. 1188(d), and that they be permitted to do so either as agents or as employers, *see* 8 U.S.C. 1188(c)(3)(B)(iv) and (d)(2). Consequently, the Department has, as a matter of longstanding practice,

[2] There is also no prohibition preventing a SWA from contacting the Department to ensure that the employer's job order and Application for Temporary Employment Certification are consistent. As a practical matter, a SWA will rarely be able to do so before posting a job order, because Applications for Temporary Employment Certification generally are not filed with the Department under the Final Rule until at least 15 days after the job order has been submitted to the SWA. Communication between SWAs and the Department has always been essential to identifying and putting a stop to deceitful employer behavior, however, and the Department expects that such communication will continue under the Final Rule.

accepted master applications from agricultural associations. In response to the comments received on this subject, the Department has decided to include specific language concerning such applications in the regulation text at § 655.101(a)(3).

The basic theory behind master applications is that agricultural associations should be able to file a single H–2A application on behalf of all their employer members in essentially the same manner that a single employer controlling all the work sites and all the job opportunities included in the application would. Two important limitations apply to such applications. First, all the workers requested by the application must be requested for the same date of need. If an agricultural association needs workers at different times, it must file a separate Application for Temporary Employment Certification for each date of need, just as a single employer would. Second, the combination of job duties and opportunities that are listed in the application must be supported by a legitimate business reason, which must be provided as part of the application. The purpose of this limitation is to prevent agricultural associations from creating undesirable combinations of job duties and opportunities for the sole purpose of discouraging U.S. workers from applying for the jobs. So long as a legitimate business reason exists supporting the combination presented, however, the Department will deem it acceptable. An acceptable business reason for a combination of job duties and opportunities could include, for example, the efficiencies that closely proximate employers expect to gain from having access to a flexible, readily available pool of workers, even though the employers in question do not grow the same crops, which may be necessary for agricultural employers to deal with uncertain and weather-dependent planting and harvesting times.

The Department is aware that this may mean that at times a U.S. worker wishing to perform only one type of job duty, such as picking asparagus, may be required to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job with that association. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. Indeed, many job opportunities offered under the current H–2A regulations include multiple job duties, some of which may be more desirable than others. There is nothing in the statute governing the H–2A program indicating that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. The Department is requiring that combinations of job duties be supported by a legitimate business reason to prevent the deliberate and unnecessary discouragement of U.S. workers from applying for job opportunities, but the Department does not believe that further restrictions on job duty combinations are warranted or necessary to fulfill the statutory criteria for certification.

(f) Timeliness of Filing Application

As required by statute, the provision stating a completed application is not required to be filed more than 45 calendar days before the date of need was retained in the proposed rule. The Department has continued that requirement in § 655.101(c). The Department received some suggestions for changes to the proposed timeframes for submitting applications. Two commenters suggested the Department should at least provide the employer with the option of applying not more than 45 days before the date of need, undertaking the recruitment after the application has been accepted, and continuing to accept referrals under the 50 percent rule.

The Department may not require an application to be filed more than 45 calendar days before the date of need under 8 U.S.C. 1188(c). The Department does not agree with the suggestion for offering employers the option of applying not more than 45 days prior to the date of need, doing post-acceptance recruitment, and continuing to accept referrals under the 50 percent rule. Given the need to maintain consistency in the program's requirements, the Department cannot offer varying options for recruitment timeframes.

(g) Emergency Situations

The NPRM did not contain the current regulatory provision (currently found at § 655.101(f)(2)) allowing the Administrator/OFLC to waive the required timeframe for application submission for employers who did not use the H–2A program during the prior agricultural season or for any employer for good and substantial cause. The Department received a number of comments objecting to its elimination. A major trade association stated the elimination would preclude many employers from legalizing their workforce simply because their decision to join the program was made too late to meet the required timeframes. Another major trade association commented that a provision allowing filing after the deadline is even more essential because the *de facto* deadline for meeting requirements under the final regulation is further in advance of the date of need than the current requirement. One association of growers/producers cited the situation following Hurricane Katrina when many employers needed to secure additional H–2A workers as an example of the need for an emergency application process.

Most of those requesting that the provision for an emergency application be reinstated also commented that if an emergency application is filed in an area of intended employment and for a job opportunity for which other employers have previously been certified for the same time frame, the emergency application should be certified immediately. These commenters also suggested that post-application recruitment could be extended for emergency applications to ensure that their availability would not create an incentive to avoid the pre-filing recruitment efforts.

The Department agrees that a provision allowing the Certifying Officer (CO) to waive the required timeframe for submission of applications in emergency situations is necessary and has included such a provision in the Final Rule at § 655.101(d). The provision, which substantially replicates the current regulatory provision governing emergency situations, requires submission of a completed application, except for the initial recruitment report that would otherwise be required, and a statement of the emergency situation giving rise to the waiver request. The emergency situation giving rise to a request for a waiver may include a lack of experience with the H–2A program obligations (including housing and transportation requirements) or for other good and substantial cause. The Department anticipates that employers who were non-users of the program during the previous year may fail to meet the filing deadline due to miscalculation of the time needed to complete the application. The Department will entertain waiver requests from employers in this situation but will consider them only after first verifying that the employer did not use the program during the prior year.

The Department is not providing an explicit definition of good and substantial cause in order to preserve flexibility when faced with unanticipated situations or conditions.

We have provided some examples in the regulatory text to assist employers in determining what might constitute sufficient cause warranting a waiver. One example provided is a dramatic change in the weather conditions resulting in a substantial change to the anticipated date of need for H–2A workers with significant attendant crop loss unless the waiver is granted. However, the employer must be able to demonstrate that the situation or condition leading to the request for a waiver was genuinely outside of the control of the employer.

The Department is requiring, in the Final Rule, that the employer who requests a waiver must conduct some recruitment as a condition for obtaining that waiver. The employer will be required to submit a job order to the relevant SWA(s) and conduct positive recruitment from the time of filing the application until the date that is 30 days after the employer's date of need. The SWA must transmit the job offer for interstate clearance as in a normal application process. We have also added a provision that requires the CO to specify a date upon which the employer must submit a recruitment report consistent with the requirements of this part.

The Department recognizes that the suggestions that waivers be approved if other applications for similar occupations and dates of need in the same geographic locations have been previously certified are intended to expedite the process. However, each application is unique and the Department must consider each request on its own merits, and therefore does not believe it should commit to approving requests solely because there have been prior approvals for employers with similar job opportunities and dates of need in the same area.

Finally, the Department made changes in § 655.101 to conform to other changes made to the rule. Such changes include, but are not limited to, changes to clarify a potential electronic filing of future applications. In addition, the Department has made non-substantive changes to enhance readability.

Section 655.102 Required Pre-Filing Activity

The Department has changed the title of this section from ''Required Pre-filing Recruitment'' to ''Required Pre-filing Activity'' to include the activities other than recruitment that are discussed in this section.

(a) Section 655.102(a) Time of Filing of Application

The NPRM proposed requiring that applications be filed at least 45 days before the employer's date of need (as required by statute) with a pre-filing recruitment period commencing no more than 120 days prior to the date of need and not less than 60 days prior to the date of need. The Department received a number of comments on the change to a pre-filing recruitment framework and the related timing for that recruitment.

The Department received multiple comments opposing this proposed timeframe; several commenters were generally opposed to the expanded timeframe and others raised more specific concerns. Several commenters questioned the Department's legal authority for a shift to pre-filing recruitment. The Department also received comments arguing that the proposed pre-filing recruitment requirement has the effect of moving the deadline for filing an application. Several commenters argued that the proposed requirement that employers begin recruitment earlier than they are required to file applications would be inconsistent with the Congressionally set timeframes and thus beyond the Department's statutory authority.

The Department disagrees strongly with the premise that its revised recruitment steps are a violation of the statute. The INA is clear that the Department may not require an application for labor certification to be filed more than 45 days prior to the date of need. *See* 8 U.S.C. 1188(c)(1). The statute is silent on how the Department implements the certification process: It does not specify when the recruitment of U.S. workers should take place, whether prior to or subsequent to filing. The INA clearly contemplates at 8 U.S.C. 1188 that recruiting U.S. workers is a separate activity from filing and considering applications, and the statute does not provide any express timeframes during which recruitment must be conducted. There is thus nothing in the statute that prevents the Department from requiring employers to recruit before filing an application, much as it requires that recruitment be conducted prior to the filing of an application in other immigration programs. The Department has determined that program integrity would be improved by being able to review a preliminary recruitment report at the time the application is filed, a requirement that is consistent with both the intent and the language of the statute.

Several commenters opined that it was not feasible for employers to make accurate assessments of timeframes and the number of workers needed so far in advance and many questioned how effective an early recruitment period would be in helping employers to locate U.S. workers who would still be available at the time the work actually began. Additionally, many commenters believed the earlier recruitment would not benefit U.S. agricultural workers seeking employment because it is inconsistent with the traditional job-seeking patterns of these workers.

Some commenters expressed concern that extending the recruitment time would either not increase the number of U.S. worker applicants for a position, or would increase the number of U.S. workers who applied for a position but would not translate into more actual workers taking the jobs, as many would not report to work. A trade association also commented that the employer is put at risk because, by the time the jobs begin, U.S. applicants may have long since changed their minds or accepted other employment. A State government agency commented that most agricultural workers would not make a commitment to a job so far in advance of the start date. One individual employer believed the proposed pre-filing recruitment would actually have the opposite effect the Department anticipates because U.S. workers would be reluctant to make commitments so far in advance of the start date. An employer association recommended that the final regulation specifically permit employers to ask workers identified during the recruitment process to attest to or affirm their intentions to actually report to work to perform the jobs.

An association of growers/producers shared its data from the 2006–2007 season which shows only 9 percent of U.S. applicants applied during the first 15 days of the current 45-day recruitment period and questioned whether a longer timeframe would yield additional applicants. The association also reported 83 percent of the applicants who applied during the initial 15-days of the recruitment period failed to report for work on the date of need, as compared to a 60 percent failure-to-report rate for applicants who applied during the last 30 days of recruitment leading up to the date of need.

Some commenters stated that the current recruitment timeframes are adequate for identifying and hiring U.S. workers and others advocated alternate timeframes. Commenters presented a number of options for the recruitment timeframe, including the current

timeframe, and options ranging between 90 to 75 days prior to the date of need for beginning recruitment and 60 to 45 days prior to the date of need for filing the application. In the words of one trade association, which was representative of the comments received on this point: ''For the sector for which H–2A is predominantly applicable—fruits and vegetables—the ability to predict months in advance when labor will be required is simply impossible.''

The Department takes seriously its twin obligations, consistent with all H–2A statutory requirements, to ensure both that an adequate workforce is available to U.S. agricultural producers and that U.S. workers have a meaningful opportunity to apply for all open agricultural job opportunities. The Department believes it can best fulfill its statutory responsibilities by requiring employers to recruit in advance of filing, which will enable employers to submit preliminary recruitment reports with their applications, giving the Department better information than it has ever had before about the availability of U.S. workers before the Department is required by the tight statutory timeframes to make a determination on an application. The current pattern of forcing positive recruitment combined with the Department's near simultaneous evaluation of the application into a substantially narrow window of only 15 days is simply inadequate to address these workforce and program integrity needs. Based on the comments received, however, the Department has come to believe that requiring employers to seek and secure a workforce 120 days in advance of need may not be practicable, given the substantial likelihood that over such an extended period variables such as weather conditions, competition from other industries for available workers, and competition among farms and crops could intervene and result in increased labor uncertainty for employers.

The Final Rule accordingly shortens the pre-filing recruitment period described in the NPRM. Employers will be required to initiate recruitment no more than 75 days prior and no less than 60 days prior to the anticipated date of need. Reducing the pre-filing recruitment time period in this manner from the time period that was proposed, while simultaneously adjusting the Department's proposal by extending the referral period beyond the date of need (discussed further below), will ensure U.S. workers have access to these job opportunities, and enable employers to recruit effectively for U.S. workers without adversely affecting planting and harvesting schedules. This revised recruitment schedule, which is closer in time to the employer's actual date of need, also addresses the commenters' concerns about the job search patterns of likely U.S. workers. The Department declines, at this time, to implement any requirement that U.S. workers affirm in writing their intent to show up for work when needed, as that is a contractual matter between the worker and the employer. The Department notes that it has afforded employers some flexibility in the Final Rule in § 655.110(e), ''Requests for determinations based on nonavailability of able, willing, and qualified U.S. workers,'' to address situations where U.S. workers have failed to appear as promised.

(b) Section 655.102(b) General Attestation Obligation

(1) General Comments Regarding the Attestations

A group of farmworker advocacy organizations commented on the language in the proposed regulation that states ''the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply.'' The organization stated it is the employer's duty to hire all qualified U.S. workers who apply and believed the proposed language did not make this clear.

An association of growers requested that the language describing the time period for acceptance of referrals be modified by adding the word ''first'' before ''begin to depart'' because not all foreign workers depart on the same date. A professional association requested the regulation be changed to permit employers to stop local recruitment efforts no more than five days prior to the date of need rather than three days as proposed. This change was requested to accommodate the actual transit time required for workers to arrive from abroad. As discussed in more detail below, the points made by these commenters have been rendered moot by changes made to this provision.

(2) The ''50 Percent Rule'' and the Cessation of Recruitment

The Department sought comments on program users' experience with the ''50 percent rule,'' which requires employers of H–2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H–2A work contract. We received numerous comments and several commenters offered alternative approaches.

Several commenters questioned the Department's authority to make changes to the 50 percent rule, citing the 1986 IRCA amendments which added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct regarding its continuation. In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an Interim Final Rule to continue the 50 percent requirement. *See* 55 FR 29356, July 19, 1990. That rule was never finalized.

As the Department stated in the NPRM, since the 1990 publication of the Interim Final Rule continuing the 50 percent rule, it has gained substantial experience and additional perspective calling into question whether the Department's 1990 decision was in fact supported by the data contained in the 1990 study, and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from potential adverse impact resulting from the employment of foreign workers.

The Department received several comments in support of retaining the 50 percent rule as it is currently administered. Commenters asserted that the rule is an important method for granting U.S. workers job preference over foreign temporary workers and creates an incentive for pre-season recruitment of U.S. workers. Some commenters stated their belief that many U.S. workers gain jobs under the 50 percent rule and that its elimination would deprive many U.S. workers of jobs unfairly, although these commenters did not provide any data to support their assertion.

Several commenters believed that few employers have had to lay off H–2A workers under the 50 percent rule, and that the rule has enabled many U.S. workers to secure jobs, and that elimination of the rule would unfairly deprive them of those jobs. The commenters believed that by eliminating this rule, the Department may keep U.S. farmworkers from applying for jobs they would otherwise be able to take. Other commenters believed that for those U.S. workers who learn of an H–2A job, the proposal would eliminate the protections that safeguard against employers rejecting qualified U.S. workers.

One commenter argued that the 50 percent rule provides an incentive that should be maintained to create an attractive working environment, and that it is critical to the integrity of the H–2A program. The commenter asserted that it prevents growers from engaging in practices that are tolerated by H–2A workers only because of their greater economic vulnerability and in turn

ensures that labor standards are not driven down for U.S. workers unable to compete with H–2A workers who have no choice but to endure such conditions.

While one commenter admitted that they could not provide data regarding the cost and benefits of the 50 percent rule, they expressed the belief that employers will hire fewer domestic workers without it, thereby adversely affecting an already vulnerable population. A number of commenters noted that the elimination of the 50 percent rule would make it more difficult for traditional farm workers who move with crops along the traditional migrant streams to secure jobs. The commenter believed that U.S. workers will be ''absolutely foreclosed'' from much if not most H–2A related employment if they cannot be hired just before, at, and past the date of need. An obligation to continue to hire U.S. workers after the departure of any foreign workers to the U.S. for employment was viewed by the commenter as critical to maintaining and developing a U.S. agricultural workforce.

Finally, another commenter observed that the 50 percent rule has served as an important tool for ensuring that the H–2A program does not adversely affect U.S. workers, and that at a time of increasing unemployment, the Department should not choose this particular moment to abandon these long-standing labor protections for U.S. workers.

Several other commenters argued the 50 percent rule should be abolished. These commenters argued that H–2A users have long considered the 50 percent rule to be unfair and unreasonable. They observed that no other temporary or permanent worker program has an even remotely corresponding requirement. Commenters also observed that the 50 percent rule was purportedly designed to enable domestic workers to accept agricultural employment opportunities, but that its costs outweigh its benefits. Commenters shared experiences that many of the domestic workers who apply under the 50 percent rule do so to maintain government benefits under the Unemployment Insurance program (the UI program requires unemployed workers to show that they have actively sought employment each week in order to continue benefits). They also found that while the rule does not actually provide substantial additional employment to domestic workers, it creates needless insecurity and uncertainty for H–2A workers who are employed under H–2A contracts.

A commenter from a state agency asserted that the elimination of the rule would relieve the SWA from having to track these H–2A job orders and would remove unnecessary burdens on employers. The commenter believed that there is no tangible evidence that the rule produces the desired results of increasing employment of domestic workers:

> My experience is that it is rare for [U.S.] workers to search our Internet postings for agricultural positions in the middle of a growing season. Employers find this requirement confusing and worrisome. Smaller employers have expressed concern that they could lose their fully trained and settled foreign worker(s), suddenly disrupting their operation. Unfortunately, their experience is that U.S. workers who drop in during a season have a tendency to not stay till the end of the contract period. If this practice had historically produced significant results, the government-mandated grower investment of time and money might be justifiable, but it has not.

One commenter stated that there is no need for the 50 percent rule where recruiting indicates that there are no or few local workers. The commenter also found no need for the rule in situations where the employers typically hire a large number of local workers. The commenter went on to argue that if the Department wants to retain the rule, it should do so only as a condition of approval of an application where there is evidence indicating that there are a relatively large number of local workers but the employer has indicated that it intends to hire few if any local workers.

A number of commenters observed that all available data support the view that relatively few U.S. workers desire employment in agriculture. They argued that it necessarily follows from this fact that the 50 percent rule provides almost no benefit to U.S. workers, yet its presence dissuades employers from participating in the program because of the uncertainty it creates. These commenters concluded that the rule should be abandoned. One commenter believed that if the Department wished to retain the rule, it should reserve the right to do so on a case by case basis, as a condition of approval for an application where the CO and SWA believed that insufficient local recruiting has been accomplished. The Department believes that this idea may have some merit, but has not devised a means to implement it at this time.

A number of agricultural employers commented that the rule requiring H–2A employers to hire any qualified U.S. worker during the first 50 percent of the H–2A work contract makes it very difficult for a producer to manage labor supply and costs over the life of the contract. Commenters from state agencies found that the features of the rule are seldom completely understood by the growers who need the H–2A program, adding to their impression that the entire process is complicated and rife with red tape. Another State commenter found the rule to be antiquated and ineffective.

Another commenter observed that the rule has been disruptive and non-productive for both workers and employers and that its elimination will provide much-needed stability in the workforce obtained by the employer. A commenter found that a cost-benefit analysis of the situation indicates that continuing to recruit U.S. workers beyond the date of need results in no corresponding benefit. One farmer observed,

> It's just not right that after I have made the best attempt to hire domestic workers that once halfway through the season I be forced to replace a trained H–2A worker. I really would prefer to hire local workers and keep that wage money at home, if I could find them.

Commenters from various farm bureaus around the country argued that under current conditions, the 50 percent rule is without foundation. They argued that anecdotal evidence shows that few, if any, employees referred for employment after the employer's date of need apply for or maintain their work status. They believed that agricultural employers, especially those with perishable crops, must be able to operate with greater certainty. Once an operation begins, the success of the work effort is the product of coordinated teamwork. Employers are willing to make strong recruitment efforts before the date of need, but they seek certainty and continuity once the work period has begun.

A commenter from a farming association found that the actual benefits of the 50 percent rule for domestic workers are, to all practical intent, illusory. The commenter strongly supported eliminating the rule entirely, arguing that such an approach would result in a substantial improvement in program operations. The commenter argued that while the Department has a statutory obligation to protect the rights of U.S. workers when implementing the program, it is necessary to strike a balance between the priority given to U.S. workers and the rights of employers, who have met all of the legal obligations that attach to employing H–2A workers. It went on to argue:

> The current 50 percent rule, while seemingly a provision to protect U.S.

workers, is more disruptive to farm operations and a disincentive to program participation than it is a true protection for workers. There is no reason to mandate that a grower's obligations to find and recruit eligible U.S. workers should extend past the recruitment period; imposing such an obligation serves only to disrupt operations of the producer and does little to protect U.S. workers * * *. The fact is, and all available data support this view, relatively few U.S. workers desire employment in agriculture * * *. The work is arduous, episodic, taxing, requires relatively little skill and virtually no education. Within the U.S. economy the pay—while increasing—is relatively low. These jobs provide tremendous economic opportunity for migrant workers but are not perceived as offering the same benefit to U.S. workers. In fact, approximately 10 million individuals in the U.S. economy today choose to work in jobs which pay them less than they could earn in agriculture. The 50 percent rule provides virtually no benefit to U.S. workers yet its presence has clearly been a disincentive to program participation. It should be abandoned.

Other commenters offered alternatives to the 50 percent rule including a 25 percent rule, recognizing that referrals after the date of need may serve a useful purpose but extending through 50 percent of the contract completion might be too long. One farming association suggested that the obligation to accept domestic referrals should terminate not later than three days before the date of need.

A number of state agencies suggested that SWAs should leave job orders open for 30 days after the date of need and employers should be required to offer employment to any qualified and eligible U.S. workers who are referred during that time, also recognizing that the current 50 percent of the contract period is too long and perhaps too uncertain to manage.

Another commenter similarly recommended that employers be required to begin recruitment no more than 60 days prior to the date of need and continue until between one and 30 days after the date of need, with adjustments made according to the expected duration of the job opportunity. Under this commenter's proposal, the determination of the end date for recruitment should be no earlier than the date of need, but the 50 percent rule should be revisited and adjusted to lessen its potential negative impact on the agricultural employer's workforce. Finally, another commenter suggested a continued obligation of 50 percent of the work period or 30 days, whichever is longer.

It is clear to the Department from these comments that many view the current 50 percent rule as a substantially burdensome requirement that does not provide a corresponding benefit to U.S. workers.[3] Others see the rule as benefiting U.S. workers by providing them expanded job opportunities. Based on the comments it has received and its substantial experience in operating the H–2A program, the Department believes that the 50 percent rule clearly does provide some benefits to U.S. workers, but that the rule creates substantial uncertainty for employers in managing their labor supply and labor costs during the life of an H–2A contract and serves as a substantial disincentive to participate in the program.

Based on the comments it received, the Department has decided to modify the rule. The requirements of 8 U.S.C. 1188(c)(3)(B)(iii) were fully satisfied when the Department promulgated interim final regulations on July 19, 1990. Nevertheless, the language of that provision suggests that when issuing regulations dictating whether agricultural employers should be required to hire U.S. workers after H–2A workers have already departed for the place of employment, the Department should weigh the ''benefits to United States workers and costs to employers.'' After considering its own experience and the experience of its SWA agents, the Department agrees, on balance, with those commenters who argued that the costs of the 50 percent rule outweigh any associated benefits the rule may provide to U.S. workers. It is beyond dispute that the obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain that they will have a steady, stable, properly trained, and fully coordinated work force. It is also apparent from the comments received that the current rule is poorly understood by employers, difficult for the SWAs to administer, and a disincentive for employers to use the H–2A program. Finally, the rule requires agricultural employers to incur additional unpredictable and unnecessary expenses, forcing them to choose between either hiring a greater number of workers than they actually need to complete their work part-way through a season, or discharging some or all of their H–2A workers, in which case the employer will lose its entire investment in those workers and will be required to incur the immediate additional expense to transport the workers back to their home countries. It is for all of these reasons that no other permanent or temporary worker program administered by the Department contains such a burdensome requirement, even though most of these programs are subject to similar statutory or regulatory requirements that the Secretary certify (1) that there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or services needed and (2) that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is clear to the Department that the current 50-percent rule does provide some benefits to U.S. workers, since at least some U.S. workers secure jobs through referrals made pursuant to the rule. The number of such hires, however, appears to be quite small. Moreover, the comments indicate that many workers hired pursuant to the 50-

[3] In December 2007, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H–2A program on U.S. farm workers. The Department had conducted a similar study of the impact of the 50 percent rule in 1990, but upon reviewing that study as part of the H–2A review which led to this recent NPRM the Department concluded that it was of limited utility because it covered only two states—Virginia and Idaho—and because, given the significant changes that have occurred in the field of agricultural employment over the last two decades, it was substantially out of date. The surveyors for the new study conducted interviews with a number of stakeholders to gather information on the impact of the 50 percent rule and how it is currently working. The surveyors queried a far more representative sample of entities affected by the 50 percent rule than the 1990 study had, including employers, state workforce agencies, and farm worker advocacy organizations.

While the new study identified a diversity of opinion about the value and effectiveness of the current 50 percent rule, the researchers found that the rule ''plays an insignificant role in the program overall, hiring-wise, and has not contributed in a meaningful way to protecting employment for domestic agricultural workers.'' *See* ''Findings from Survey of Key Stakeholders on the H–2A '50 Percent Rule','' HeiTech Services, Inc. Contract Number: DOLJ069A20380, April 11, 2008. The researchers estimated that the number of agricultural hires resulting from referrals to employers during the 50 percent rule period was exceedingly small, with H–2A employers hiring less than 1 percent of the legal U.S. agricultural workforce through the 50 percent rule. All of the categories of surveyed stakeholders, including employers, state workforce agencies, and even farm worker assistance and advocacy organizations, reported that U.S. workers hired under the 50 percent rule typically do not stay on the job for any length of time when hired, frequently losing interest in the work when they learn about the job requirements. Many of the survey respondents, including representatives from each of the three groups, suggested that the rule should be either eliminated or modified.

The Department did not specifically rely on either of the two surveys in crafting the Final Rule. It does, however, believe that the information provided adds some additional depth to the discussion contained in this preamble. Accordingly, it has posted the studies on the Department's Web site.

percent rule do not complete the entire work period, adding costs to employers and further diminishing the total economic benefits derived from the rule by U.S. workers. It is also relevant that under the Final Rule, the period of time that a job order is posted by a SWA prior to an employer's dates of need has been substantially expanded from the current rule, which will provide U.S. workers with more up-front information about agricultural job opportunities, rendering mandatory post-date-of-need hiring less necessary.

In sum, after considering the best information currently available, the Department has concluded that the benefits of the 50-percent rule to U.S. workers are not, on balance, sufficient to outweigh its costs. The Department has also determined that modifying or eliminating the 50-percent rule would not compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of H–2A workers, just as the absence of a 50-percent rule from the other permanent and temporary worker programs administered by the Department has never been thought to compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of foreign workers under those programs. If it is true, as some commenters suggested, that some U.S. agricultural workers simply drift from employer to employer without paying attention to actual advertising about agricultural job opportunities, the Department is confident that farm worker advocacy and assistance organizations will help to spread the word about advertised agricultural job openings, much as they do today. The available hiring and referral data strongly suggest, however, that such workers only rarely secure their jobs through the 50-percent rule today. It is also worth noting that to the extent workers can identify agricultural job openings before those jobs have started, they will gain the additional benefit of a longer period of employment.

Despite these conclusions, the Department is concerned that the sudden and immediate elimination of the 50-percent rule might prove disruptive to the access of some U.S. workers to agricultural employment opportunities. If some U.S. workers have become accustomed to the ability to secure H–2A-related employment after the jobs have already started, those workers may benefit from a transition period that will allow those workers to adjust their employment patterns. A transition period would also allow the Department to collect additional data about the costs and benefits of mandatory post-date-of-need hiring under the new rule structure over a period of several years, allowing the Department to assure itself that its initial conclusions regarding the rule are sound.

For these reasons, the Department has created a five-year transitional period under the Final Rule during which mandatory post-date-of-need hiring of qualified and eligible U.S. worker applicants will continue to be required of employers for a period of 30 days after the employer's date of need. In determining precisely what form mandatory hiring should take during this transitional period, the Department considered all of the various options presented by commenters. Several commenters suggested limiting the period during which employers are required to engage in mandatory post-date-of-need hiring to 30 days. The Department has adopted this suggestion as the transitional period rule, both for ease of administration and to minimize the extent to which the various costs and considerations outlined above will burden employers during the transition. The Department believes that the use of this 30-day post-date-of-need mandatory hiring period during the five-year transition period will allow a smooth adjustment of the expectations of U.S. workers and will provide the Department additional time to collect data on the effect of the rule. At the end of the transition period, the mandatory post-date-of-need hiring requirements under the Final Rule will expire, and employers will only be required to accept referrals of U.S. workers until the first date the employer requires the services of H–2A workers. However, the Department intends to conduct a study of the impact of this transitional 30-day rule on U.S. workers and on employers during the five-year transition period, and under the rule retains the ability to indefinitely extend the 30-day rule by notice published in the **Federal Register** should the Department's study determine that the rule's benefits outweigh its costs.

We believe this framework addresses the concerns of many of the commenters, both for and against continuation of the 50-percent rule, and strikes an appropriate balance between the concerns of agricultural employers and the need to protect U.S. workers' access to the employment opportunities under the H–2A program. Having a set period of time during the transition period, not tied to a percentage of the contract length, will provide employers more predictability and be easier to administer for employers, workers and SWAs making referrals. The language of § 655.102(b) as originally proposed implied that mandatory post-date-of-need hiring would no longer be required by the H–2A regulations. The language creating the transitional 30-day mandatory hiring period outlined above may be found at § 655.102(f)(3) of the Final Rule.

To the extent that the 30-day rule applies, the employer would require similar safeguards as under the 50-percent rule so long as the employer continues to have an affirmative obligation to hire U.S. workers beyond the date of need. Accordingly, the Department has included a provision in § 655.102(f)(3)(ii) of the Final Rule on the prohibition of withholding of U.S. workers. The provision is similar to the provision in § 655.106(g) of the current regulations, but has been modified to reflect the centralization of the application process with the NPC. Under the final rule, the CO, and not the SWA, receives and investigates the complaint and makes a determination whether the application of the 30-day rule should be suspended with respect to the employer.

(c) Section 655.102(c) Retention of Documentation

The Department proposed in the NPRM a 5-year retention requirement for all H–2A applications and their supporting documents. The vast majority of commenters who provided observations on this provision voiced concern with the proposed 5-year document retention period and recommended 3 years, stating that they did not have adequate staff to comply with the requirement or that it is not an industry standard and not legally consistent with other regulations and might even discourage use of the H–2A program. The Department has reconsidered its position and has changed the retention requirement to 3 years.

One commenter suggested that all record retention requirements and periods be combined into one section of the amended regulations to provide program participants with clearer guidance for these obligations. The Department agrees and has added a new § 655.119 to the regulatory text. The new section lists all the document retention requirements.

Another commenter requested that the Department add a sentence to the rule indicating that the employer is not liable for eliminating records after the retention period expires. The Department has not added an express provision to this effect, as we believe the cessation of the employer's

responsibility to retain the records after the retention period expires is self-evident. The Department suggests, however, that there may be some benefits to employers keeping records beyond the required 3-year period; if the employer later faces an allegation of fraud or some other alleged violation that has a statute of limitations of longer than 3 years, retained documents may help the employer defend itself. Indeed, if a proceeding or investigation relating to the retained records has already been initiated, it should be understood that the employer is obligated to retain the records that are the subject of the proceeding or investigation until it has come to a conclusion.

One commenter requested that the Department allow applicants who are denied certification to discard records 180 days after the denial. The Department has decided to eliminate the requirement to retain records pertaining to denied certifications in its entirety. If an application is denied on grounds of fraud or malfeasance, the Department expects that it will have already obtained copies of any documents necessary to prove the fraud or malfeasance during the process of denying the certification, and thus the retention of such documents by the employer would be needlessly duplicative. Under the Final Rule, any employer who has been denied certification can discard the records immediately upon receiving the denial notice, or, if the employer appeals the decision, whenever the decision to deny certification becomes final. If the denial is ultimately overturned on appeal and certification is granted, the application of course becomes subject to the document retention requirements for approved cases.

A SWA requested that we define who is responsible for monitoring the documentation and ensuring compliance. This Final Rule places responsibility squarely with the employer to maintain the documentation. The NPC, through the audit function as well as the other enforcement tools at its disposal, will ensure compliance. SWAs would not be responsible for monitoring documentation or ensuring compliance with this provision.

(d) Section 655.102(d) Positive Recruitment Steps

The Department proposed ''positive recruitment'' steps including posting a job order with the SWA serving the area of intended employment; placing three print advertisements; contacting former U.S. employees who were employed within the last year; and recruiting in additional States designated by the Secretary as States of traditional or expected labor supply.

Many commenters, primarily employers and employer associations, expressed concerns with the specific proposed pre-filing recruitment steps. Many argued that the proposed longer recruitment period and increased advertising would simply increase the cost of the recruiting effort without increasing the benefits and that the increased steps were duplicative. These commenters believe that their workforce shortage problem is not due to a lack of awareness of available jobs, but rather is because of a lack of willing and available U.S. workers. They suggested that rules be promulgated to use only the current state employment service system and not require agricultural employers to perform a substantial prolonged search for U.S. workers before being able to apply for an H–2A labor certification. According to these commenters, the time required in the current rules is sufficient to identify and notify the U.S. work force of the availability of particular jobs.

Requiring pre-filing recruitment is, in the Department's view, essential to the integrity of an attestation-based process. Only with sufficient time for adequate recruitment can the Department ensure that the potential U.S. worker pool is apprised of the job opportunity in time to access that opportunity. The current recruitment time frame, in which employers file applications 45 days prior to the date of need, recruit for 15 days thereafter, and in which a CO must adjudicate the application no later than 30 days prior to need, has proven unworkable. COs are today certifying the absence of U.S. workers based on, at best, a handful of days of recruitment activity, which is insufficient to apprise U.S. workers of job opportunities through either the SWA employment service system or other positive recruitment activities.

The belief of some commenters that the time allotted in the present regulatory scheme for recruiting is sufficient to canvass the potential U.S. workforce is, in the Department's view, incorrect. The Department has heard significant concerns voiced by the farmworker advocate community that there is an inability to access job opportunities within the short recruitment period provided in the current system. The Department takes seriously these concerns about the length of the recruitment, particularly in light of the Department's modification of the 50 percent rule (discussed above with respect to § 655.102(b)) and the possibility that it will be phased out entirely after a period of five years. The movement of the recruitment period to a time prior to the filing of the application provides a clear and well-defined time for the employer to make available and for the U.S. farmworker to access job opportunities, and provides the Department with better information with which to make its certification determination. The establishment of a 30-day post-date-of-need referral period for the next five years further ensures that the expectations of workers will not be unduly disrupted.

A trade association recommended SWAs be removed from the recruitment process altogether, and only be involved in the inspection of worker housing and workplace conditions after approval of the labor certification and visa and the commencement of work. A State agency representative recommended the SWAs receive copies of the ETA–750 (*Application for Temporary Employment Certification*) and ETA–790 not for review but to ensure the SWA would have access to accurate information.

The Department notes that it is statutorily prohibited at this time from amending the Wagner-Peyser regulations to remove SWAs from the H–2A process. *See* Public Law 110–161, Division G, Title I, Section 110. Nor does it believe such a step would be beneficial at this time. SWAs provide an effective means of completing many required activities, such as inspections of employer-provided housing. SWAs are also integral to the process of receiving and posting agricultural job orders. The Department declines to require that SWAs also receive the form ETA–750, as they will receive far more significant information in the form ETA–790 job clearance order request.

A group of farmworker advocacy organizations also claimed that the proposed changes to the recruitment process were inconsistent with INA requirements, portions of the Wagner-Peyser Act, and MSPA. The organization believed the proposed regulations changed the standards for employer recruitment efforts to the detriment of U.S. workers and did not address recruitment violations that had been uncovered in the past. Specifically, the organization objected to the elimination of the standard for positive recruitment based on comparable efforts of other employers and the H–2A applicant employer as found in the current regulation at § 655.105(a). This organization was also concerned about the elimination of the current provision requiring that ''[w]hen it is the prevailing practice in the area of employment and for the occupation for

non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers.'' 20 CFR 655.103(f). The organization made several recommendations for revisions regarding recruitment, including preserving the burden on the employer (under Departmental review) to identify and positively recruit in locations with potential sources of labor, and the obligation to work with the SWA to do so; retaining current regulatory provisions requiring that employers engage in the same kind and degree of recruitment for U.S. workers as they utilize for foreign workers; and requiring adequate compensation of farm labor contractors who find U.S. workers. Additionally, it recommended preserving the role of SWAs contained in the current regulations and detailed in the internal Departmental H–2A Program Handbook.

Other commenters expressed concern that the Department's proposal to reduce the scope and type of required recruitment efforts while increasing the length of time to perform recruitment was primarily intended to streamline the program, but would not actually benefit U.S. workers. These commenters disagreed with the proposed rule's elimination of the current regulatory requirement to contact farm labor contractors, labor organizations, nonprofits and similar organizations to recruit domestic employees. If the Department seeks to revise the current recruitment practices, in the opinion of these commenters, it would be more effective to maintain or increase current recruitment standards, while giving agricultural employers additional time within which to meet their obligations; otherwise the Department is reducing opportunities for U.S. workers.

One commenter suggested that the Department bolster word-of-mouth recruitment because it is, in the commenter's opinion, the only way that U.S. workers find out about jobs in the agricultural sector and it encourages free-market competition as long as the information is accurate. This commenter believes too many H–2A employers do not provide accurate information to U.S. workers because it is in their best interests to hire H–2A workers who must stay tied to that employer for the entire agricultural season.

While the Department appreciates the concerns expressed, it believes these concerns are misplaced in light of the recruitment methods that the Department will be requiring employers to undertake under the Final Rule. The Department will continue, and in some respects expand, those core positive recruitment requirements that have a proven track-record of providing cost-effective information to U.S. workers about available job opportunities. For example, the Final Rule retains the current requirement that employers run two newspaper advertisements in the area of intended employment, but expands that requirement, as laid out more fully in § 655.102(g), by requiring that one of the advertisements be placed on a Sunday, which typically is the newspaper edition that has the highest circulation. The Department declines, however, to continue obscure and difficult-to-administer provisions requiring employers and the Department to abstractly measure the amount of ''effort'' that employers put into their domestic positive recruitment, or to determine precisely what the prevailing practice is in a given area with respect to the payment of labor contractor override fees. Provisions that call for the measurement of employer effort require the Department to make highly subjective judgments and are extremely difficult to enforce. Moreover, the Department's program experience has shown that most of the discontinued recruitment methods cited by commenters—radio ads and contacting fraternal organizations, for example—substantially add to the burden of using the program, but add little to the total amount of information about agricultural job opportunities that is made available to U.S. workers through the positive recruitment methods that are required by the Final Rule. The elimination of specific requirements to contact entities such as fraternal organizations does not mean that interested entities will be entirely deprived of information about open agricultural job opportunities. Rather, it means that interested entities should pay attention to newspaper advertisements and SWA job orders.

The Department appreciates the suggestion that it should develop methods for encouraging word-of-mouth as a recruitment tool, and that word-of-mouth is frequently a successful way for U.S. workers to learn about job opportunities. We do not believe that word-of-mouth recruitment can effectively be mandated by regulation, however. Rather, the Department anticipates that word-of-mouth communication will be instigated by the positive recruitment efforts that the Final Rule requires, particularly through the assistance of farm worker assistance and advocacy organizations, which can spread the word about available job openings.

The Department takes seriously its statutory obligation to determine whether there are sufficient numbers of U.S. workers who are able, available, willing, and qualified to perform the labor or services involved in the petition and to ensure that U.S. workers' wages and working conditions are not adversely affected by the hiring of H–2A workers. The Department believes that the positive recruitment methods it has selected for inclusion in the Final Rule—the use of newspaper advertisements, the state employment service system, contact with former workers, and recruitment in traditional or expected labor supply States—provide notice of job opportunities to the broadest group of potential applicants in an efficient and cost-effective manner, while avoiding burdening employers with requirements that have proven costly and at times difficult to administer without yielding clear benefits. The Department notes that employers stand to gain a great deal from recruiting eligible U.S. workers rather than incurring the considerable time and expense of securing foreign workers from thousands of miles away. The various provisions of these regulations, including wage, housing, and transportation requirements, ensure that it is virtually always more expensive for employers to hire H–2A workers than it is for them to hire U.S. workers outside the H–2A program. Thus, employers have significant incentives to use the positive recruitment methods prescribed by these regulations to maximum effect, and the Department is confident that these methods will adequately spread the word to U.S. workers about available job opportunities. The Department expects that many employers will also engage in additional recruitment efforts that can, in the absence of rigid and overly prescriptive regulatory requirements, be flexibly tailored to the particular circumstances of local labor markets.

(e) Section 655.102(e) Job Order

Proposed § 655.102(e) required that, prior to filing its application with the NPC, the employer place a job order, consistent with 20 CFR part 653, with the SWA serving the area of intended employment. The NPRM also required the job order to be placed at least 75 but no more than 120 days prior to the anticipated date of need.

Several commenters focused on the requirements for placement of the job order. Three commenters posited that the rule would create problems for program users by establishing requirements for acceptable job offers that are subject to the Department's discretion, while employers would have to conduct the recruitment before the terms and conditions of the employer's job offer have been reviewed and approved by the Department. According to these commenters, the rule is silent on what happens if, after the employer conducts the pre-filing recruitment, the Department does not approve the employer's job offer. Under the current program, the recruitment would be considered invalid, and the employer would be required to revise the job offer and repeat the recruitment. This situation, according to these commenters, introduces an unacceptable degree of uncertainty and risk into the process. A trade association further commented that, because there will be no prior approval of the job offer by the NPC, all SWAs would be independently interpreting and making decisions about the job offers, and believed that such a process would lead to inconsistencies among SWAs. The association was also concerned there would be inconsistency between what a local SWA employee would accept and what the CO would later find acceptable. The association recommended retaining the existing process as an option for employers.

The Department requires that the employer submit an acceptable job order (current form ETA–790) to the appropriate SWA for posting in the intrastate and interstate clearance system. The ETA–790 describes the job and terms and conditions of the job offer: the job duties and activities, the minimum qualifications required for the position (if any), any special requirements, the rate of pay (piece rate, hourly or other), any applicable productivity standards, and whether the employee is expected to supply tools and equipment. This form is submitted to the SWA for acceptance prior to the employer's beginning positive recruitment. As long as the employer's advertisements do not depart from the descriptions contained in the accepted job order, the advertisements will be deemed acceptable by the Department. Thus, employers should place advertisements after the form ETA–790 has been accepted for intrastate/interstate clearance, eliminating any chance that recruitment will later be rejected by the NPC due to problems with the job offer and corresponding advertisements.

The Department also does not anticipate significant problems in uniform decision making among SWAs. SWAs will be, as they have been for some time, the primary arbiter of whether job descriptions and job orders are acceptable. In response to comments on the subject, however, the Department has clarified in the text of the rule that employers may seek review by the NPC of a SWA rejection, in whole or in part, of a job description or job order. The regulations have also been revised to permit the NPC to direct the SWA to place the job order where the NPC determines that the applicable program requirements have been met and to provide the employer with an opportunity for review if the NPC concludes that the job order is not acceptable. This modification renders concrete what has long been the informal practice with respect to H–2A related job orders, as the NPC has worked hand-in-hand with the SWAs to ensure that job orders comply with applicable requirements. It is also implicit in the status of the SWAs as agents of the Department, assisting the Department in the fulfillment of its statutory responsibilities.

One trade association noted that the job order must be filed in compliance with part 653, and that § 653.501 requires that the employer give an assurance of available housing as part of the job offer. This commenter opined that this would be impossible to do since employers cannot guarantee the availability of housing that far in advance for purposes of using the proposed housing voucher. The Department's disposition of the proposed housing voucher, discussed below, renders this comment moot.

The same commenter noted that § 653.501(d)(6) requires that the SWA staff determine whether the housing to be provided by the employer meets all of the required standards before accepting a job order, and argued that this would be an impossible task 120 days before the actual date of need, as the proposed rule purported to allow. As explained above in the discussion of § 655.102(a), the Department has amended the timeframe for recruitment by moving the first date for advertising and placement of the job order to no more than 75 days and no fewer than 60 days prior to the date of need. Moreover, in response to the comments received, the Department has specified in the Final Rule that SWAs should place job orders into intrastate and interstate clearance prior to the completion of the housing inspections required by 20 CFR 653.501(d)(6) where necessary to meet the timeframes required by the governing statute and regulations. This will maximize the time that job orders are posted, providing better information to workers. The Final Rule further directs SWAs that have posted job orders prior to completing a housing inspection to complete the required inspections as expeditiously as possible thereafter. This provision is consistent with the current regulations, which already permit job orders to be posted prior to the completion of a housing inspection pursuant to § 654.403. If a SWA notes violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. With these amendments, the Department believes it has adequately addressed the concerns contained in this comment.

In addition, a group of farmworker organizations objected to the use of the language ''place where the work is contemplated to begin'' in describing which SWA should receive a job order when there are multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State. It believed this language would allow employers to choose where they wanted to recruit U.S. workers simply by ''contemplating'' that the work would begin in an area unlikely to have U.S. workers. The Department received other comments that supported this requirement. After considering these comments, the Department has revised the language of the provision to state that an employer can submit a job order ''to any one of the SWAs having jurisdiction over the anticipated worksites.'' The revised language affords employers some flexibility in determining where to initially send job orders, but it does not allow employers to use this flexibility to avoid recruitment obligations, as § 655.102(f) provides that the SWA that receives the job order ''will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the job order as anticipated worksites.'' Thus, no matter where the job order is initially sent, the scope of required recruitment will be the same, covering all areas in which anticipated worksites are located.

A sentence has also been added to the Final Rule, simply as a procedural direction to the SWAs, that ''[w]here a future master application will be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the

association on behalf of all employers that will be duly named on the Application for Temporary Employment Certification.''

(f) Section 655.102(f) Intrastate/Interstate Recruitment

The proposed regulation instructs the SWA receiving an employer's job order to transmit a copy to all States listed as anticipated worksites and, if the worksite is in one State, to no fewer than three States. Each SWA receiving the order must then place the order in its intrastate clearance system and begin referral of eligible U.S. workers.

The Department received some general comments regarding the referral process for U.S. workers. One group of farmworker advocacy organizations expressed concern about the lack of referrals by SWAs to H–2A employers in the past and believed the proposed regulation would not cure this deficiency. One association of agricultural employers expressed concern regarding the ability of the SWAs to adequately handle the referral process.

The Department believes these concerns are misplaced, especially under a modernized system in which SWA responsibilities with respect to each H–2A application is reduced. A core function of the SWA system is the clearance and placement of job orders and the referral of eligible workers to the employers who placed those job orders. Past program experience demonstrates the occurrence of a sufficient number of referrals to sustain this requirement.

One SWA commented that although the NPRM states the purpose of removing the SWA is to remove duplication of effort, one important duplicative effort is retained—the requirement for sending job orders to other labor supply States and neighboring States. This agency suggested that if the job orders are uploaded to the national labor exchange program, then the transmittal of job orders to other States is unnecessarily duplicative. Other commenters recommended all agricultural job orders be posted in an automated common national job bank.

The Department acknowledges the potential benefits of a national online system for posting job offers. However, automating interstate job clearance would require regulatory reforms that the Department is currently constrained from undertaking by Congress. *See* Public Law 110–161, Division G, Title I, Section 110. There is currently no online national exchange organized under the auspices of the Department to which such jobs could be posted. The Department's former internet-based labor exchange system, America's Job Bank, was disbanded in 2007 because the private sector provides much more cost-effective and efficient job search databases than the federal government can provide. The Department, however, does not wish to impose mandatory participation in such job databases on SWAs or employers at this time. Because the Department already has an existing system in place for handling interstate job orders, and given the current legal and operational constraints of changing that system, the Department has determined that the only feasible and prudent approach at this time is to continue to require SWAs to process the interstate job orders in accordance with 20 CFR Part 653.

An association of growers/producers opposed the requirement for transmitting job orders to additional States and recommended the job orders be circulated only in the State where the job is located. This association also suggested that any out of State notifications should list only the location of the job offer and never list the employer's name.

The Department's circulation of the job order to any States that are designated by the Secretary as labor supply States is required by statute. Section 218(b)(4) of the INA prohibits the Secretary from issuing a labor certification after determining that the employer has not ''made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' The interstate recruitment must be conducted ''in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer.'' The Department does not have the ability to eliminate or alter the requirement absent Congressional amendment.

At the same time, the Department does not read the statutory language to require the Secretary to designate traditional or expected labor supply States with respect to all States in which H–2A applications may be filed. Rather, the Department believes that the statutory language is most reasonably read to require the Secretary to make a determination for each area (which the Secretary has elected to do on a State-by-State basis) whether, with respect to agricultural job opportunities in that area, there are other areas (which the Secretary has also elected to examine at the State-by-State level) in which ''there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' In other words, the Department reads the statute as contemplating that with respect to agricultural job opportunities in certain States at certain times, as a factual matter there simply will not be other States in which there are ''a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' Under this reading of the statute, the word ''where'' in 8 U.S.C. 1188(b)(4) essentially means ''if'': *If* the Secretary determines that the statutory criteria have been met, then she is required by the statute to designate the area of traditional or expected labor supply, but *if* the Secretary determines that the statutory criteria have not been met, then the requirement is simply inapplicable. This sensible reading of the statute comports with the realities of the agricultural sector: The pattern of seasonal migrant work has clearly changed over time, and in some cases older patterns have become well-established while others have fallen away. The changeable nature of the agricultural labor flow, which is highly dependent upon weather patterns, crop distribution, the availability of transportation, and even the price of gasoline, are all recognized under this system of flexible, fact-specific designations by the Secretary.

A group of farmworker advocacy organizations pointed out that the proposed regulations do not provide a timeframe for how long the local SWA can wait before placing the H–2A job order into interstate clearance, and only require the SWA to ''promptly transmit'' the job offer. The Department does not believe that its requirement of ''prompt'' transmission requires further clarification, however. Posting job orders is one of the core functions of the SWAs, and the Department is confident the SWAs will continue to act responsibly in promptly transmitting and posting job orders as they have in the past.

The organization was also concerned about the clarity of the instructions to be followed by SWAs for circulating job orders among other States. The proposed regulations require the SWA to transmit a copy of the open job order to all States listed in the employer's application as anticipated worksites or, if the employer's anticipated worksite is

within a single State, to no fewer than three States, including those designated as traditional or expected labor supply States. However, the organization believed the proposed regulation would be read to not require any additional job order circulation by the SWA if the employer has anticipated worksites in two States, and thus would provide less circulation of job orders and no contact of labor supply States in such situations. The Department agrees and has clarified the language of § 655.102(f)(1) by removing the phrase, ''If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State'' to make clear that job orders with locations in more than one State must be circulated to any traditional or expected labor supply States designated by the Secretary for either of the work locations.

An attorney for an association of growers/producers suggested the H–2A process could be further improved by allowing State officials to affirm that employers need agricultural workers in their State. The Department believes it cannot implement such an affirmation process, as similar processes for determining the unavailability of U.S. workers have been found to be insufficient for the factual determination required by the Secretary. *See First Girl, Inc.* v. *Reg. Manpower Admin. DOL*, 361 F. Supp. 1339 (N.D. Ill. 1973) (availability of U.S. workers could not be determined by generic listing of available workers listed with state agency).

A public legal service firm recommended that the Department require employers to circulate all job orders in Texas, which they said is a traditional agriculture labor surplus state. If the commenter's factual assertions about labor availability in Texas are correct, the Department would expect that Texas will frequently be designated as a labor supply State. The Department is cognizant of the changeable nature of worker flows, however, and therefore does not wish to require the mandatory inclusion of one or more specific States in the designation process. It is subject to question, for example, whether significant numbers of agricultural workers in Texas would be willing to accept seasonal employment in Alaska or Hawaii. Rather, the Department will rely on annually updated information in designating labor supply States to ensure the accuracy of the assertions that farm workers are indeed available in the purported labor supply State and that recruitment there for out of State jobs would not take needed workers away from open agricultural jobs in the labor supply State. In response to these concerns, however, the Department notes it will announce, at least 120 days in advance of the Secretary's annual designation, an opportunity for the public to offer information regarding States to be designated.

Finally, a group of farmworker advocacy organizations expressed concern regarding the content of job orders placed by agricultural associations. It objected to the placement of job orders with a range of applicable wage offers with a statement that ''the rate applicable to each member can be obtained from the SWA.''

In promulgating this rule, the Department made no changes to current practice. An association is permitted to pay a different wage for each of its members, should it choose to do so, as long as that wage meets the criteria established in the regulations (now found at § 655.108). U.S. workers seeking a job opportunity from or within an association can acquire from the SWA a list of member locations and the wages associated with each so that the worker can make a fully informed decision as to which job, if any, the worker wishes to apply.

We made several minor edits that are consistent with the above discussion to the language of § 655.102(f) for purposes of clarity. Some language was also moved to other sections or deleted, again for purposes of clarity and without substantive effect. Section 655.102(f)(3), which describes the recruitment period during which employers are required to accept referrals of U.S. workers, was added to the rule for reasons described at length in the discussion of the 50 percent rule under § 655.102(b).

(g) Section 655.102(g) Newspaper Advertisements

The Department proposed that in addition to the placement of a job order with the SWA, employers be required to place three advertisements (rather than the current two) with a newspaper or other appropriate print medium. Most who commented on this suggestion believed the additional advertising would result in additional costs without any additional benefits. An association of growers/producers stated: ''Additional newspaper advertising is a very expensive alternative of recruiting workers in today's world and should not be the only method allowed.''

A trade association also questioned the expansion of the advertising requirements in the proposed regulations and commented that newspapers are not a usual or even occasional source of labor market information for farm workers. The association and other commenters referenced the National Agricultural Worker Survey (NAWS) which reported that percent of seasonal crop workers (both legal and illegal) learn about jobs from a friend or relative or already know about the existence of the job (although how such knowledge is attained was not reported). The association further commented that the proportion of workers who learn about their jobs from a ''help wanted'' ad was apparently too small even to warrant inclusion in the report. Several of these commenters suggested it would be more efficient to simply allow for posting to the SWA's job bank which is more practical, less expensive, and reaches applicants more readily.

A few employers objected to the very concept of newspaper advertising. One employer objected to having to advertise in a newspaper, commenting that newspaper advertisement is ''not only expensive, but doesn't find any hiding sheep shearers.'' Another employer objected to the increase in required newspaper advertising for U.S. workers ''when it is clear that local workers are simply not available for seasonal jobs.'' Many commenters were particularly concerned that increasing the number of ads from two to three in addition to requiring that one be placed in a Sunday edition would greatly increase employer costs. One trade association commented that it is likely that in the typical situation an employer's advertising costs would increase by three to four times under the proposed regulations, adding hundreds to thousands of dollars to the employers' application costs. That commenter did not provide data supporting this conclusion, however.

Several commenters were in favor of the proposal to increase advertising and expressed support for the additional ad in the expectation it would provide additional notice to the target population. An association of growers/producers supported the increase in advertisements from two to three, believing it would enhance the ability of an eligible U.S. worker to identify and apply for agricultural job openings before the job begins. A farmworker/community advocacy organization agreed that requiring three instead of two advertisements would be a step toward improving the recruitment of U.S. workers.

The Department appreciates that a newspaper ad frequently may not, of itself, result in significant numbers of U.S. workers applying for employment. However, such advertising has been required for decades and remains the central mechanism by which jobs are

advertised, especially to workers who may have only limited access to the Internet. The ads may not necessarily be seen by all farmworkers, but may be, and indeed are, seen by those who participate in the greater farm work community and who can pass along a description of the jobs ads through ''word-of-mouth.'' Newspaper advertising remains, along with the state employment service system network, an objective mechanism by which notice of upcoming farm work can be assessed by the Department and communicated to those who are interested.

The study referenced by many commenters suggesting that most referrals in the agricultural sector take place through word-of-mouth rather than through newspaper advertisements was actually conducted by the Department, and, as noted above, the Department acknowledges that word-of-mouth frequently results in U.S. workers learning about job opportunities. However, the Department believes it would be nearly impossible to effectively implement and enforce a word-of-mouth regulatory standard. The Department believes the combination of job orders and required newspaper advertisements are cost-effective, easily administrable, and readily enforceable, and will make job information available in ways that will result in word-of-mouth referrals.

Although it may be true that few agricultural workers themselves read such advertisements, others do read them, including farm labor advocacy organizations, community organizations, faith-based organizations, and others who seek out such opportunities on behalf of their constituents. The newspaper becomes a very visible source of information for such organizations that are in turn able to spread the word to workers. Through publication to this wide audience, the information ultimately reaches those for whom it is intended.

The Department appreciates the substantial concern raised by a number of commenters regarding the placement of multiple ads and has thus revised its proposal on the number of ads that must be placed in the area of intended employment. The Department has decided to revert from the proposed three to the existing rule's requirement for two ads. The Department is retaining its proposal, however, to require that one of the newspaper advertisements be run on a Sunday, as that is typically the newspaper edition with the broadest circulation and that is most likely to be read by job-seekers.

In response to the various comments about the proposed advertising requirements, the Department is also slightly modifying the language of § 655.102(g)(1) to provide some limited flexibility in selecting the newspaper in which the job advertisement should be run. The Final Rule clarifies that the newspaper must have a ''reasonable distribution.'' Thus, advertisements need not be placed in the New York Times, even if the New York Times is the newspaper of highest circulation in a given area, but also cannot be placed in a local newspaper with such a small distribution that it is unlikely to reach local agricultural workers. The Final Rule also clarifies that the newspaper must be ''appropriate to the occupation and the workers likely to apply for the job opportunity,'' but deletes the modifier requiring that the newspaper must be the ''most'' appropriate. This change was made out of a recognition that in many areas there are multiple newspapers with a reasonable distribution and that are likely to reach U.S. workers interested in applying for agricultural job opportunities, and that as long as these criteria are met, an employer's positive recruitment should not be invalidated. If an employer is uncertain whether a particular newspaper satisfies these criteria, it can seek guidance from the local SWA or the NPC.

The Final Rule also instructs employers not to place the required newspaper advertisements until after the job order has been accepted by the SWA for intrastate/interstate clearance; this replaces the time frame contained in the NPRM and shifts the initiation of recruitment back to the submission to and clearance by the SWA of the job order. This ensures that advertisements reflect the job requirements and conditions accepted by the SWA and minimizes the risk that employers' advertisements will later be determined to be invalid by the NPC.

One commenter suggested that a better alternative to employer-placed advertisements would be for the Department to maintain an up-to-date database listing advertisements for farming and ranching jobs and directing interested workers to contact the SWA in the States where the jobs were located. The commenter believed this approach would expand the ability of U.S. workers to select more varied jobs in a larger geographic area. The Department does not disagree; however, as noted above, amending the current job order clearance process is not an option at this time.

A private citizen commented that the SWA, not the employer, is in the best position to know which newspaper is most likely to reach U.S. workers, and that the SWA should, therefore, continue to have a role in determining where advertising is conducted. Nothing, of course, prevents an employer from consulting with the SWA regarding the most appropriate publication in which to place advertising and thus ensure compliance with the regulations, particularly in instances in which a professional, trade or ethnic publication is more appropriate than a newspaper of general circulation. In fact, a representative of a State government agency suggested the advertising requirements should be limited to local area media and trade publications where available, and that the specific publications should be agreed to by the employer and the SWA based on the potential for attracting candidates and historical experience. While we are not incorporating this suggestion for coordination into the regulation as a requirement, we note that the regulation at § 655.102(g)(1) already requires the ads to be placed in the ''newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity.''

(h) Section 655.102(h) Contact With Former U.S. Workers

The Department proposed that employers be required to contact by mail former U.S. workers as part of the recruitment process. A group of farmworker organizations objected to the requirement and commented: ''if DOL had intended to come up with the least effective way of contacting former employees, it could not have selected a better method than by mail.'' This organization was concerned because they claimed a majority of farm workers are not literate in English or their primary language and, therefore, might not understand the written communication and the regulation does not require the written communication to be in any language other than English. The organization also recommended contact by telephone or through crew leaders or foremen as alternative methods of contact. In response, we have modified this provision in the Final Rule to permit employers to also contact former U.S. workers through alternative effective means, and document those means in some manner (telephone bills or logs, for example).

Additionally, the organization believes many workers would be missed by the proposed mailing effort because the proposed regulation limits the requirement to contacting former

workers ''employed by the employer in the occupation at the place of employment, during the previous year'' and does not require that H–2ALCs contact a growers' former workers who did not work for the H–2ALC during the previous season. The Department declines to adopt a requirement that employers contact workers who did not work for them during the previous season, as such a requirement would be quite impractical, and the other positive recruitment requirement methods included in the Final Rule are intended to reach such workers. It is not at all clear how H–2ALCs would even gain access to the necessary contact information for former employees of other employers, and in the judgment of the Department such a requirement would be excessively burdensome.

One association of growers/producers suggested the proposed rule be modified to allow employers the ability to deny work to employees hired in previous years who demonstrated an unsatisfactory work history/ethic even if the worker was not terminated for cause. A trade association and other commenters expressed concern about former employees who were the subject of no-match letters from the Social Security Administration and requested a safe harbor or common sense exception in such situations.

The Department appreciates that employers that do not participate in the H–2A program generally are not required to rehire employees who have a poor work history. The Department also appreciates that employers frequently may allow short-term workers who prove to be poor performers to finish their job terms if it is easier and, in light of potential litigation risks, less costly than firing them. There is a countervailing concern, however, that if the Department allowed employers to reject former workers who completed their previous job term on the alleged ground that the workers were actually poor performers, it would open the door for bad actor employers to reject former workers on the basis of essentially pretextual excuses. The Department has therefore decided to address employers' concerns about poorly performing workers by creating an exception allowing employers not to contact certain poor performers, but only in the narrow circumstance where the employer provided the departing employee at the end of the employee's last job with a written explanation of the lawful, job-related reasons for which the employer intends not to contact the worker during the next employment season. The employer must retain a copy of the documentation provided to the worker for a period of 3 years, and must make the documentation available to the Department upon request. The Department will review the propriety of the employer's non-contact in such situations on a case-by-case basis. The Department believes that the insertion of this provision is responsive to the comment in that it relieves employers from the burden of being required to rehire truly poorly performing workers, while ensuring that workers who will not be recontacted are aware of the employer's intentions and reasons well in advance of the next employment season and have the opportunity to bring reasons they regard as pretextual to the Department's attention.

With respect to the comment about no-match letters, we note that employers are not required to hire a worker who cannot demonstrate legal eligibility to work. Receipt of a no-match letter may give rise to a duty on the employer's part to inquire about work eligibility, but the letter in and of itself is not sufficient legal justification to refuse to hire a U.S. worker.

One trade association expressed concern about the related requirement for documenting contact with former employees and stated, ''This requirement could reasonably be interpreted to mean that the employer must maintain a copy of its correspondence with each former employee demonstrating that it had been mailed. The only practical way to do this would be to send each letter by certified mail or some other means providing evidence of attempt to deliver. Such a requirement would be unnecessarily burdensome and costly.'' The association recommended this be simplified by requiring the employer to keep a copy of the form of the letter sent and a statement attesting to the date on which it was sent and to whom. Additionally, the association questioned what kind of documentation would demonstrate that the employee ''was non-responsive to the employer's request.'' The association suggested the employer's recruitment report should be sufficient to document which employees were responsive and requiring documentation of non-responsiveness is unreasonable.

The Department does not intend this requirement to be overly burdensome to employers and agrees that copies of form letters together with the employer's attestation that the letters were mailed to a list of former employees would be sufficient to meet the requirements of this provision. The Department also agrees that the recruitment report can be used to sufficiently document the non-responsiveness of former employees. The Department inserted language into the Final Rule clarifying the Department's expectations regarding the type of documentation that should be maintained.

(i) Section 655.102(i) Additional Positive Recruitment

(1) Designation of Traditional or Expected Labor Supply States

In the NPRM, the Department continued to impose on employers the requirement that the employer make ''positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed,'' as mandated by 8 U.S.C. 1188(b)(4). The Department proposed that each year the Secretary would make a determination with respect to each State in which employers sought to hire H–2A workers whether there are other States in which there a significant number of eligible, able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. The Department also proposed to continue the current regulatory provision stating that the Secretary will not designate a State as a State of traditional or expected labor supply if that State had a significant number of local employers recruiting for U.S. workers for the same types of occupations. The Department proposed to publish an annual determination of labor supply States to enable applicable employers to conduct recruitment in those labor supply States prior to filing their application. The Department received several comments on this provision.

A group of farmworker advocacy organizations opined that the Department's proposal contravenes the H–2A statutory requirements regarding positive recruitment. The organization believes the Department's proposal will result in employers not competing with one another for migrant workers and workers not receiving job information even though a particular job in another State may offer a longer season, a higher wage, or better work environment. Another farmworker advocacy organization commented that it makes no sense in a market economy which recognizes competition as good to stop requiring employers to recruit for farmworkers in areas where other employers are seeking farmworkers. A labor organization commented that this

provision demonstrates a lack of understanding of farmworker recruitment and what it believes is an inappropriate desire to ease the recruitment obligations for growers at the expense of U.S. farmworkers. This organization recommended the current positive recruitment rules should be retained and enforced. A U.S. Senator was concerned that the NPRM would cost American workers jobs because they would not have access to information about jobs in other areas.

Employers seeking farmworkers are statutorily required to recruit out-of-State if the Secretary has determined that other States contain a significant number of workers who, if recruited, would be willing to pick up and move in order to perform the work advertised in accordance with all of its specifications. The commenters referenced above appear to believe that the Department's proposal is a new regulatory provision. That is incorrect. The current regulations at 20 CFR 655.105(a), which have been in place for 20 years, specify that Administrator, OFLC should ''attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations.'' This longstanding provision reflects two judgments on the part of the Department. First, it reflects the Department's reading that 8 U.S.C. 1188(b)(4) was intended to require out-of-State advertising only in areas with a surplus labor supply, and was not intended to deleteriously impact farmers in certain areas by instituting federal program requirements that would draw away their local workers. Second, it reflects the Department's judgment that where a ''significant'' number of local employers are already recruiting U.S. workers in a given area for the same types of occupations, there is already significant competition for workers in that area and the addition of further out-of-State advertising would likely be futile. The Department's program experience in applying this limitation over a long period of time leads it to believe that it has worked well in practice to aid program administration and avoid the imposition of unnecessary program expense. The Department notes that this limitation does not mean that out-of-state recruitment will cease in States where workers are being locally recruited, since SWAs will continue to have discretion to post job orders in those States where appropriate.

Several commenters sought more information on the methodology that would be used in making the determinations about labor supply States. A group of farmworker/community advocacy organizations voiced its concern that ''The annual survey is flawed in many respects and not designed to identify sources of labor at the time of need.'' The organization was also concerned about the timing and specificity of the survey to be used. A representative of a State Workforce Agency requested additional information about the designation of labor supply States for the logging industry in her State. A trade association commented that ''the same types of occupations'' should mean something more than merely agricultural work. An individual commenter believed that just because an employer in a State may request H–2A workers for a certain crop activity for a certain time period should not mean that State should not be considered a labor supply State for other crop activities and time periods.

The Department has addressed many of these concerns by modifying the provision to allow for notice to be published in the **Federal Register** at least 120 days before the announcement of the annual determination, allowing anyone to provide the Department with information they believe will assist the Secretary in making her determination about labor supply states. The Department will consider all timely submissions made in response to this notice. In addition to the information presented by the public, the Department expects that it will continue to consult SWAs, farmworker organizations, agricultural employers and employer associations, and other appropriate interested entities. As discussed above, the ''same types of occupations'' language in the Final Rule has been carried over from the current regulations, and the Department intends to apply the term in the same manner that it has in the past. The Department agrees that the phrase is not intended to lump all agricultural work together as the ''same type of occupation.''

(2) Required Out-of-State Advertising

The Department proposed that each employer would be required to engage in positive recruitment efforts in any State designated as a labor supply State for the State in which the employer's work would be performed. This recruitment obligation would consist of one newspaper advertisement in each designated State.

Several commenters felt the newspaper advertisement requirements were too burdensome on employers and that the additional time and expense of recruiting in traditional or expected labor supply States should be borne by the Department rather than the employer. An association of growers/producers recommended that the regulation only require SWAs to send the job orders to those States designated as labor supply States as they do now. A United States Senator recommended that after the employer has satisfied the intrastate recruitment requirements and has attested that insufficient domestic workers are available, the burden of proof that U.S. workers are unavailable should shift to the Department.

The Department does not consider a requirement to place a single out-of-state advertisement in each designated labor supply state to be unjustifiably onerous on employers and is of the opinion at this time that the potential benefit to be gained in locating eligible and available U.S. workers outweighs the costs of the advertising. This is required in the current program and the Department has received little negative feedback on the burden of such advertising. The Department does not agree that this is an expense the Department should bear, beyond the expense of the interstate agricultural clearance system that the Department already finances. The INA at sec. 218(b)(4) is clear that it is an employer who must engage in such out-of-state positive recruitment, not the Department.

Several associations of growers/producers commented that placing newspaper advertisements should be limited to no more than three States, to avoid the possibility that the Department could require recruitment in 50 States and the additional territories because the language in the companion recruitment provision for SWAs at § 655.102(f) reads ''no fewer than 3 States.'' A United States Senator also endorsed a limit on the number of States in which an employer is required to recruit and suggested the Department should provide a means of indemnifying employers from liability associated with mandatory out-of-State advertising.

The Department anticipates the number of States to be so designated will be no more than three for any one State, but that the number of States designated will vary by State. In some cases, no State or only one or two States may meet the relevant criteria. In response to these comments, the Department has added to the Final Rule language specifying that ''[a]n employer will not be required to conduct positive recruitment in more than three States designated in accordance with paragraph (i)(1) for each area of intended employment listed on the employer's application.'' This is

generally consistent with past practice concerning required out-of-State recruitment, as employers have only very rarely been required to conduct advertising in more than three States of traditional or expected labor supply. Providing this modest cap will provide employers with needed certainty regarding expected advertising costs.

A farmworker advocacy organization believed the requirement should be for three advertisements, not one, in each designated State and also recommended that the Department require that the language predominant among agricultural workers in the region be used. A representative of a State government agency commented that the proposed regulations were not clear as to how an employer's ad in another State would be handled. The individual commented that the advertising instructions indicate interested applicants should contact the SWA, but asserted that this procedure would not work well for an ad placed out of State and recommended the ads placed out of State should advise applicants to contact the employer directly. Another commenter recommended the newspaper ads in other States should direct all applicants to the SWA and the SWA should then refer them to the employer's SWA. An association of growers/producers recommended the required newspaper advertisements should contain only the job specifications and the SWA contact information.

The Department agrees that more clarity on the mechanics of out-of-state recruitment is appropriate. The Department has added language to the regulation to clarify that one advertisement is to be placed in each State identified for the area of intended employment as a traditional or expected labor supply State. The Department declines to require more than one ad in each State, which would be a significant departure from the advertising requirements under the current regulations and would add additional program expense. In response to comments, and out of recognition that employers often will not be well-versed in the characteristics of out-of-State newspapers, the Department has included language in the Final Rule specifying that its annual **Federal Register** notice will not only announce the designation of labor supply States, but will also specify the acceptable newspapers in the designated States that employers may utilize for their required out-of-State advertisements. In no case will an employer be required to place an ad in more than one newspaper in a labor supply State. In response to comments, the Final Rule has also been modified to specify that ads should refer interested employees to the SWA nearest the area in which the advertisement was placed. The SWA will then refer eligible individuals to the SWA of the employer's State. The Department believes these procedures will provide a workable advertisement-and-referral system to provide farmworkers information about available jobs and to supply needed labor to prospective users of the H–2A program.

(j) Section 655.102(j) Referrals of Verified Eligible U.S. Workers

The Department proposed to require SWAs to ''refer for employment only those individuals whom they have verified through the completion of a Form I–9 are eligible U.S. workers.'' These provisions are consistent with the Department's statutory mandate. Although the INA prohibits the referral of workers where it is known that they are unauthorized to work in the United States, this rule clarifies and spells out the Department's expectations. Based upon comments received and the Department's experience with this requirement, which has been in effect administratively since the issuance of TEGL 11–07, Change 1 on November 14, 2007, and with respect to which ETA has provided recent training webinars for SWAs, the Department believes that SWAs should be required to verify the identity and employment authorization of referred workers by completing USCIS Form I–9 in accordance with DHS regulations at 8 CFR 274a.2 and 274a.6. The NPRM, ETA's written guidance, and an opinion by the Solicitor of Labor, all of which have been shared with SWAs over the past year, explain both the rationale for the SWA verification requirement.

Comments on this subject were received from a national association representing state agencies, 12 individual SWAs, several civil rights and labor advocacy organizations, members of Congress, and numerous employer groups and individual employers. Commenters supporting the proposal generally cited the longstanding need for a reliable employment service system that is based on affirmative verification and refers only workers who are authorized to work in the U.S. Commenters opposing the proposal raised a variety of legal, programmatic, resource-related, and policy-based concerns.

Many commenters considered the employment verification requirement to be a change in policy after decades of contrary Departmental interpretation. Another argued that the requirement runs afoul of the Department's FY08 Appropriations Act, Public Law 110–161, Division G, Title I, Section 110, in which Congress prohibited ETA from finalizing or implementing any rule under the Wagner-Peyser or Trade Assistance Acts until each is reauthorized.

The Department has always required that SWAs fulfill the requirements of the INA to refer only eligible workers by verifying their employment authorization. Recent instructions by the Department (including TEGL 11–07, Change 1) have clarified the way that employment verification is required to be accomplished. To the extent that these requirements were thought by some to represent a shift in Departmental policy, they are now being clearly stated in the Department's regulations. The Department has not reviewed the H–2A regulations comprehensively since the current program's inception in 1986. After a top-to-bottom review of the program requested by the President in August 2007, the Department is revising and modifying a number of established practices based on program experience, years of feedback from stakeholders, and changing economic conditions.

As discussed in the NPRM our clarification of SWAs' obligation to affirmatively verify employment eligibility is in direct response to longstanding concerns about the reliability of SWA referrals. The referral of workers not authorized to work undermines the integrity of the H–2A program, can harm U.S. workers, and can disrupt business operations.

Many commenters argued that the requirement is inconsistent with INA provisions at 8 U.S.C. 1324a, and DHS regulations at 8 CFR 274a.6, which permit but do not require SWAs to verify employment eligibility for individuals they refer. The USCIS regulations expressly permit SWAs to verify the identity and employment authorization of workers before making referrals, and certainly do not prohibit such verification. *See* 8 CFR 274a.6. The Acting General Counsel of DHS has issued an interpretive letter stating that while the USCIS regulations do not require SWAs to verify the eligibility of workers before referring them, those regulations do not prevent other agencies with independent authority from imposing such a requirement. *See* November 6, 2007 letter from Gus P. Coldebella, DHS Acting General Counsel, to Gregory F. Jacob, Senior Advisor to the Secretary of Labor. The Department is now exercising its independent statutory authority under

the INA to require through regulation that SWAs verify employment eligibility of referrals. Further, to ensure that the regulated community has appropriate notice of the specific requirement, and to ensure a standard process for verification remains in place consistent with the procedures already approved by Congress, we have clarified in the regulatory text that states must at a minimum use the I–9 process for purposes of verification. The Department also strongly suggests (but does not require), as it did in the NPRM, that States utilize the DHS-administered E-Verify system. State agencies with procedures that do not comply with the minimum requirements of the Form I–9, however, such as verification through scanned documents transmitted over the Internet, must revise their processes to ensure that agricultural referrals are made only as a result of in-person verification.

The INA requires that employers execute a Form I–9 for all new employees. Some commenters interpreted the NPRM to shift this employer responsibility to SWAs. A subset of these commenters raised concern that removing responsibility for verification from agricultural employers alone would be unfair to other, non-agricultural employers who would still be required to complete the Form I–9 form.

This Final Rule does not govern employment eligibility verification, nor does it seek to change, for purposes of H–2A labor certification, the basic responsibility of employers under the INA. As we strongly cautioned in the NPRM, a SWA's responsibility to perform threshold, pre-referral verification exists separate from an employer's independent obligation under the Immigration Reform and Control Act of 1986 to verify the identity and employment authorization of every worker to whom it has extended a job offer. However, the governing statute does permit employers to rely on an employment verification conducted by the SWA to fulfill their statutory responsibilities. The INA—at sec. 274A(a)(5)—exempts employers from the verification requirement and provides a ''safe harbor'' from legal liability to employers, regardless of industry, who unwittingly hire an unauthorized worker where the hire is based on a SWA referral made in compliance with 8 CFR 274a.6, requiring appropriate documentation from the SWA certifying that verification has taken place. As discussed more fully below, the Department requires in this Final Rule that SWAs provide documentation meeting the requirements of sec. 274A(a)(5) of the INA and 8 CFR 274a.6 to each employer at the time the SWA refers the verified worker to the employer. Employers must retain a copy of the SWA certificate of verification just as it would retain a copy of Form I–9. Employers must still verify employment eligibility for workers who do not have a state certification that complies with all of the applicable statutory and regulatory requirements.

Some commenters were concerned that employers who hire SWA-referred workers may seek to hold SWAs responsible for referring unauthorized workers. The Department expects that any referrals a SWA makes to individual employers will comply with the requirements of Federal law, including those established in this Final Rule. For example, the preamble to the proposed rule directs SWAs to provide all referred employees with adequate documentation that verification of their employment has taken place, and clarifies that employers may invoke ''safe harbor'' protection only where the documentation complies with all statutory and regulatory requirements. We have clarified in the Final Rule the SWA's obligation to complete Form I–9 and provide evidence of such completion by providing the employer with a certification that complies with the DHS requirements for such certificate at 8 CFR 274a.6. However, employers have no obligation to hire a job applicant, whether or not referred by the SWA, who does not present the employer with appropriate documentation evidencing the applicant's work eligibility. As stated in the NPRM, an employer will not be penalized by the Department for turning away applicants who are not authorized to work. Additionally, as long as a SWA complies with the process established by DHS for State Workforce Agencies and undertakes good faith efforts to establish the employment eligibility of referred workers, it will not incur any potential liability. Although the Department certainly intends to hold SWAs responsible for complying with all program requirements, just as it has in the past, the Department is not aware of any basis under which SWAs could be held liable to third parties for failing to properly perform their employment verification responsibilities in the absence of willful or malicious conduct.

Many commenters raised a concern that these new procedures would have an unlawful, disparate impact on a protected class, or at least make states vulnerable to legal claims of disparate impact that would require the expenditure of significant resources to defend. More specifically, these commenters felt that to the extent the verification process is not applied to non-agricultural workers, it would have a disparate impact on agricultural workers, many of whom are Hispanic, and that could be perceived as unlawful discrimination on the basis of race or ethnicity. Some commenters were concerned that states would be forced to expend significant resources to defend lawsuits or, alternatively, that in order to protect against lawsuits, would be forced to apply the verification procedures to all job referrals.

The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is established by statute and is similar to verification requirements to gain access to other similar public benefits. *See*, e.g., Section 432, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, 110 Stat. 2105 (employment eligibility verification requirement for most federal public benefits for needy families). As this regulation governs the H–2A foreign labor certification program, the clarification made here is limited to that program and to agricultural job referrals, but the Department proposed an analogous provision in the H–2B NPRM published on May 22, 2008, seeking to extend the same procedural employment verification requirements to that program. More generally, the clarification of the requirement in this regulation does not mean the Department's policy is limited only to agricultural referrals, as the Department's expectation is that SWAs will do what they can, including exercising their authority under 8 U.S.C. 1324a, to avoid expending public resources to refer unauthorized workers to any job opportunities, regardless of program area. The employment verification provisions included in this regulation are part of a much broader, concerted effort—one that includes regulation, written guidance, and outreach and education—to address longstanding weaknesses in the system and to strengthen the integrity of foreign labor certification activities.

Some commenters opined that the employment eligibility verification requirement presents an obstacle to employment for, and will reduce the pool of, the U.S. workers it is designed to protect. For example, these commenters stated that States are increasingly moving toward web-based employment services. The commenters believe an in-person verification requirement will require potentially

onerous visits by job seekers who they believe currently could be referred to work without ever visiting a workforce center. The commenters stated that, especially in the larger States, this will present a greater and perhaps insurmountable hurdle for a larger number of U.S. workers, who will be discouraged from travelling great distances to obtain a job referral.

In practice, an in-person verification requirement will not significantly change the operation of referrals in most States. In the Department's program experience, States often require that agricultural job applicants visit the workforce center to receive information on the terms and conditions of the job, which must be provided prior to referral. *See* 20 CFR 653.501(f) (placement of the form within local offices). While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, at this juncture the impact is speculative and does not outweigh the significant value of verification. Moreover, it is a problem that SWAs may be able to adjust to by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs given that workers often must travel great distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. Although employment eligibility verification does require some amount of time and effort, Congress has determined that simple convenience must cede to the overarching goal of achieving a legal workforce and the Department has drafted its regulations accordingly.

Commenters opposing the eligibility provision uniformly complained that the verification requirement would add potentially significant workload and strain the already inadequate resources of many State Workforce Agencies. Many saw it as an unfunded federal mandate in violation of the Unfunded Mandates Reform Act. More than one referred to the Department's recent inclusion of the requirement as a condition for receiving further labor certification grant funding.

As stated in the preamble to the NPRM, the Department is not insensitive to the resource constraints facing state agencies in their administration of the H–2A program. However, as we stated in the NPRM, we do not believe that the requirement will result in a significant increase in workload or administrative burden. We have provided training to SWAs to meet their obligations in this context and will continue to do so.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent and uniform verification requirement at the state government level. Verification is a statutory responsibility of the Department and the SWAs under the INA and the Wagner-Peyser Act, and the Department has further determined employment verification is a logical and necessary condition for the issuance of foreign labor certification grants to states. Precisely to ensure that available federal funding supports verification activities, the Department has added the verification requirement as an allowable cost under the foreign labor certification grant agreement. While cognizant of the challenges posed by funding limitations, we expect states to comply as they do with other regulatory requirements and other terms and conditions of their grant.

Commenters raised a number of concerns with the use of E-Verify, including potential system problems, delays and inaccuracies. The Department strongly encourages state agencies to use the system, which provides an additional layer of accuracy and security over and above the basic I–9 process, but it has not mandated use of E-Verify. SWAs can comply with this Final Rule without the use of E-Verify.

One commenter pointed out that the regulation does not describe the penalties to SWAs for non-compliance or delayed compliance with this requirement, or the implications for H–2A employers who may seek services from SWAs that are not in compliance with the requirement. For instance, the commenter inquired whether, if the Department were to suspend Foreign Labor Certification grant funding, employers would be required to accept referrals funded exclusively by Wagner-Peyser funding. The commenter also inquired whether the SWA in an employer's state would be required to verify the work eligibility of a worker that was referred to it by a non-compliant out-of-State SWA. As the verification requirement is implemented, the Department's guidance will evolve in response to the experience of the regulated community and our own. We do note that these problems already exist under the Department's current regulations and policies, and the Department is working through them as they arise. The problems are substantially alleviated by the fact that virtually every State and territory administering the H–2A program has already agreed to come into compliance with the employment eligibility verification requirements established by current Departmental policies, minimizing the chance that a State will need to be de-funded due to non-compliance or that non-compliant referrals will be made by out-of-State SWAs. Nevertheless, we do not discount the importance of the questions posed by the commenter, but see them as issues of implementation that should be addressed, as they arise, through appropriate guidance.

In addition, we note that the SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC), unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not yet have generated a final confirmation of employment eligibility.

(k) Section 655.102(k) Recruitment Report

The Department proposed requiring employers to submit an initial recruitment report with their applications and to supplement that report with a final recruitment report documenting all recruitment activities related to the job opportunity that took place subsequent to the filing of the application. The Department proposed that the initial recruitment report to be filed with the application be prepared not more than 60 days before the date of need, and that the supplemental, final report be completed within 48 hours of the date H–2A workers depart for the worksite or 3 days prior to the date of need, whichever is later. Many individuals and members of agricultural associations expressed concern that recruitment reports will not simplify the application process and will instead inflict an undue burden on employees of small farms. Some agricultural associations argued that having two recruitment reports will double the work for employers and stated that the supplemental report is not justified because of its limited utility in resolving compliance issues.

The Department disagrees that a supplemental recruitment report will have limited benefit, given the Department's intended use of supplemental reports in the event of an audit. The supplemental recruitment report will provide assurance to the Department that an employer has complied with all of its obligations with respect to the domestic workforce. Compliance throughout the program, including after filing of an application,

is necessary for the appropriate enforcement of the H–2A program and its requirements. By requiring a supplemental report, the Department is not requiring a duplicative effort but is in fact effectively requiring employers to split the current comprehensive total report (of all referrals that are required to be reported) into two smaller, more manageable reports. The Department does not believe that this splitting of the comprehensive total report will require significantly more effort on the part of employers.

Several commenters specifically mentioned the timing of the recruitment report as the biggest problem with the requirement. One farm association noted that since the initial application cannot be submitted without the recruitment report, and the recruitment report must be prepared not more than 60 days prior to the date of need, the application itself cannot be filed until 60 days ahead of time. In order to rectify this issue, the commenter believed the application itself should be required to be filed not more than 60 days prior to the date of need. Another farm association suggested that the timeline for the recruitment report be moved up to no later than 45 days before the date of need, rather than 60 days before the date of need. The Department also received comments in support of the supplemental recruitment reports.

The Department has learned through experience that if recruitment is begun no more than 45 days before the date of need, it is virtually impossible for the Department to receive an adequate recruitment report by the time it is statutorily required to make a certification determination 30 days before the date of need. As discussed above, we have in response to comments amended the timeframe for pre-filing recruitment to reflect a recruitment period closer to the date the workers are needed. In addition, in accordance with the revisions to the time frame specified in § 655.102(e) for submitting job orders, the original proposal regarding the timing of the filing of recruitment reports has been revised in the Final Rule and now provides that the initial recruitment report may not be prepared more than 50 days prior to the employer's date of need. The Final Rule also revises the proposed timing for the completion of the supplemental recruitment report, and now requires the employer to update the recruitment report within 2 business days following the last date that the employer is required to accept referrals; that is, the end of the recruitment period as specified in § 655.102(f)(3). With respect to employers who wish to file an *Application for Temporary Employment Certification* prior to 50 days before the date of need, they are welcome to do so to initiate processing of the application, but the application will not be considered to be complete, and thus eligible for a final determination, until the initial recruitment report is submitted.

Finally, the Department has made additional clarifying edits to the regulatory text. These edits are to ensure this provision comports with other sections of this Final Rule, to improve readability, and to clarify its requirements. These include the deletion of the redundant phrase ''who applied or was referred to the job opportunity'' which appeared twice in the NPRM paragraph (k)(2) (which is now (k)(1)(iii)); simplifying the reference to the contents of the supplemental recruitment report through the use of cross-references; and placing the paragraph regarding the updating of recruitment reports before the paragraph regarding document retention requirements. In addition, the Department has added a requirement that the recruitment report must contain the original number of openings advertised. This last addition will enable the Department to grant an employer a partial certification in the event it can meet part but not all of its need through the recruitment of U.S. workers.

Section 655.103 Advertising Requirements

The Department proposed detailed instructions for the content of the newspaper advertisements to be placed by employers as part of the required pre-filing recruitment in § 655.103. A few comments were received on the specific contents of the ads. Other comments regarding the rule's advertising requirements are discussed in the section of the preamble pertaining to § 655.102(g).

An association of growers/producers commented that the advertising requirements are inefficient and wasteful, particularly when ''numerous virtually identical ads are appearing at the same time.'' Another association suggested that employers be allowed to advertise jobs by simply referencing the job order placed with the SWA, and suggested that employers should not be required to include all of the detailed information contained in the proposed regulation. Another association suggested that if more than one grower is simultaneously recruiting in an area covered by only one newspaper, their ads should be combined and placed by the SWA. The association suggested that the names of the growers could all be provided in the ad, but applicants would be directed to the SWA to get additional information about the jobs and referrals to the employers.

The Department has considered but declines to adopt these suggestions at this time. The Final Rule significantly clarifies the H–2A advertising requirements. The Department believes that it has struck a careful and appropriate balance, based on its program experience, between the expense of advertising to employers and workers' need for basic job information when considering whether to pursue advertised employment opportunities.

The Final Rule contains several clarifying and conforming changes to the proposed text for § 655.103, none of which are substantive. The Final Rule also paraphrases in § 655.103 the equal treatment requirement already stated in § 655.104(a). Section 655.103 requires that an employer's recruitment ''must contain terms and conditions of employment which are not less favorable than those that will be offered to the H–2A workers.''

Section 655.104 Contents of Job Offers

(a) Section 655.104(a) Preferential Treatment of Aliens

The Department's proposed regulation stated: ''The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers.'' A group of farmworker advocacy organizations opposed the removal of the words ''U.S. worker'' from this section of the rule. This commenter believes that the proposed wording allows employers to treat U.S. workers less favorably than H–2A workers.

While the Department does not agree that the new wording would have allowed employers to treat U.S. workers any less favorably than H–2A workers, the words ''U.S. worker'' have been reinserted.

(b) Section 655.104(b) No Less Than Minimum Offered

The NPRM proposed that the ''job duties and requirements specified in the job offer shall be consistent with the normal and accepted duties and requirements of non-H2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation.'' Several commenters expressed concern that the proposed requirements would prove unworkable,

unadministrable, and exceedingly difficult for employers to comply with, as what is ''normal'' and ''accepted'' are substantially subjective determinations. All of the commenters who provided input on this provision suggested that the Department should not second guess an employer's business decision regarding an occupation's job duties when they are unique to that employer. These commenters believe that the Department's proposal would give the Department more discretion to deny an application than is contemplated by the statute.

The Department agrees with the basic thrust of these comments. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer's asserted job qualifications are appropriate, to apply ''the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops.'' There is a substantial difference, however, between job duties and job qualifications; job qualifications typically describe the minimum skills and experience that an employee must have to secure a job, while job duties describe the tasks that qualified workers are expected to perform. The Department agrees that, as a general matter, employers are in a far better position than the Department to assess what job duties workers at a particular establishment in a particular area can reasonably be required to perform in an H–2A eligible position.

The Department is therefore altering this provision to conform more closely to the language of the statute, and is limiting the restriction in § 655.104(b) to job qualifications. The Department is aware that this may mean that at times a U.S. worker wishing to perform one type of job duty, such as picking asparagus, may be required by an employer to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. There is nothing in the statute governing the H–2A program indicating that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. In the Final Rule, this provision states that ''[e]ach job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops.''

The Department is sensitive, however, that in certain circumstances a listed job duty may act as a de facto job qualification, because the listed duty requires skills or experience that agricultural workers may not typically possess. When such circumstances arise, the Department reserves the right to treat the listed job duty as a job qualification, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and restated in the regulations in determining whether the qualification is appropriate.

One commenter suggested that this provision should be made consistent with those in the PERM regulations at 20 CFR 656.17. The Department declines to apply the PERM standard to the H–2A program, as that standard is based on a substantially different statutory structure. The Department is confident that the revised standard for § 655.104(b) that is set forth in the Final Rule, which hews closely to the language of sec. 218(c)(3)(A) of the INA, is appropriately tailored to the H–2A program and will prove workable in practice.

(c) Section 655.104(c) Minimum Benefits

A group of farmworker advocacy organizations pointed out that proposed § 655.104 does not correlate exactly to current § 655.102(b). Specifically, in this commenter's opinion the proposed section does not require the employer to pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period as required in the current regulation. According to this commenter, under the proposed rule, H–2A workers would have only contract law as their primary enforcement tool. With proposed § 655.104(c) stating that every job offer must include the wage provisions listed in paragraphs (d) through (i) of this section but no longer requiring precisely what the current § 655.102(b)(9)(i) requires, this commenter argued that workers will be left at a disadvantage if the employer fails to specify the required wage provisions in the work contract.

The Department appreciates this commenter's analysis. However, we do not agree that the employer will no longer be bound to pay the employee the wage promised, nor that the only enforcement tool available is through contract law. Under the new program the employer's attestation required under § 655.105(g) is an enforceable program requirement. The failure of an employer to comply with any program requirement subjects the employer to the Department's enforcement regime.

A commenter pointed out the illogical consequences of rigid rules governing wages for agricultural workers. It is the commenter's contention that the Department should add a phrase at the end of § 655.104(c) that would not force employers to pay the NPC prescribed wage until the date of need and instead would allow employers to pay U.S. workers a mutually agreed upon wage between the time they recruit the workers and the date the H–2A workers are needed in order to train the U.S. worker and retain them until and throughout the period of the H–2A contract. The commenter reports that if they do not offer those U.S. workers employment immediately, they will most likely not be available when the H–2A work begins. The commenter believes that any employment prior to the date of need and prior to the date that foreign H–2A workers arrive should not be governed by the H–2A contract or its wage provisions.

The Department agrees that the H–2A required wage takes effect on the effective start date of the H–2A contract period. However, the Department does not believe that any changes to the regulatory text need to be made under this section because § 655.105(g) provides that the requirement to pay the offered wage applies only during the valid period of the approved labor certification. U.S. workers who are hired in response to H–2A recruitment and who perform work for an employer before the date of need specified in the H–2A labor certification are not required by these regulations (but may be required by contract) to be paid the H–2A wage until the period of the H–2A contract begins, without regard to the type of work performed.

A group of farmworker advocacy organizations argued that under the proposed rule, employers would no longer be required to disclose in job offers their obligation to provide housing to workers. That is incorrect. Section 655.104(c) provides that ''[e]very job offer accompanying an H–2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.'' Paragraph (d) of that section provides, in turn, that ''[t]he employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to

their permanent residence at the end of the work day.''

(d) Section 655.104(d) Housing

Section 218(c)(4) of the INA requires employers to furnish housing in accordance with specific regulations. The employer may fulfill this obligation by providing housing which meets the applicable Federal standards for temporary labor camps or providing housing which meets the local standards for rental and/or public accommodations or other substantially similar class of housing. In the absence of local standards, the rental and/or public accommodations or other substantially similar class of housing must meet State standards, and in the absence of State standards, such housing must meet Federal temporary labor camp standards. By statute, the determination of whether employer-provided housing meets the applicable standards must be made no later than 30 days before the date of need. The Department proposed three changes to the current housing requirements.

First, the Department proposed allowing employers to request housing inspections no more than 75 and no fewer than 60 days before the date of need. The Department further proposed that the NPC would, as required by statute, make determinations on H–2A applications 30 days before the employer's date of need, even if the housing referenced in the application had not yet been physically inspected by the SWA, so long as (1) the employer requested a housing inspection within the time frame specified by the regulations and (2) the SWA failed to conduct the inspection for reasons beyond the employer's control. Under the Department's proposal, SWAs would have the authority and the responsibility under such circumstances to conduct post-certification housing inspections prior to or during occupancy. If such a post-certification housing inspection identified deficiencies that the employer failed to act promptly to correct, the proposal provided that the SWA would inform the NPC of the deficiencies in writing so that the NPC could take appropriate corrective action, potentially including revocation of the labor certification. The Department proposed these changes in part to alleviate the problems SWAs currently face in trying to conduct large numbers of required housing inspections during the short 15-day window provided by the statute between the time that applications are required to be filed (45 days before the date of need) and the time that the Department is required to make a determination on the application (30 days before the date of need). The changes were also intended to avoid penalizing employers for the failure of SWAs to comply with their legal duty to meet the timeframes established by the statute.

The Department heard from a number of SWAs on the issue of timely housing inspections, many of which declared their ability to conduct housing inspections within the 15-day window. One SWA acknowledged that at times delays may occur in conducting housing inspections, but attributed those delays to incomplete or inaccurate information being provided to inspectors. This SWA suggested that providing a copy of the job order with the housing inspection request would alleviate the problem of inspectors investigating the wrong housing. Finally, an anonymous commenter tied the delays in housing inspections to a lack of funding at the state level.

The Department recognizes that many SWAs conduct housing inspections in advance of the statutory deadline of 30 days before the date of need, but cannot ignore the fact that SWA delays in conducting housing inspection have in many instances resulted in labor certification determinations being made by the Department outside of the statutorily required timeframes. This result is not acceptable to the Department or to employers seeking H–2A certification. As one employer commenter stated:

> [u]ntimely housing inspections are one of the most common reasons for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program.

While employers and employer associations favored the proposed conditional labor certifications, several commenters representing employer interests had concerns with the proposed requirement that housing inspections be requested no fewer than 60 days before the date of need. Employers stated that in some parts of the U.S., housing may still be winterized 60 days before the date of need and therefore may be unavailable for inspection, or unable to pass inspection. In certain areas, inspection agencies require that the employer rent the housing before an inspection is conducted and the earlier time frame for requesting an inspection requires employers to pay an additional month or two of rent for the housing, substantially adding to the cost of providing housing. Other growers stated that current inspection procedures prohibit the inspection of occupied housing and therefore this proposal would require that regulations be adjusted to permit inspection of occupied housing. Some said that the earlier time frame for requesting housing inspections may be before many farmers plant their crops, let alone know the dates of the harvest.

Commenters representing employer interests also included questions concerning implementation of the proposal. Many argued that employers should be provided a specific and reasonable period of time for abatement of violations found in post-determination inspections conducted by SWAs, and that employers who correct violations within the specified period should not be penalized for the violations. One employer association argued that ''the fact that employers continue to face consequences for having deficient housing will prevent any adverse effects for workers.'' Employers also questioned the proposed requirement that housing inspection requests be made in writing, and some employers recommended that the Department provide training to SWA staff on conducting housing inspections of occupied housing. Finally, one employer commented that in the state in which he operates, the state's Department of Health conducts inspections of temporary labor camps and that to require SWAs to conduct these inspections would result in confusion.

Employee advocacy organizations and state agencies expressed concern that the granting of pre-inspection labor certification determinations could potentially result in cases where housing is not inspected prior to occupancy, which in turn could result in workers being housed in substandard conditions. Several commenters objected to this proposed revision stating that pre-occupancy housing inspections are an effective incentive for employers to take corrective action, thus ensuring that workers are housed in safe and sanitary housing. Other commenters urged the Department to continue the requirement that housing be inspected before workers arrive.

A few comments from both organizations representing employer interests and from organizations representing employee interests questioned the Department's legal authority to establish a requirement that housing inspections be requested more than 45 days before the date of need, which is the earliest date that the

Department may under the statute require applications to be filed. One commenter asserted that the proposed changes contradict the Department's Wagner-Peyser regulations requiring that the housing be inspected to determine compliance with applicable housing safety and health standards before a job order can be posted (and, thus, before the housing can be occupied).

The Department has carefully considered the comments and has determined that the framework of the Department's original proposal strikes an appropriate balance between the need to ensure that housing for H–2A workers meets all applicable safety and health standards, that agricultural employers are able to secure H–2A workers in a timely manner, and that the Department complies with the statutory requirement to render a determination no fewer than 30 days before the date of need. To ensure that SWAs have adequate time to complete housing inspections before the statutory deadline of 30 days before the date of need, the Final Rule requires employers to request housing inspections no fewer than 60 days before the date of need, except when the emergency provisions contained in § 655.101(d) are used. The Department is eliminating in the Final Rule the proposed restriction on housing inspections being requested more than 75 days before date of need. Eliminating this restriction will provide SWAs additional flexibility to manage the workload of completing required inspections with respect to those cases where an employer's housing is ready for inspection well in advance of the date of need.

The INA at 8 U.S.C. 1188(c)(3)(A) expressly requires the Secretary of Labor to make a determination on an employer's application for temporary labor certification no fewer than 30 days before the employer's date of need. The INA also requires that the Secretary make a determination as to whether employer-provided housing meets the applicable housing standards by the same deadline—no fewer than 30 days before the employer's date of need. Although the Department has delegated its statutory housing inspection responsibilities to the SWAs, the statutory deadline applicable to that responsibility continues to apply. This is made explicit by § 655.104(d)(6)(iii) of the Final Rule, which states that ''[t]he SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under sec. 218(c)(3)(A) of the INA, which is 30 days before the employer's date of need.''

Some commenters read the language of sec. 218(c)(4) of the INA as prohibiting the Secretary from making a determination on an employer's application for temporary labor certification until the employer's housing has been physically inspected. The Department strongly disagrees with that interpretation. The language of sec. 218(c)(4) is not phrased as a limitation on the Secretary's duty under sec. 218(c)(3)(A) to make determinations on applications no later than 30 days before the employer's date of need. In fact, the language of sec. 218(c)(4) does not require that housing inspections be completed prior to the Secretary's certification determination, although Congress certainly could have phrased the requirement that way had it wanted to do so. Instead, the language of sec. 218(c)(4) is most naturally read as imposing a statutory duty on the Department to complete required housing inspections ''prior to the date specified in paragraph (3)(A)''—which, as noted previously, is 30 days before the employer's date of need. The provision does not specify what consequence should follow in the event that the Department fails to comply with this mandate. Presumably, however, if Congress had intended that the primary consequence of the government's failure to meet its statutory responsibility to complete housing inspections in a timely manner would be to penalize employers by releasing the Department from its independent statutory responsibility to make determinations on applications no later than 30 days before the employer's date of need—a deadline that was indisputably established to ensure that employers can secure needed H–2A workers in a timely fashion without undue delays caused by the government—it would have said so explicitly.

Of course, the Department greatly prefers that housing inspections be conducted prior to certification, as this gives the Department the strongest possible assurance that ''the employer has complied with the criteria for certification'' as required by sec. 218(c)(3)(A)(i) of the INA. To this end, the Final Rule requires that employers make requests for housing inspections no fewer than 60 days before the employer's date of need, ensuring that SWAs have adequate time to meet the statutory deadline for conducting housing inspections. Moreover, SWAs remain under an express statutory and regulatory mandate to complete housing inspections by 30 days before the employer's date of need, an obligation that the Department expects SWAs will not take lightly. The Department therefore believes that under the Final Rule, post-certification housing inspections will be the very rare exception rather than the rule.

The Department has never read sec. 218(c)(3)(A)(i), however, as requiring that the government directly observe for itself that the employer has satisfied all of the statutory criteria for certification. For example, under the current regulations a substantial portion of required recruitment takes place after a certification has been made, and SWAs typically do not conduct pre-certification inspections of rental housing or public accommodations secured by employers pursuant to sec. 218(c)(4). It is important to note that under the Final Rule employers are required to provide or secure housing that meets all applicable standards, and that a certification cannot be granted, with or without an inspection, unless the employer has attested that its housing fully complies with those standards. Sanctions and penalties may be imposed for violations of the attestation requirements and the housing standards, including revocation of a labor certification, regardless of whether a pre-certification housing inspection was conducted.

As to commenters who argued that it is unacceptable that housing might in some rare circumstances be occupied by H–2A workers before it is inspected, the Department notes that under MSPA, U.S. workers often occupy agricultural housing before it is inspected, and the Department has not seen any data indicating that this arrangement has caused harm to U.S. workers. The Department does not believe that H–2A workers will be harmed by this rule when being afforded the same level of protection that Congress has afforded to U.S. workers. Moreover, the Department believes that any chance that H–2A workers would be placed in substandard housing under the Final Rule—a possibility that can never fully be guarded against as a practical matter, and occurs on occasion even under the current rule—is minimized by the fact that a certification cannot be granted unless the employer has attested that its housing fully complies with all applicable standards. If this attestation is later shown to be false, the employer risks substantial penalties, including the possibility of a revoked labor certification and/or debarment.

The Department is not persuaded by employers' arguments for specific language allowing employers in all cases to abate housing violations

without penalties where the housing has already been occupied. Penalties for failing to meet the applicable standards help ensure compliance. As with all Department investigations to determine compliance with Federal safety and health standards for housing, however, the employer is as a matter of practice provided a reasonable opportunity to correct or abate any violations that are found. This also is true when the SWA or other state agency conducts the inspection. Time frames for abatement are directly related to the severity of the violation and its potential impact on the safety and health of the workers. Therefore, language in this regulation specifying an abatement period for the correction of housing violations is unnecessary. Current regulations at 29 CFR 501.19(b) and the Final Rule at §§ 655.117 and 655.118 address the factors considered by the Department in determining the appropriateness of penalties and sanctions. The Department will continue to ensure that the penalties assessed and sanctions imposed for violations of housing safety and health standards are appropriate to the violation.

The Department is cognizant that requiring employers to request housing inspections no fewer than 60 days before the date of need may present a challenge to some employers. However, we believe that overall this requirement will be beneficial to employers, workers and the SWAs by allowing more time for the SWAs to schedule and conduct pre-occupancy housing inspections, and more time for employers to correct any deficiencies prior to the arrival of the workers. The Department expects that SWAs will continue to work with employers on the scheduling of housing inspections and that SWAs will endeavor to minimize the expense to the SWA and maximize the benefit to the employer and workers by avoiding scheduling inspections of facilities at times that they are not winterized or otherwise unlikely to pass inspection. In response to comments about obstacles that currently exist in some jurisdictions to securing timely housing inspections, the Department has also included an instruction to SWAs in the Final Rule not to adopt rules or restrictions that would inhibit their ability to conduct inspections by 30 days before the date of need, such as requirements that rental housing already be formally leased by the employer before the SWA will conduct an inspection, or rules that occupied housing will not be inspected. It is solely the employer's responsibility, however, to ensure that the SWA has access to the housing to be inspected so that the inspection may take place. For the reasons set forth in the discussion of § 102(a) concerning the Final Rule's pre-filing recruitment requirements, the Department does not agree that the statute prohibits the Department from requiring that housing inspection requests be submitted to SWAs prior to the date that applications must be submitted to the NPC.

The Department also disagrees that the possibility that some housing inspections will take place after certification under the Final Rule violates the Wagner-Peyser regulations. The current regulations at 20 CFR 654.403 already permit job orders to be posted prior to the completion of a housing inspection. If an SWA identifies violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. Although some commenters expressed the view that the regulatory process under § 654.403 is more protective of workers because § 654.403(e) requires that the SWA ''shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart,'' that provision is actually less protective of workers than the Final Rule. The Final Rule unequivocally recapitulates the statutory requirement that housing inspections be completed no later than 30 days before the employer's date of need, a date that is actually earlier than that required by the conditional access provisions set forth in § 654.403. Thus, both the Final Rule and § 654.403 contain clear mandates for pre-occupancy inspections. Significantly, however, § 654.403 does not specify any particular consequence if an SWA fails in its duty to conduct the required pre-occupancy inspection; under that provision, it is only if the SWA fulfills its duty to conduct the required inspection and finds violations that the employer's job order is removed from clearance. Thus, in specifying that the Department will adhere to its statutory obligation to make certification determinations on applications no later than 30 days before the employer's date of need even where an SWA has failed in its statutory duty to conduct the required housing inspection in a timely fashion, the Department is not depriving workers of any protections that they have under § 654.403. Both provisions fundamentally depend on SWAs to protect workers by fulfilling their responsibilities under the law—and the Department notes that in its experience, the SWAs take those responsibilities very seriously.

The Department is retaining the proposed requirement that the employer's request for housing inspections must be in writing. This requirement provides the employer with the documentation necessary to demonstrate that their request for a housing inspection was made within the required time frame.

While the Department refers to the SWAs as the entities responsible for making housing inspections related to labor certification determinations, the Department does not intend to limit the flexibility afforded SWAs in fulfilling this requirement. For example, some SWAs have agreements with other State agencies for conducting housing inspections and it is not the Department's intention to change such arrangements.

Finally, in response to concerns that SWA staff is not sufficiently trained to conduct inspections of occupied housing, the Department anticipates that there will be additional training of SWA staff on the conduct of housing inspections.

The Department's second housing-related proposal was the creation of a housing voucher as an additional option employers could use to meet the H–2A housing requirements. The Department did not explain in detail in the NPRM how such a voucher program would work, but instead requested suggestions and comment from the public about how the program should be constructed and operated. The Department's NPRM did, however, propose to include several safeguards in the voucher program to ensure that workers would be provided housing meeting the applicable safety and health standards, including requirements that the voucher could not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment. Other safeguards included the provision that the voucher could only be redeemed for cash paid by the employer to a third party, that the housing obtained with the voucher had to be within a reasonable commuting distance of the place of employment and that workers could ''pool'' their vouchers to secure housing (e.g., to secure a house instead of a motel room) but that such pooling may not result in a violation of the applicable safety and health standards. The Department also included as a safeguard the requirement that if acceptable housing could not be obtained with the voucher, the employer would be required to provide

housing meeting the applicable safety and health standards to the worker. The Department requested comments on whether such a program would adequately balance the needs of employers and workers and how such a program should operate. The Department received a number of comments from employers, employer associations, employee advocacy organizations and State agencies on the housing voucher option.

A number of comments from stakeholders representing both employer and employee interests led us to conclude that the proposal was not well understood. Several commenters stated that ''the voucher program would effectively eliminate the requirement that all housing for H–2A workers must meet health and safety standards.'' Some employer associations stated that they supported the concept of ''using vouchers to provide housing in lieu of actually providing housing'' while another commenter asserted that the housing voucher option would ''undermine Congressional intent by eliminating the requirement that employers provide non-local workers with free housing that meets the basic safety and health standards.''

While noting a few concerns with the proposal (e.g., the employer's responsibility for violations of safety and health standards at housing obtained by the voucher), employers and employer associations generally praised the Department for the much needed flexibility a voucher program would create. Some commenters opined that the use of housing vouchers would ''greatly stimulate H–2A participation'' and ''would encourage others to use legal workers.'' Other commenters stated that the H–2A current requirement to provide housing to workers is a serious impediment to program participation and that the implementation of a housing voucher option would make the H–2A program more usable and effective.

Comments from individuals and organizations representing employee interests criticized the voucher option, stating that the proposed safeguards were illusory and provided no substantive protections to workers. Virtually all criticism of the proposal, including from SWAs, misunderstood the Department's position and assumed health and safety standards would not apply to housing obtained with a voucher. Many commenters argued that the voucher idea ''ignores the reality of the situation for both U.S. and H–2A workers'' in that many farmworkers, particularly H–2A workers, do not have the resources to conduct a long-distance housing search, such as access to the Internet, knowledge of the area, and language difficulties. Several found it unreasonable to expect that a worker will travel from another country, or even across the State, for employment and be able to quickly find a motel or landlord that will accept vouchers for a short-term stay.

The comments received from SWAs on the housing voucher option were generally opposed to the proposal and also reflected a misunderstanding of the Department's proposal. One SWA cited concerns that a voucher would eliminate established standards that ensure safety and healthful conditions of housing. Another SWA argued that ''[t]he use of vouchers and the failure to cover the full cost of housing reflects an unrealistic understanding of the housing market for seasonal workers.'' Another SWA suggested that it would be impossible for the Governor to determine whether there was inadequate housing available in the area since the SWAs would not be the recipient of the labor condition applications, and therefore, would not know the number of workers in need of housing.

Some commenters criticized the Department's proposal on the grounds that many basic questions about how the voucher would function were not adequately addressed in the NPRM, including the lack of: A mechanism for determining the amount or value of the voucher; a definition of ''reasonable commuting distance;'' criteria to be used in determining whether the employer made a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and standards to be used in the Governor's certification of insufficient housing for migrant workers and H–2A workers in the area of intended employment. Other commenters took issue with the Department's proposal to allow workers to ''pool'' the vouchers, claiming that such pooling would result in workers overpaying for overcrowded and/or substandard housing. Several commenters questioned the Department on the rationale for not allowing the voucher to be redeemed for cash by the employee to a third party.

The requirement that employers furnish housing that meets applicable safety and health standards is a statutory requirement in the INA. The Department does not have authority to waive this statutory requirement, nor did the Department intend to do so in proposing a voucher option. In proposing a voucher option, the Department sought comment on how best to provide much needed flexibility to employers in fulfilling their obligation to furnish housing while ensuring that workers are not housed in substandard conditions. After reviewing the comments received on this proposal, the Department is persuaded that it should drop the proposal at this time because it would be extremely difficult to implement. The extent to which the Department's proposal was misunderstood by commenters on all sides also caused the Department concern that, if implemented, the proposal would result in numerous program violations and become a substantial enforcement problem. If, in the future, the Department is able to design an effective, enforceable and viable alternative, it will develop a proposal and request public comment.

We are sympathetic to the concerns of many growers and employer associations who supported the proposal and noted that the cost of providing housing is a major deterrent for many to participate in the H–2A program and that in many parts of the country, restrictive building and zoning codes can prevent growers from building housing to accommodate workers. The Department notes that many of these problems can be overcome by employers under the statute and the Final Rule by securing ''housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation.'' These options do not require employers to build and furnish their own housing. As is noted in ETA Handbook No. 398, there is nothing to preclude an employer who does not actually own housing on his/her property from renting non-commercial housing from other individuals or entities. If there are areas where rental and public accommodation options, including non-commercial housing, are not readily available, it is difficult to imagine how workers could have secured housing in those areas through the use of a voucher, such that the voucher program would not have been viable in those areas anyway.

Third, the Department proposed in the NPRM to clarify and codify additional limited flexibility under certain circumstances to make post-certification changes to housing. The Department's current policy [4] allows the employer to substitute rental or public accommodations for certified housing in the event that certified housing becomes unexpectedly unavailable for reasons

[4] Training and Employment Guidance Letter 11–07, Change 1 (November 14, 2007).

outside of the employer's control. The employer is required to notify the SWA in writing of the housing change and the qualifying reason(s) for the change, and provide evidence that the substituted housing meets the applicable safety and health standards. The SWA may inspect the substitute housing to determine compliance with applicable safety and health standards. The NPRM sought to clarify and codify this policy and included a provision for the SWA to notify the CO of any housing changes and the results of housing inspections conducted on substitute housing. Employer commenters and commenters representing employer interests universally favored the clarification in the proposal:

> The inclusion of language that permits employers to use substitute housing in the event that their approved housing becomes unavailable for reasons beyond their control will be beneficial for the obvious reason that in the rare circumstances where this occurs, an employer has a housing option without being in violation.

Commenters on behalf of employees questioned the Department's authority to propose such a change and thought the proposed change would result in workers being housed in substandard housing saying:

> [T]his change is not permitted by the statute [INA 218(c)(4)] and would encourage potentially fraudulent ''bait and switch'' tactics perpetrated by H–2A employers with respect to employer-provided housing.

Commenters also questioned which standards are the applicable standards to the substitute housing.

The Department maintains that this additional limited flexibility with respect to substitute housing is the best approach in those rare circumstances where the certified housing becomes unavailable for reasons beyond the employer's control. The Department believes that the requirements that the substitute housing be rental or other public accommodations and that the employer provide evidence that the new housing meets the applicable safety and health standards offer workers the necessary protections. Indeed, the proposal in no way lessens the applicable housing standards, as substitute housing must meet the standards that typically apply to H–2A housing of the same type. Failure to create a substitute housing provision could leave H–2A employers in the untenable position of having workers arrive at the worksite and having no permissible place to house them. Therefore, the Department has included this provision in the Final Rule. This Final Rule specifically references the applicable standards to which rental or public accommodation housing, including substitute housing, is subject.

The Department has made several modifications to this provision in the Final Rule for purposes of clarity and to conform the standard to the structure of the rest of the Final Rule. First, the proposal states that the unavailability provision would apply in ''situations in which housing certified by the SWA later becomes unavailable.'' To ensure that the full range of applicable situations is covered, the Final Rule provides that the unavailability provision applies where housing becomes unavailable ''after a request to certify housing (but before certification), or after certification of housing.'' There is no reason to exclude housing that has not yet been inspected from the scope of the provision, since the initially designated housing has become unavailable anyway. Second, the phrase ''applicable housing standards'' has been replaced in the Final Rule with ''the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section,'' which is more specific. Third, the phrase ''in accordance with the requirements of paragraph (d)(1)(ii) of this section'' has been added to the end of the second sentence of the provision, and the phrase ''from the appropriate local or State agency responsible for determining compliance'' has accordingly been deleted as unnecessary; as noted in the discussion of paragraph (d)(1)(ii), that paragraph has been separately modified to reflect the evidentiary standard that is currently in place in ETA Handbook No. 398. For the same reason, the proposal's admonition that SWAs ''should make every effort to inspect the accommodations prior to occupation, but may also conduct inspections during occupation, to ensure that they meet applicable housing standards'' has been removed in the Final Rule. As current ETA Handbook No. 398 explains at page II–15, ''[i]f DOL standards are not applicable, no pre-occupancy inspections need be conducted, and the employer need only document to the RA's satisfaction that the housing complies with the local or State standards which apply to the situation.'' To the extent that some SWAs may typically inspect rental or public accommodation housing despite the fact that they are not required by these rules to do so, they should make every effort to inspect substitute housing prior to occupation.

The Department received comments on other housing-related issues for which no changes were proposed. A number of commenters noted that the text of proposed § 655.104(d)(1)(i) referred to employer-owned housing, whereas the current regulation at § 655.102(b)(1)(i) and the preamble to the proposed rule referenced employer-provided housing. The Department did not intend to change the current requirements for employer-provided housing and has corrected this inadvertent reference to ''employer-owned'' housing in the regulatory text.

A group of farmworker advocacy organizations commented that, in its view, all rental and/or public accommodations should be required by the Department, at a minimum, to meet the Federal standards for temporary labor camps. The commenter asserted that State and local standards for rental and/or public accommodation housing may in many instances be grossly inadequate, and that the application of Federal minimum standards is therefore essential. The Department does not believe, however, that it has the authority under the INA to impose such a minimum requirement. Section 218(c)(4) of the INA expressly provides that to satisfy their housing obligation employers may, at their option, either ''provide housing meeting applicable Federal standards for temporary labor camps'' or ''secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation.'' An employer that secures rental and/or public accommodations that meet all of the applicable local standards has satisfied its housing obligation under the statute. The statute provides that rental and/or public accommodation housing does not need to meet Federal temporary labor camp standards unless there are no ''applicable local or State standards.'' The Department is not at liberty to issue regulations that are inconsistent with the structure of employer housing obligations under the INA.

A few commenters urged the Department to relieve employers in certain border communities (e.g., Yuma, AZ) of the requirement to provide housing to H–2A workers from Mexico who are able to commute back to their homes across the border on a daily basis. According to one association commenter, Yuma, Arizona employers have traditionally attracted tens of thousands of seasonal workers daily, approximately half of whom reside in the U.S. while the other half choose to maintain their residences in Mexico. This association believes that requiring employers in such instances to provide housing and transportation not only hinders participation but ignores reality.

The INA at sec. 218(c)(4) requires employers to provide housing to all H–2A workers. The Department does not believe it has a legal basis upon which to permit employers to employ H–2A workers without providing those workers with housing. Of course, there is no statutory requirement that workers actually reside in the employer-provided housing. So, an H–2A worker who resides within commuting distance of a home across the border could presumably return home each night if the worker wanted to, provided the employer didn't require its workers to reside in specific housing as a condition of the work agreement. Nevertheless, the employer would be required by statute to make appropriate housing available to the worker.

Some commenters suggested that U.S. Department of Agriculture sec. 514 Farm Labor Housing Loans should be made available for the construction of housing used for H–2A workers. The Department has no authority to allocate Farm Labor Housing Loans, but has passed along the comment to the USDA.

Several commenters raised specific concerns about the attestation process as related to housing for agricultural workers. These commenters believe that the attestation process will lead to abuses in housing because there is no process in place for establishing compliance with the housing inspection request. Pursuant to the Final Rule, housing inspections are still required to be completed by SWAs. The Department believes that the extended timeframes for required pre-certification housing inspections will give the housing inspectors more time to complete inspections and should actually lead to more thorough inspections that in turn will help ensure violations are corrected.

So as not to inadvertently alter the availability of the conditional access provisions of § 654.403, which were cited favorably by some commenters, the Department has added language to § 655.104(d)(6)(i) clarifying that the required attestation ''may include an attestation that the employer is complying with the procedures set forth in § 654.403.''

Finally, the Department notes it has made several non-substantive changes to the text of § 655.104(d) to provide clarity. For example, the NPRM noted the obligation to provide housing to those workers who are not reasonably able to return to their permanent residence ''within the same day.'' The Department has amended this phrase to ''at the end of the work day'' to clarify that a work day may go beyond the same 24-hour period (for example, a late shift may not necessarily end within the same day but would still be considered part of the same work day after which an H–2A worker could not be reasonably expected to return to the home residence). For the same reason, the term ''without charge'' has been amended to read ''at no cost to the worker,'' in order to ensure clarity and understanding. The Department has also included language in § 655.104(d)(1)(ii) to clarify the kind of documentation that employers are expected to retain if they secure rental and/or public accommodations for their workers to show that the accommodations comply with the applicable legal standards. The language is taken directly from ETA Handbook No. 398, which provides at page I–26 that such documentation ''may be in the form of a certificate from the local or State Department of Health office or a statement from the manager or owner of the housing.'' In addition, non-substantive changes have been made to comport with plain English standards (for example, the use of active voice, such as the change in § 655.104(d)(6)(iii) to read ''The SWA is required by Section 218(c)(4) of the INA to make its determination''). Finally, a provision that is in the current regulation regarding charges for public housing, which was inadvertently omitted from the NPRM and whose absence was noted by several commenters, has been restored.

(e) Section 655.104(e) Workers' compensation

The NPRM proposed to continue the current requirement that the job offer must contain a statement promising that workers' compensation insurance will be provided. This is a statutory requirement. The INA at Section 218(b)(3) requires the employer to provide the Secretary with satisfactory assurances that ''if the employment for which certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.'' One commenter noted the State of Washington has an unusual Worker's Compensation statute that requires workers to contribute 50 percent of the premium unless the employer is self-insured, whereas the NPRM required the employer to provide such insurance at no cost to the worker. The intent of the workers' compensation provision in the INA is to ensure that no worker is left without insurance in those States that exclude agricultural work from coverage. In fact, Section 218(b)(3) provides that if ''employment for which the certification is sought *is not covered* by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the workers' employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment'' (emphasis added). Where the employment in question is covered by State workers' compensation law, but subject to certain rules applied by the State, the statutory provision is inapplicable. Therefore, the Department has modified language in § 655.104(e) to clarify that the employer should follow State law, but if the State excludes the type of employment for which the certification is being sought, then the employer must purchase the insurance at no cost to the worker.

Other commenters complained that the Department no longer requires submission of proof of Worker's Compensation Insurance. These commenters believe that employers circumvent this requirement by having inadequate coverage or by allowing the coverage to lapse after receiving certification, or by not buying it at all because State law does not require it. The Department is confident that the attestation-based application system will allow the Department to enforce these provisions because these attestations are made under penalty of perjury. If it is revealed during an audit that an employer fraudulently claimed to have met all program requirements, the employer would be subject to penalties, including debarment from the program.

Other changes made to the language of this provision were non-substantive, and made for purposes of clarification, or (as in the case of the recordkeeping language) to conform to changes made elsewhere in the rule.

(f) Section 655.104(f) Employer-Provided Items

The NPRM proposed to continue the current requirement that employers provide workers with ''all tools, supplies, and equipment required'' to perform the duties of the job. The NPRM allowed employers to require workers to provide tools or equipment where the employer can demonstrate such a practice was ''common'' in the area of employment.

The Department received one comment relating to its proposal, asserting that the Department should

not have deleted the current language mandating approval from the Department if employers seek to require employees to purchase any tools and equipment because it is common practice to do so. The ''common practice'' standard is not new, but has been carried over from the current regulation. Whether a common practice exists will still be a determination of fact to be decided by the Department and not by the employer. The only change in this determination is that the employer will now bear the burden of proof in the event of an audit or investigation to show that the practice claimed is common. In determining whether a practice is ''common'' in a particular area, the Department will apply a simple mathematical formula. If an employer can demonstrate that 25 percent of non-H–2A workers in the crop activity and occupation in the particular area are required to provide tools or equipment, the Department will consider the practice to be ''common.'' This simple standard will be relatively easy to administer, and will ensure that employers have fair notice of their legal obligations.

Clarifying language was also inserted referencing the requirements of sec. 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m) (FLSA), which does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Section 655.104(g) Meals

Section 655.104 (g) concerns the provision of meals to workers and the amount employers may charge workers for meals each day. Although the Department proposed no changes to this section, a few comments were received stating that the amount allowed to be charged/reimbursed does not reflect the true cost of the employer's providing or the worker's purchase of meals. Section 655.114 provides for annual adjustments of the previous year's allowable meal charges based upon Consumer Price Index (CPI) data. Each year the maximum charges allowed are adjusted from the charges allotted the previous year by the same percentage as the twelve-month percent change in the CPI for all Urban Consumers for Food (CPI–U for Food) between December of the year just concluded and December of the year prior to that. The Department reminds employers of their ability to petition for higher meal charges, a practice that has been continued in the Final Rule in § 655.114. The amount of the meal charge, which in the NPRM was listed in § 655.104(g), has for purposes of clarity been listed instead in § 655.114.

(h) Section 655.104(h) Transportation

Existing regulations at § 655.102(b)(5) require employers to provide or pay for workers' daily subsistence and transportation from the place from which the worker has come to the place of employment. The employer is to advance these costs to the worker when it is the prevailing practice of non-H–2A employers in the occupation and area to do so. If the employer has not advanced transportation and subsistence costs or otherwise provided or paid for these costs and the worker completes 50 percent of the work contract period, the employer is required to reimburse the worker for these costs at that time. The Department proposed no change to this requirement, but sought comments and information on the costs and benefits to employers and workers of continuing to require employers to pay for the workers' inbound and outbound (return) subsistence and transportation costs.

The Department received several comments on this requirement. Some comments from employers and employer associations advocated that employers and employees should share the costs of workers' inbound subsistence and transportation. These commenters argued that both employees and employers benefit from the H–2A employment relationship and therefore should share the costs. Others suggested that the employees should bear the full cost of their inbound subsistence and transportation, arguing that the inbound travel employment once they are in the country. Some commenters also noted that no other nonimmigrant work-related program requires employers to pay for the workers' inbound subsistence and transportation.

Comments from employee advocates urged the Department to continue the requirement that employers provide or pay for workers inbound subsistence and transportation costs, asserting that inbound subsistence and transportation costs:

> [a]re necessary for many reasons—to attract U.S. workers; to encourage employers to fully employ the workers in whom they have invested and to recruit only those workers needed; * * * and, because farmworkers wages are so low, to prevent farmworkers from becoming even more deeply indebted (and more exploitable) or from seeking low-cost transportation that is often unregulated and deadly.

While there was disagreement among commenters on the current requirement that employers pay inbound subsistence and transportation, there was agreement that employers should continue to pay for workers' outbound transportation. Employer and worker advocate commenters agreed that payment of outbound travel is a critical means to help ensure that workers depart the U.S. at the end of their H–2A contract.

Many comments addressed the timing of reimbursement to workers for inbound subsistence and transportation costs. Most commenters referenced the appellate court's decision in *Arriaga* v. *Florida Pacific Farms,* L.L.C., 305 F.3d 1228 (11th Cir. 2002), which held that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers employed by the growers under the H–2A program. Under the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered ''kick-backs'' of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage. 29 CFR 531.36. Although the employer in the *Arriaga* case did not itself make direct deductions from the workers' wages, the Court held that the costs incurred by the workers amounted to ''de facto deductions'' that the workers absorbed, thereby driving the workers' wages below the statutory minimum. The Eleventh Circuit reasoned that the transportation and visa costs incurred by the workers were primarily for the benefit of the employer and necessary and incidental to the employment of the workers and stated that ''[t]ransportation charges are an inevitable and inescapable consequence of having H–2A foreign workers employed in the United States; these are costs which arise out of the employment of H–2A workers.'' Finally, the court held that the growers' practices violated the FLSA minimum wage provisions, even though the H–2A regulations provide that the transportation costs need not be repaid until the workers complete 50 percent of the contract work period. The Eleventh Circuit noted that the H–2A regulations require employers to comply with applicable federal laws, and in accepting the contract orders in this case, the ETA Regional Administrator informed the growers in writing that their obligation

to pay the full FLSA minimum wage is not overridden by the H–2A regulations.

Comments from employers recommended continuing the Department's requirement that workers be reimbursed at the 50 percent point of the work contract, stating that the current policy appropriately balances the interests of employers and employees by creating an incentive for employees to complete at least half of the contract. Many employers urged the Department not to require immediate reimbursement to workers and that the Department:

> should explicitly state that an employer of H–2A workers does not have an obligation under the INA, the Fair Labor Standards Act (''FLSA''), or DOL regulations to reimburse a worker's in-bound transportation expense until the 50 percent point of the work contract and that if a worker's payment of inbound transportation and subsistence costs reduces his/her first week's wage below the minimum wage, such reduction does not result in a violation of the FLSA.

Employee advocates, on the other hand, pressed the Department to require employers to comply with the FLSA which, they state, requires the reimbursement of costs at the beginning of employment when those costs are for the benefit of the employer and effectively reduce the workers' weekly income below the minimum wage. Another employee advocate suggested that the Department consider requiring H–2A employers to advance to workers inbound costs and to pay referral fees to domestic labor contractors to encourage the movement of low-wage U.S. workers to labor shortage areas.

After due consideration of the comments, the Department has determined to continue the current policy of requiring employers to provide or pay for workers' inbound and outbound subsistence and transportation and the corresponding requirement for reimbursement of such inbound costs upon the worker's completion of 50 percent of the work contract period. Thus, reimbursement at the 50 percent point is all that the Final Rule requires pursuant to the Department's rulemaking authority under the INA. Moreover, the Department believes that the better reading of the FLSA and the Department's own regulations is that relocation costs under the H–2A program are not primarily for the benefit of the employer, that relocation costs paid for by H–2A workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck is not required by the FLSA.

The FLSA requires employers to pay their employees set minimum hourly wages. 29 U.S.C. 206(a). The FLSA allows employers to count as wages (and thus count toward the satisfaction of the minimum wage obligation) the reasonable cost of ''furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.'' 29 U.S.C. 203(m). The FLSA regulations provide that ''[t]he cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable [costs within the meaning of the statute] and may not therefore be included in computing wages.'' 29 CFR 531.3(d)(1). The FLSA regulations further provide examples of various items that the Department has deemed generally to be qualifying facilities within the meaning of 29 U.S.C. 203(m), see 29 CFR 531.32(a), as well as examples of various items that the Department has deemed generally not to be qualifying facilities, *see* 29 CFR 531.3(d)(2), 29 CFR 531.32(c).

Separate from the question whether items or expenses furnished or paid for by the employer can be counted as wages paid to the employee, the FLSA regulations contain provisions governing the treatment under the FLSA of costs and expenses incurred by employees. The regulations specify that wages, whether paid in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally, or ''free and clear.'' 29 CFR 531.35. Thus, ''[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. For example, if the employer requires that the employee must provide tools of the trade that will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.'' *Id.* The regulations treat employer deductions from an employee's wages for costs incurred by the employer as though the deductions were a payment from the employee to the employer for the items furnished or services rendered by the employer, and applies the standards set forth in the ''kick-back'' provisions at 29 CFR 531.35 to those payments. Thus, ''[d]eductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute 'board, lodging, or other facilities' '' are illegal ''to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act.'' 29 CFR 531.36(b).

In sum, where an employer has paid for a particular item or service, under certain circumstances it may pursuant to 29 U.S.C. 203(m) count that payment as wages paid to the employee. On the other hand, when an employee has paid for such an item or service, an analysis under 29 CFR 531.35 is required to determine whether the payment constitutes a ''kick-back'' of wages to the employer that should be treated as a deduction from the employee's wages.

The *Arriaga* court seems to have assumed that all expenses necessarily fall into one of these two categories—that either they qualify as wages under 29 U.S.C. 203(m) or they constitute a ''kick-back'' under 29 CFR 531.35. *See Arriaga,* 305 F.3d at 1241–42 (stating that if a payment ''may not be counted as wages'' under 29 U.S.C. 203(m), then ''the employer therefore would be required to reimburse the expense up to the point the FLSA minimum wage provisions have been met'' under 29 CFR 531.35 and 29 CFR 531.36). That is incorrect. For example, if an employer were to give an employee a valuable item that was not ''customarily furnished'' to his or her employees, the employer would not be able to count the value of that item as wages under 29 U.S.C. 203(m) unless the employer ''customarily furnished'' the item to his or her employees. Nevertheless, since the employee paid nothing for that item, it clearly would not constitute a ''kick-back'' of wages to the employer that would have to be deducted from the employee's wages for purposes of determining whether the employer met its minimum wage obligations under 29 U.S.C. 206(a). Similarly, if a grocery employee bought a loaf of bread off the shelf at the grocery store where he or she worked as part of an arms-length commercial transaction, the payment made by the employee to the employer would not constitute a ''kick-back'' of wages to the employer, nor would the loaf of bread sold by the employer to the employee be able to be counted toward the employee's wages under 29 U.S.C. 203(m). Both parties would presumably benefit equally from such a transaction—it would neither be primarily for the benefit of the employer, nor would it be primarily for the benefit of the employee.

Expenses paid by an employer that are primarily for the employer's benefit cannot be counted toward wages under 29 U.S.C. 203(m). *See* 29 CFR 531.3(d). Similarly, expenses paid by an employee cannot constitute a ''kick-back'' unless they are for the employer's benefit. *See* 29 CFR 531.35. An analysis conducted under 29 U.S.C. 203(m) determining that a particular kind of expense is primarily for the benefit of the employer will thus generally carry through to establish that the same kind of expense is primarily for the benefit of the employer under 29 CFR 531.35. Each expense, however, must be analyzed separately in its proper context.

The question at issue here is whether payments made by H–2A employees for the cost of relocating to the United States, whether paid to a third party transportation provider or paid directly to the employer, constitutes a ''kick-back'' of wages within the meaning of 29 CFR 531.35. If the payment does constitute a ''kick-back,'' then the payment must, as the *Arriaga* court decided, be counted as a deduction from the employee's first week of wages under the FLSA for purposes of determining whether the employer's minimum wage obligations have been met.

The Department does not believe that an H–2A worker's payment of his or her own relocation expenses constitutes a ''kick-back'' to the H–2A employer within the meaning of 29 CFR 531.35. It is a necessary condition to be considered a ''kick-back'' that an employee-paid expense be primarily for the benefit of the employer. The Department need not decide for present purposes whether an employee-paid expense's status as primarily for the benefit of the employer is a *sufficient* condition for it to qualify as a ''kick-back,'' because the Department does not consider an H–2A employee's payment of his or her own relocation expenses to be primarily for the benefit of the H–2A employer.

Both as a general matter and in the specific context of guest worker programs, employee relocation costs are not typically considered to be ''primarily for the benefit'' of the employer. Rather, in the Department's view, an H–2A worker's inbound transportation costs either primarily benefit the employee, or equally benefit the employee and the employer. In either case, the FLSA and its implementing regulations do not require H–2A employers to pay the relocation costs of H–2A employees. *Arriaga* misconstrued the Department's regulations and is wrongly decided.

As an initial matter, any weighing of the relative balance of benefits derived by H–2A employers and employees from inbound transportation costs must take into account the fact that H–2A workers derive very substantial benefits from their relocation. Foreign workers seeking employment under the H–2A nonimmigrant visa program often travel great distances, far from family, friends, and home, to accept the offer of employment. Their travel not only allows them to earn money—typically far more money than they could have in their home country over a similar period of time—but also allows them to live and engage in non-work activities in the U.S. These twin benefits are so valuable to foreign workers that these workers have proven willing in many instances to pay recruiters thousands of dollars (a practice that the Department is now taking measures to curtail) just to gain access to the job opportunities, at times going to great lengths to raise the necessary funds. The fact that H–2A farmworkers travel such great distances and make such substantial sacrifices to obtain work in the United States indicates that the travel greatly benefits those employees. Many of the comments received by the Department support this conclusion.

Most significantly, however, the Department's regulations explicitly state that ''transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment'' are qualifying ''facilities'' under 29 U.S.C. 203(m). 29 CFR 531.32(a). As qualifying facilities, such expenses cannot by definition be primarily for the benefit of the employer. 29 CFR 531.32(c). The wording of the regulation does not distinguish between commuting and relocation costs, and in the context of the H–2A program, inbound relocation costs fit well within the definition as they are between the employee's home country and the place of work.

The *Arriaga* court ruled that H–2A relocation expenses are primarily for the benefit of the employer in part because it believed that under 29 CFR 531.32, ''a consistent line'' is drawn ''between those costs arising from the employment itself and those that would arise in the ordinary course of life.'' 305 F.3d at 1242. The court held that relocation costs do not arise in the ordinary course of life, but rather arise from employment. *Id.* Commuting costs and relocation costs cannot be distinguished on those grounds, however. Both kinds of expenses are incurred by employees for the purpose of getting to a work site to work. Moreover, an employee would not rationally incur either kind of expense but for the existence of the job. Both the employer and the employee derive benefits from the employment relationship, and, absent unusual circumstances, an employee's relocation costs to start a new job cannot be said to be primarily for the benefit of the employer.

That is not to say that travel and relocation costs are never properly considered to be primarily for the benefit of an employer. The regulations state that travel costs will be considered to be primarily for the benefit of the employer when they are ''an incident of and necessary to the employment.'' 29 CFR 531.32(c). This might include, for example, a business trip, or an employer-imposed requirement that an employee relocate in order to retain his or her job. Relocation costs to start a new job will rarely satisfy this test, however.

In a literal sense it may be necessary to travel to a new job opportunity in order to perform the work, but that fact, without more, does not render the travel an ''incident'' of the employment. Inbound relocation costs are not, absent unusual circumstances, any more an ''incident of * * * employment'' than is commuting to a job each day. Indeed, inbound relocation costs are quite similar to commuting costs in many respects, which generally are not considered compensable. Cf. DOL Opinion Letter WH–538 (August 5, 1994) (stating that travel time from home to work is ''ordinary home-to-work travel and is not compensable'' under the FLSA); *Vega ex rel. Trevino* v. *Gasper,* 36 F.3d 417 (5th Cir. 1994) (finding travel to and from work and home not compensable activity under Portal-to-Portal Act). In fact, there is no reason to believe that the drafters of 29 U.S.C. 203(m) and 206(a) ever intended for those provisions to indirectly require employers to pay for their employees' relocation and commuting expenses. To qualify as an ''incident of * * * employment'' under the Department's regulations, transportation costs must have a more direct and palpable connection to the job in question than merely serving to bring the employee to the work site.

Taking the *Arriaga* court's logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees—or at least to pay relocation expenses for all newly hired foreign employees, since international relocation is perhaps less ''ordinary'' than intranational

relocation. That simply cannot be correct. The language of 29 U.S.C. 203(m) and 206(a) and their implementing regulations provide a very thin reed on which to hang such a seismic shift in hiring practices, particularly so many years after those provisions have gone into effect. Nor does the fact that H–2A workers are temporary guest workers change the equation. Even assuming that H–2A workers derive somewhat less benefit from their jobs because they are only temporary, that fact alone would not render the worker's relocation expenses an ''incident'' of the temporary job. If it did, ski resorts, camp grounds, shore businesses, and hotels would all be legally required to pay relocation costs for their employees at the beginning of each season—again, a result that is very difficult to square with the language and purpose of 29 U.S.C. 203(m) and 29 CFR 531.35.

A stronger argument could be made, perhaps, that employers derive a greater-than-usual benefit from relocation costs when they hire foreign guest workers such as H–2A workers, because employers generally are not allowed to hire guest workers unless they have first attempted but failed to recruit U.S. workers. Thus, such employers have specifically stated a need to hire non-local workers. Given the substantially greater benefit that foreign guest workers generally derive from work opportunities in the United States than they do from employment opportunities in their home countries, however, the Department believes that this at most brings the balance of benefits between the employer and the worker into equipoise. Moreover, the employer's need for non-local workers does nothing to transform the relocation costs into an ''incident'' of the job opportunity in a way that would render the employee's payment of the relocation expenses a ''kick-back'' to the employer. If it did, courts would soon be called upon every time an employer hired an out-of-state worker to assess just how great the employer's need for the out-of-state employee was in light of local labor market conditions. Conversely, the courts would also have to inquire into the employee's circumstances, and whether the employee had reasonably comparable job prospects in the area from which the employee relocated. Again, the Department does not believe such a result is consistent with the text or the intent of the FLSA or the Department's implementing regulations.

It is true, of course, that H–2A employers derive some benefit from an H–2A worker's inbound travel. To be compensable under the FLSA, however, the question is not whether an employer receives *some* benefit from an item or paid-for cost, but rather whether they receive the *primary* benefit. Significantly, despite the fact that employers nearly always derive some benefit from the hiring of state-side workers as well, such workers' relocation costs generally have not been considered to be ''primarily for the benefit of the employer.'' That is so because the worker benefits from the travel either more than or just as much as the employer.

The Department obligated H–2A employers to pay H–2A workers' transportation costs not because it believed that the workers were entitled to such payments under the FLSA, but rather in the discharge of its responsibilities under the INA to insure the integrity of the H–2A program. The Department carefully crafted its regulation to give H–2A workers a strong incentive to complete at least 50 percent of their work contract. The practical effect of the Arriaga decision, however, is to require H–2A employers to pay for H–2A workers' inbound transportation costs without any reciprocal guarantee that the workers will continue to work for the employer after the first workweek. The Department believes that the payment of such transportation costs unattached to a reciprocal guarantee that the needed work will ultimately be performed substantially diminishes the benefit of the travel to the employer, and certainly would not allow the travel to be considered primarily for the employer's benefit.

In sum, the Department believes that the costs of relocation to the site of the job opportunity generally is not an ''incident'' of an H–2A worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H–2A employer. The Department has publicly stated that ''in enforcing the FLSA for H–2A workers, the Department's general policy is to ensure that workers receive transportation reimbursement by the time they complete 50 percent of their work contract period (or shortly thereafter) rather than insisting upon reimbursement at the first pay period.'' The Department continues to believe that this is the appropriate interpretation of the interplay between the H–2A program regulations and the FLSA in regards to transportation reimbursement. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.

The current regulation uses the phrase ''place from which the worker has departed'' to describe the beginning point from which employers are required to provide or pay for inbound transportation and subsistence, and, if the worker completes the work contract period, the ending point to which employers are required to provide or pay for outbound transportation and subsistence. This phrase has at times been interpreted by the Department to mean the worker's ''home,'' or the place from which the worker was recruited. Most recently, the phrase was addressed in ETA Training and Employment Guidance Letter No. 23–01, Change 1 (August 2, 2002): '' 'Home' is where the worker was originally recruited.'' While the Department proposed no changes to this regulatory language or interpretation, comments were received on this point. One agricultural association suggested that the Department clarify that transportation from and back to the place from which the worker came to work should be considered to require transportation from or to the site of the U.S. Consulate that issued the visa. This commenter stated:

> For the past 20 years the phrase ''from the place from which the worker has come to work for the employer to the place of employment,'' has meant payment of transportation from the location of the U.S. Consulate which issued the H–2A visa to the place of employment of the petitioning employer. Although the Department in its memoranda refers to ''place of recruitment'' its examples of how this rule works speaks only of transportation from and back to the worker's home country. There is no mention of the worker's village. This interpretation is in line with the INA and DHS regulations which do not allow a worker to enter the U.S. until that foreign worker has an H–2A visa. Thus, the worker cannot ''come to work for the employer'' until he or she has an H–2A visa. It is at the point that the worker has the H–2A visa that he or she is eligible to go to work for the employer.

The Department finds this to be a compelling argument. It is the Department's program experience that workers, particularly H–2A workers, gather in groups for processing and transfer to the U.S. The logical gathering point for these workers is at the U.S. Consulate location where the workers receive their visa. In most countries that send H–2A workers to the U.S., such processing is usually centrally located (in Monterrey, Mexico, for example, rather than in Mexico City or another Consulate location). Designating the Consulate location where the visa is issued provides the Department with an administratively consistent place from which to calculate charges and

obligations. We have therefore made corresponding changes in the regulatory text to clarify that the ''place from which the worker has departed'' for foreign workers outside of the U.S. is the appropriate U.S. Consulate or port of entry.

Finally, the Department sought to clarify that minimum safety standards required for employer provided transportation between the worker's living quarters (provided or secured by the employer pursuant to INA sec. 218(c)(4)) and the worksite are the standards contained in MSPA (29 U.S.C. 1841). The Department does not seek to apply MSPA to H–2A workers and has no authority to do so. This clarification is intended to remove any ambiguity concerning the appropriate minimum vehicle safety standards for H–2A employers and should simplify compliance for those H–2A employers that also employ MSPA workers.

Other changes to the language of the proposed provision—most significantly, the notation that an employer's return transportation obligation under § 655.104(h)(2) applies where ''the worker has no immediately subsequent H–2A employment''—are non-substantive and have been made for purposes of clarification.

(i) Section 655.104(i) Three-Fourths Guarantee

The Department chose, in the NPRM, to continue the so-called ''three-fourths guarantee,'' by which it ensures that H–2A workers are offered a certain guaranteed number of hours of work during the specified period of the contract, and that if they are not offered enough hours of work, that they are paid as though they had completed the specified minimum number of work hours. In doing so, the Department suggested some minor changes to make the guarantee easier to apply in practice.

One grower association objected to the continuation of the three-fourths guarantee. They stated that it needs to be eliminated because it is arcane, is seldom understood by the growers, and complicates the system by creating more ''red tape'' for the growers. Other commenters supported the rule, but commented on the nuances of the changes made to the rule under the NPRM. A few commenters expressed the view that the guarantee deters employers from over-recruiting, which may create an oversupply of workers and drive wages down, and also assures long-distance migrants that attractive job opportunities exist. However, some commenters also believe that the guarantee requirement results in employer abuses, such as employers misrepresenting the length of the season. They suggested the Department add language to allow workers to collect the three-fourths guarantee ''based on the average number of hours worked in a particular crop region and upon a showing of having worked through the last week in which the employer offered work to a full complement of his workforce.''

The Department believes the rule provides essential protection for both U.S. and H–2A workers, in that it ensures their commitment to a particular employer will result in real jobs that meet their reasonable expectations. The Department also believes the rule is not easy to abuse or circumvent, as it is based on a simple mathematical calculation. For those employers that might try to evade their responsibilities, the Department has enforcement measures and penalties to act as a deterrent.

Changing the three-fourths guarantee to be based on a per-crop harvest calculation using an average of hours worked rather than a contract period would make it nearly impossible to track and enforce the guarantee. To require employers to keep track of workers on a per-crop basis and allow the workers to collect money based on the three-fourths guarantee when the U.S. workers transition from one employer to another during the peak harvesting times appears patently unfair and the Department is not willing to create such an option.

Two commenters also suggested that the Department take out the reference to ''work hours'' and return the term ''workday'' because the commenters believed that the employer might otherwise submit job orders based on a ''bogus'' hourly work day or work week. The Department believes that this concern is misplaced. The new terminology proposed by the Department is no more susceptible to abuse than the old terminology is; under either phrasing, employer fraud requires submitting false calculations of work. The Department purposely added the sentence with ''work hours'' and kept the old references to ''workday'' in the NPRM to make the formula for calculation of the total amount guaranteed easier to understand and calculate. The end result is the same under either phrasing, however.

A farm bureau requested that we insert language at the end of § 655.104(i)(1) to protect employers from the costs resulting from U.S. workers who voluntarily abandon employment in the middle of the contract period and then return at the end of the contract period or from those U.S. workers who show up in the middle of the contract period. This commenter does not believe that an employer should have any liability under the three-fourths guarantee rule for such unreliable employees. The guarantee has never applied to workers who voluntarily abandon employment or who never show up for the work, provided notice of such abandonment or no-show is provided to DOL within the time frames for reporting an abandonment that are set forth in § 655.104(n). The Department has further clarified that provision in the Final Rule by defining abandonment of the job as the worker failing to report for work for 5 consecutive days.

Farmworker advocates expressed concern that the Department would not enforce this provision. The Department appreciates the concerns raised and assures the public it intends to enforce this provision fully, as it intends to implement the entire rule.

Another commenter requested clarification on what hours an employer may count toward the three-fourths guarantee when an employee voluntarily works more than the contract requires. The commenter asked for language to be inserted into § 655.104(i)(3) stating that all hours of work actually performed including voluntary work over and above the contract requirement can be counted by the employer. The Department believes that this principle was already made clear by § 655.104(i)(1), but it has added the requested language for purposes of clarification.

In proposed § 655.104(i)(4) the Department sought to reiterate the employer's obligation to provide housing and meals to workers during the entire contract period, notwithstanding the three-fourths guarantee. The proposed paragraph, while properly entitled ''Obligation to provide housing and meals,'' inadvertently discussed an obligation to provide meals and transportation. Two comments were received on this paragraph. One employer association suggested that the text of the paragraph be revised to reflect that employers are not obligated to provide housing to workers who quit or are terminated for cause. One employee advocacy organization commented that the clarification that the employer is not allowed to shut down the labor camp or the camp kitchen during the contract period is a positive change. The Department has modified the paragraph to clarify that it is the employer's obligation to provide housing and meals during the contract period that is not affected by the three-fourths guarantee,

and to clarify that employers are not obligated to provide housing to workers who voluntarily abandon employment or are terminated for cause.

Finally, in the NPRM the Department inadvertently deleted some qualifying phrases from this provision that are contained in the current regulation, and has accordingly in the Final Rule reverted to the language of the current regulation. Section 655.104(i)(3) discusses an employee's failure to work in the context of calculating whether the period of guaranteed employment has been met. The Final Rule reinserts the phrase currently in the regulations at § 655.102(b)(6)(iii) permitting an employer to count ''all hours of work actually performed (including voluntary work over 8 hours in a workday or the worker's Sabbath or Federal Holidays).'' The Final Rule also reinserts as § 655.104(i)(4) the statement found in the current regulation at § 655.102(b)(6)(iv) that an employer is not liable for payment of the three-quarters guarantee to an H–2A worker whom the CO certifies has been displaced because of the employer's compliance with its obligation under these rules, where applicable, to accept referrals of U.S. workers after its date of need.

(j) Section 655.104(j) Records

The NPRM proposed continuing the ''keeping of adequate and accurate records'' with respect to the payment of workers, making only minor modifications to the current regulation. The Department received several comments specific to the provisions of this section.

A commenter requested that the Department eliminate the requirement for employers to provide information to the worker through the worker's representative upon reasonable notice. The Department does not believe this requirement should be eliminated because it is the Department's goal to encourage the availability of information to workers. Another commenter suggested refinements to the provision, including suggesting that a ''worker's representative'' be defined and documented in some manner so as to prevent the theft of information under the guise of disclosure to worker's representatives, and also to require disclosure of records within five days instead of upon ''reasonable'' notice.

The Department agrees that it did not clarify in sufficient detail how a designated worker's representative should be identified so as to prevent unauthorized disclosure of records, and it accordingly has added language to the Final Rule stating that appropriate documentation of a designation of representative status must be provided to the employer.

Instead of changing the term ''reasonable'' notice in the Final Rule to refer to a specific number of days, however, the Department has instead decided to adopt in § 655.104(j)(2) of the Final Rule the standard for production of records that is currently found at 29 CFR 516.7 and that the WHD uses under the FLSA. The Secretary can already request most H–2A records kept pursuant to this rule under the FLSA, and having one standard will help to avoid confusion in the regulated community.

(k) Section 655.104(k) Hours and Earnings Statements

The Department did not receive any comments on this section. However, the Department made non-substantive punctuation changes to the provision in the Final Rule to reflect plain language standards.

(l) Section 655.104(l) Rates of Pay

In the NPRM, the Department proposed to require employers to pay the highest of the adverse effect wage rate, the prevailing wage rate, or the Federal, State, or local minimum wage. The Final Rule retains this requirement, with some minor non-substantive clarifications to the text of the provision; comments specific to the issue of actual rates that will be required and the timing of their application are dealt with in the discussion of § 655.108.

Because this provision discusses the use of piece rates, several commenters took the opportunity to suggest changes to how piece rates are treated within the H–2A program. Worker advocates argued for reinstitution of the pre-1986 rules regarding piece rate adjustments. Some employers argued that the Department should not attempt to regulate piece rates at all. As the NPRM did not propose changes to the now long-standing procedures for the regulation of piece rates, the Department did not adopt any of these suggested changes in the Final Rule.

The NPRM proposed a modest change to the regulation governing productivity standards. Under existing regulations, an employer who pays on a piece rate basis and utilizes a productivity standard as a condition of job retention must utilize the productivity standard in place in 1977 or the first year the employer entered the H–2A system with certain exceptions and qualifications. The NPRM proposed to simplify this provision by requiring that any productivity standard be no more than that normally required by other employers in the area.

No commenter explicitly opposed the change in the methodology by which acceptable productivity standards are determined, but several employers asked for additional flexibility to be allowed to use a productivity standard even if the majority of employers in the area do not utilize one. We believe the ''normal'' standard, which the Department will retain in the Final Rule, will provide adequate flexibility for employers while ensuring that the wages and working conditions of U.S. workers are not adversely affected by the use of productivity rates not normal in the area of intended employment. Clarifying language has been added to the provision supplying the Department's interpretation of the term ''normal'' to mean ''not unusual.'' The Department has long applied this meaning of the term ''normal'' In the H–2A context. *See, e.g.*, ETA Handbook No. 398 at II–7 (''The terms 'normal' and 'common', although difficult to quantify, for H–2A certification purposes mean situations which may be less than prevailing, but which clearly are not unusual or rare.''); *id.* at I–40 (noting that the Department will carefully examine job qualifications, which are required by statute to be ''normal'' and ''accepted,'' if the qualifications are ''unusual''). It is also within the range of generally accepted meanings of the term. *See, e.g.*, Black's Law Dictionary 1086 (8th ed. 2004) (''The term describes not just forces that are constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are *unusual* and *extraordinary*.''); Webster's Unabridged Dictionary 1321 (2d ed. 2001) (supplying ''not abnormal'' as one of several definitions). Thus, ''normal'' does not require that a majority of employers in the area use the same productivity standard. If there are no other workers in the area of intended employment that are performing the same work activity, the Department will look to workers outside the area of intended employment to assess the normality of an employer's proposed productivity standard.

With respect to other provisions in the NPRM, some commenters argued that the Department is required by statute to use a ''prevailing'' standard with respect to all practices permitted by the regulations. These commenters argued that the use of anything less than a ''prevailing practice'' standard necessarily adversely affects U.S. workers. The Department disagrees. The Department notes that with respect to

many types of practices, it may not even be possible to determine what the ''prevailing'' practice is. For example, there may be a wide range of productivity standards used by employers in a given area, none of which is used by 50 percent of employers or with respect to 50 percent of workers. Furthermore, many practices are not readily susceptible to averaging: For example, with respect to practices regarding the frequency with which workers are paid, some employers may pay workers at the end of each week, others at the end of every two weeks, and others twice a month. If one third of employers used each method, which practice would be ''prevailing''?

The Department has examined each type of employment practice and each type of working condition that is addressed by this rule to determine what parameters or limits are necessary to ensure that U.S. workers will not be adversely affected. With respect to productivity standards, the Department has determined that a range of practices are acceptable, and that it is unlikely that U.S. workers will be adversely affected if H–2A employers use a productivity standard that is not unusual for non-H–2A employers to apply to their U.S. workers. The Department will not, however, certify applications containing unusual productivity standards that are clearly prejudicial to U.S. workers.

(m) Section 655.104(m) Frequency of Pay

The Department proposed in the NPRM to continue the requirement of the current regulation that the employer must state in the job offer the rate of frequency that the worker is to be paid, based upon prevailing practice in the area but in no event less frequently than twice a month. The Department received one comment on this provision noting that weekly or daily earnings are ''always'' the prevailing practice in agriculture, never bi-weekly, and that the Department should accordingly require weekly payment. After considering this comment, the Department has determined that it would be difficult, and not at all cost-effective, to use surveys to determine the frequency with which employers in a given area typically pay their employees. The Department has therefore decided to retain the minimum requirement that employees must be paid at least twice monthly, but has dropped the reference to the use of prevailing practices. The Department notes that this modest change affects only the frequency with which workers are paid, and not the amount to which they are entitled.

(n) Section 655.104(n) Abandonment of Employment

The NPRM included a provision stating that the employer is not required to pay the transportation and subsistence expenses of employees who abandon employment, provided the employer notifies the Department or DHS within 2 workdays of abandonment. One association of farm employers argued that this requirement was unreasonable in that the typical practice is termination 3 days beyond the abandonment or ''no show'' of the worker. An employer opined that this requirement should create an obligation on the part of the Department to help employers locate and pursue remedies against employees who voluntarily abandon employment without returning to their home country.

The Department acknowledges the need for clarification in the provision to ensure that the requirement begins to run only when the abandonment or abscondment is discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL and DHS no later than 2 workdays ''after such abandonment or abscondment occurs.'' The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that a worker is deemed to have absconded when the worker has not reported for work for a period of 5 consecutive work days without the agreement of the employer. The Department has extended this standard to a worker's failure to report at the beginning of a work contract. This is intended to clarify for the employer that the same standard of reporting applies for both agencies. The Department declines to include provisions prescribing new employer remedies against workers who abandon the job, but notes that abandonment of a job may result in a worker being ineligible to return to the H–2A program.

(o) Section 655.104(o) Contract Impossibility

The current and proposed regulations contain a provision that allows an employer to ask permission from the Department to terminate an H–2A contract if there is an extraordinary, unforeseen, catastrophic event or ''Act of God'' such as a flood or hurricane (or other severe weather event) that makes it impossible for the business to continue.

One commenter noted that the proposed regulation eliminates a current requirement that ''the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker,'' and stated that U.S. workers, in particular, would benefit from such an effort. The Department declines to adopt this suggestion, as it believes the workers themselves will be in a better position to find alternative job opportunities than an employer whose business enterprise has been substantially impacted by an Act of God. In response to this comment, the Department has, however, added language to the Final Rule specifying that the H–2A worker may choose whether the employer terminating the H–2A contract should pay to transport them ''to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2A employer (but only if the worker can provide documentation supporting such employment).'' The limitation providing that a worker who requests transportation to the next employer must provide documentation of that employment will help to ensure that H–2A workers who do not have subsequent employment inside the United States return to the country from which they came to the United States rather than remaining in the United States illegally.

To conform to similar changes made elsewhere in the rule, the Final Rule clarifies that ''for an H–2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry.''

Other changes to the language of the proposed rule are non-substantive and have been made for purposes of clarifying the provision or to conform to changes made elsewhere in the Final Rule.

(p) Section 655.104(p) Deductions

The Department, in the NPRM, proposed requiring employers to make assurances in their application that they will make all deductions from the workers' paychecks that are required by law. A group of farmworker advocacy organizations asserted that the Department was skirting its responsibility under *Arriaga* by allowing ''reasonable'' deductions to be taken from a worker's paycheck without any mention of the FLSA. This commenter believes that the Department inappropriately removed clarifying language in the current regulation that

''an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA.'' This commenter opined that workers under the H–2A program are entitled to full coverage under the FLSA, and that the Department should not make regulatory changes which suggest otherwise. By eliminating this language from the rule, this commenter believes the Department would effectively undermine the rights of farm workers to be paid the minimum wage free and clear of costs imposed on them for inbound transportation and visa costs, as established by case law.

The Department does not agree with this commenter's characterization of the applicability of the FLSA to H–2A workers, including regarding inbound transportation. Nevertheless, we have returned the deleted language to the Final Rule to clarify that employers must of course comply with all statutory requirements applicable to them.

(q) Section 655.104(q) Copy of Work Contract

The NPRM contained the provision found in the current regulation specifying that a copy of the work contract must be provided to the worker no later than the date the work commences. One group of farmworker advocacy organizations pointed out that this proposed regulation does not require that the work contract be given to the employee in the employee's native language and believed that these regulations as proposed are contrary to the requirements in MSPA for domestic workers. The Department has decided to make no substantive changes to this provision. Employers seeking to hire H–2A workers, as with all employers seeking to recruit agricultural workers under the Wagner/Peyser system, must file a Form ETA 790 with the SWA. This Form provides the necessary disclosures for MSPA purposes. The form itself is bilingual. In addition, section 10(a) of the Form specifically requires that the summary of the material job specifications be completed by the employer in both English and Spanish. The changes made to the language of the provision in the Final Rule are non-substantive and were made to provide better clarity.

Section 655.105 Assurances and Obligations of H–2A Employers

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H–2A program. The Department received many comments expressing approval of the new attestation-based process, and others opposed to such a change. Still other commenters expressed general approval of the new attestation-based approach but suggested changes to the attestations and the process of submitting such attestations.

The Department received two comments regarding the substantive obligations imposed on employers through the attestations. One commenter requested that the Department add another attestation that employers will not confiscate workers' passports. Another commenter requested that the Department impose substantial penalties on employers who lure H–2A workers away from contract jobs before the termination of their contracts. This commenter believes that such a practice victimizes both the employer, who loses laborers, and the employee, who loses status under U.S. law when they prematurely terminate a contract.

The Department is not aware that the confiscation of passports is a widespread practice among agricultural employers hiring H–2A workers. However, where evidence of such practice is found, it would likely indicate the presence of other practices prohibited by the H–2A regulations, such as the withholding of pay and other program entitlements. In such situations, the Department possesses mechanisms under this Final Rule to investigate and take appropriate action against such unscrupulous employers, both through program actions including revocation and debarment and through direct enforcement with civil fines and debarment.

On the subject of changes of employment, the proposed companion regulation to the Department's NPRM, issued by USCIS at 73 FR 8230, Feb. 13, 2008, underscored that H–2A workers are free to move between H–2A certified jobs, and proposed to provide even greater mobility toward that end. The ability of workers to move to new H–2A employment when the current H–2A contract is completed is not something the Department wishes to discourage. A worker who abandons a job before its conclusion must be reported to DOL and DHS, and, depending on the reason for the abandonment, such abandonment may result in a violation of H–2A status and the consequent inability to commence employment with another employer. Such abandonment may also adversely affect a worker's future eligibility to participate in the H–2A program.

One commenter requested that we allow substitution of H–2A workers at the port of entry without having to file a new petition. An *Application for Temporary Employment Certification* is filed without the names of the foreign workers. Substitution of workers is permitted by the DHS companion rule.

(a) Section 655.105(a)

The attestation obligation set forth in § 655.105(a) in the NPRM requires the employer to assure the Department that the job opportunity is open to any U.S. worker and that the employer conducted (or will conduct) the required recruitment, and was still unsuccessful in locating qualified U.S. applicants in sufficient numbers to fill its need. This assurance was criticized by a farm bureau because it believes that it is impossible for employers to state they ''will conduct'' recruitment as required in the regulations and at the same time attest that they were unsuccessful in finding any U.S. workers. The Department has clarified this language in the Final Rule to enable employers to attest that the employer ''has been'' unsuccessful in locating U.S. workers sufficient to fill the stated need.

One group of advocacy organizations believes the Department should retain the language from the current § 655.103(c), which states: ''Rejections and terminations of U.S. workers. No U.S. worker will be rejected for *or terminated from* employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the SWA.'' (Emphasis supplied.) This commenter requests that the provision against termination should be added to the assurance found in the new § 655.105(a), specifically where it states: ''Any U.S. workers who applied for the job were rejected for only lawful, job-related reasons.''

The Department declines to add language regarding terminations at this location in the regulations. The provision at issue is an attestation by an employer regarding the hiring of U.S. workers, not their termination. The termination of U.S. workers for inappropriate reasons is already covered under the regulations by the prohibition in § 655.105(j), discussed below.

The Department added several clarifications and conforming changes to the text of the proposed provisions. First, the Department added language clarifying that the employer must attest that it will keep the job opportunity open to qualified U.S. workers ''through the recruitment period,'' which is defined at § 655.102(f)(3). Second, the Department added language clarifying that the employer must attest that it has

hired and will hire all U.S. workers who apply for the job and are not rejected for lawful, job-related reasons. Third, and relatedly, the Department added language stating that an employer must attest that ''it will retain records of all rejections as required by § 655.119.'' Other changes to the language of the provision were minor and non-substantive, and made for purposes of providing additional clarity.

(b) Section 655.105(b)

The Department proposed in the NPRM that employers be required to offer terms and conditions that are ''normal to workers similarly employed'' and ''which are not less favorable than those offered to the H–2A workers.'' One commenter believed that this standard is not sufficiently protective of the wages and working conditions of U.S. farmworkers to meet the statutory precondition that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. According to this commenter, a practice applying to a small percentage of workers may still be considered ''normal.'' This commenter opined that this criterion violates the statute, because requiring anything less than the prevailing practices of non-H–2A employers with respect to job terms will necessarily harm U.S. workers, either by putting downward pressure on wages and conditions and/or by facilitating job offers that are meant to deter U.S. workers from applying and accepting work.

For reasons that have already been discussed above, the Department disagrees. Where the Department has identified particular terms or working conditions that have an important impact on U.S. workers—such as wages or the obligation to provide tools—it has inserted provisions addressing them directly. Not every term or condition attaching to a job, however, threatens to negatively impact the wages and working conditions of U.S. workers simply because it is not a ''prevailing'' condition. An employer may, for example, be the only employer in the area that grows a particular crop, or that requires the use of a particular tool. Such requirements generally do not threaten to adversely affect U.S. workers and are not improper for employers to impose. Moreover, as noted above, it is often very difficult, if not impossible, to determine what the ''prevailing practice'' is with respect to certain types of job terms and working conditions. Other specific provisions in the regulations safeguard against job qualifications, terms, and working conditions that are deliberately designed by employers to discourage U.S. workers from applying for job openings.

Because the Department has indicated in the Final Rule the specific standard (i.e., ''common,'' ''normal,'' ''prevailing'') that applies to each type of covered job term and working condition, the Department has deleted language from the proposed rule that might have been understood to apply a catch-all requirement to all job terms and working conditions that they be ''normal to workers similarly employed in the area of intended employment.'' Retaining this language would have resulted, in some instances, in application of different standards to the same job requirements, potentially creating substantial confusion. The deleted language might also have been misconstrued as applying to job terms and working conditions that are not elsewhere addressed in the Final Rule. The Department never intended for the deleted language to apply to such peripheral job requirements; those job terms and working conditions that the Department considers to be central to H–2A work and to preventing an adverse effect on U.S. workers—such as wages, housing, transportation, tools, and productivity requirements—have each been specifically addressed elsewhere in the Final Rule. The Final Rule retains the requirement that employers must offer job terms and working conditions that ''are not less than the minimum terms and conditions required by this subpart.'' This language ensures that employers must attest to their adherence to the standard specified in the Final Rule for each covered job term and working condition.

(c) Section 655.105(c)

The Department proposed in the NPRM to continue to require that the employer submitting an application attest that the job opportunity being offered to H–2A workers is not vacant because the former occupants are on strike or locked out in the course of a labor dispute involving a work stoppage. The language of the proposed provision has been modified in the Final Rule by reverting to the language in the current regulation at § 655.103(a), which provides that the employer must assure the Department that ''[t]he specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.'' The Department is reverting to the current regulatory language to clarify that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individual case-by-case basis. As the Department's current ETA Handbook No. 398 explains at page II–23, the Department must ensure that ''the specific positions vacant because of the dispute will not be included in any otherwise positive H–2A certification determination or redetermination.''

The purpose of the strike/lock-out provision is to ensure that striking U.S. workers are not replaced with temporary foreign workers, thereby adversely affecting such workers. However, if an agricultural employer needs twenty workers, and only ten of the positions are vacant because workers are on strike, the employer should not be prohibited from hiring H–2A workers to fill the ten job openings that are not strike-related. Hiring foreign workers to fill positions of U.S. workers that are on strike is likely to adversely affect the U.S. workers, but hiring H–2A workers to fill positions that are not vacant because of a strike would not. The language of this provision in the Final Rule is also more consistent with the Department's statutory authority to withhold a labor certification where granting the certification would adversely affect the wages and working conditions of U.S. workers.

Comments regarding the NPRM's labor dispute provisions, which overlap with the contents of § 655.109(b)(4)(i) of the NPRM, are addressed in the discussion of that section below.

(d) Section 655.105(d)

The NPRM included a provision that required the employer to attest it would continue to cooperate with the SWA by accepting referrals of all eligible and qualified U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date the H–2A workers departed or three days prior to the date of need, whichever was later. The language of the provision in the Final Rule has been modified to render it consistent with § 655.102(f)(3), which specifies that employers must continue to accept referrals until the ''end of the recruitment period'' as defined in that provision.

The only comment that the Department received on this section is discussed in greater detail under the Department's discussion of the 50 percent rule in § 655.102(b), above.

(e) Section 655.105(e)

No comments were received on § 655.105(e)(1) regarding the attestation promising to comply with all labor laws. Comments received on § 655.105(e)(2)

pertaining to the housing attestation are addressed in the discussion of §§ 655.102(e) and 655.104(d). Comments received on § 655.105(e)(3) pertaining to the workers' compensation attestation are addressed in the discussion of § 655.104(e). Finally, comments received with respect to § 655.105(e)(4) about the transportation attestation are addressed in the discussion of § 655.104(h) and the comments received in connection with § 655.105(e)(4) regarding worker protections are addressed in the discussion of the section on revocation at § 655.117. Several minor non-substantive modifications have been made to the text of the provision for purposes of clarity and to conform to changes made elsewhere in the Rule.

(f) Section 655.105(f)

Several comments were received on § 655.105(f), which as published in the NPRM required employers to notify the Department and DHS within 48 hours if an H–2A worker leaves the employer's employ prior to the end date stipulated on the labor certification. The commenters thought that 48 hours was not enough time to accomplish this especially in light of DHS' requirement that proof of notification be kept for up to one year. The commenters thought it was unfair to require the employer to comply with this requirement and incur the added expense of sending the notice by certified mail. One commenter went on to say that such notice is not needed in all cases. The commenter cited the example of an employee transferring to another employer with approval to do so by the Department and DHS and asks why the employer should still be required to provide notification in such cases. According to this commenter, notification should only be required if the H–2A worker absconds from the work site.

The notification is necessary in all circumstances because the early separation of a worker impacts not only the rights and responsibilities of the employer and worker but also implicates DOL's and DHS's enforcement responsibilities. For instance, an employer would no longer be responsible for providing or paying for the subsequent transportation and subsistence expenses or the ''three-fourths guarantee'' for a worker who has separated prior to the end date stipulated on the labor certification, either through voluntary abandonment or termination for cause. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by regular U.S. mail, with notation of the posting date, will suffice. In addition, the Department revised the notification requirement in the Final Rule to reflect that a report must be made no later than 2 workdays after the employee absconds, which, consistent with DHS, has been defined as 5 consecutive days of not reporting for work. The text of this provision has been modified accordingly.

The Department also received comments on this section relating to notification when H–2A workers leave their home country for the first place of intended employment. The Department believes those comments pertain to requirements in the DHS NPRM published February 13, 2008 rather than the Department's NPRM of the same date.

(g) Section 655.105(g) Offered Wage Assurances

Comments received pertaining to the offered wage are addressed in the response to comments on § 655.108. The Department added language to the text of this provision in the Final Rule to clarify that, as a matter of enforcement policy, the adverse effect wage rates that are in effect at the time that recruitment is initiated will remain valid for the entire period of the associated work contract. This enforcement policy will honor the settled expectations of workers and employers regarding their respective earnings and costs under an H–2A work contract and will avoid surprises that might give rise to disputes. It will also be an easy rule for the Department to administer, particularly when calculating payments due under the three-quarters guarantee. Because H–2A contracts never last more than a year, locking in wage rates for the duration of a contract in this manner will not significantly prejudice workers or employers in the event that wage rates happen to rise or fall during the middle of a work contract.

(h) Section 655.105(h) Wages Not Based on Commission

Comments pertaining to the offered wage are addressed in the response to comments on § 655.108.

(i) Section 655.105(i)

The NPRM contained an assurance requiring the employer to attest that it was offering a full-time temporary position whose qualifications are consistent with the ''normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations or crops.'' This was a continuation of current obligations.

The Department received several comments relevant to this provision. One commenter opined that the Department should scrutinize employer applications that offer U.S. workers a 30-hour work week arguing that such a requirement is not normal and is meant to dissuade U.S. workers from applying when in reality H–2A workers would work 50–60 hours a week. The commenter argues, under the new rule, it will become impossible for the Department to deny an application because the standard for what is ''normal'' is so lax.

The word ''normal'' in § 655.105(i) does not refer to the requirement that the jobs be full-time, but rather to the qualifications provision in that section. Thirty hours a week is the minimum to be considered full-time employment in the H–2A program and the Department has, as a clarification, provided that definition of full-time in this section in the Final Rule. Moreover, other provisions in these regulations (see, e.g., §§ 655.103, 655.105(b)) prohibit giving H–2A workers more favorable job terms than were advertised to U.S. workers, which include the number of hours of employment.

Another commenter noted that requirements that the job duties be normal to the occupation and not include a combination of duties not normal to the occupation has led to frequent disputes, particularly in specialty areas of agriculture. This commenter noted that there is a distinction between restrictive requirements that are clearly contrived for the purpose of disqualifying domestic workers and those directly designed to producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

The Department agrees that the INA was not meant to require employers to adhere to timeworn formulas for production in the H–2A or any other employment-based category, and that job duties for which there is a legitimate business reason are permissible. The requirement that job qualifications be ''normal'' and ''accepted,'' however, is statutory and cannot be altered. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer's asserted job qualifications are appropriate, to apply ''the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops.'' For the reasons provided in the discussion of § 655.104(b) of the Final Rule above, the Department has deleted the phrase ''in that they shall not require a combination of duties not normal to the

occupation'' from the NPRM to conform to the language of the statute.

In the Final Rule, the language of this provision has been modified in one additional respect to conform to the language of § 655.104(b). The provision now states that job qualifications must not ''substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations or crops.''

(j) Section 655.105(j) Layoffs

The Department in its NPRM added a new provision prohibiting employers from hiring H–2A workers if they laid off workers within a stated time frame, unless such laid-off workers were offered and rejected the H–2A positions. Two commenters saw the new provision on layoffs as unnecessary and unworkable. One commenter saw this as contrary to the section on unforeseeable events and also illogical because many employers request a contract period of ten months. This would mean that employers would be unable to lay off workers at the end of one season, because the new season begins within 60 days and the proposed 75-day requirement will not have lapsed. Another commenter suggested a change to the language in this section to include a caveat that such layoffs shall be permitted where the employer also attests that it will offer or has offered the opportunity to the laid-off U.S. worker(s) beginning on the date of need, and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

The Department agrees, in general, with the changes proposed by the commenters. We have accordingly modified the language of the provision in the Final Rule to limit the effect of the provision to 60 days on either side of an employer's date of need. This modification is also consistent with the revised timetables for recruitment in the Final Rule. This 120-day protective period will provide U.S. workers important protections during the period of time that H–2A workers are being recruited and through the beginning of the work season, which is the period of time that U.S. workers are most vulnerable to layoffs related to the hiring of H–2A workers, while avoiding most of the problems cited by the commenters. We also agree that a laid off worker must be qualified for the opportunity and that U.S. workers may only be rejected for lawful, job-related reasons, a limitation that preserves an employer's right to reject those workers it knows to be unreliable.

(k) Sections 655.105(k) and (l) Retaliation and Discharge

One commenter reasoned that the Department has weakened its own enforcement ability by eliminating the word ''discharge'' from the list of prohibited retaliatory acts against a worker who files a complaint or testifies against the employer, consults with an attorney, or asserts any rights on behalf of himself/herself or other workers.

The Department believes it has, in fact, strengthened its enforcement ability by addressing discharge separately in § 655.105(l). By making this a separate assurance, the employer acknowledges even more obviously the prohibition against discharge as retaliation.

One group of farmworker advocacy organizations commented that the NPRM's proposed language requiring employers to attest that they will not discharge any person ''for the sole reason'' that they engaged in protected activity under § 655.105(k) would substantially weaken the anti-retaliation language in the current regulations. The Department agrees with this commenter that a ''sole reason'' standard would impose an inappropriately high burden on retaliation claimants. A retaliation claimant should only be required to prove that protected activity was a contributing factor to the discharge. Thus, the Department has modified the language of § 655.105(l) to require employers to attest that they will not discharge any person ''because of'' protected activity under § 655.105(k).

Section 655.104(k)(4) provides that an employer may not retaliate against an employee who has consulted with an employee of a legal assistance program. This provision does not, however, provide employees license to aid or abet trespassing on an employer's property, including by persons offering advocacy or legal assistance. No matter how laudable the intent of those offering advocacy or legal services, an employee does not have the legal right to grant others access to the private property of an employer without the employer's permission. A farm owner is entitled to discipline employees who actively aid and abet those who engage in illegal activity such as trespassing. Absent any evidence of a workers' actively aiding or abetting such activity, however, an employer's adverse action against an employee in response to that employee meeting with a representative of an advocacy or legal services organization, particularly on the worker's own time and not on the employer's property, would be viewed as retaliation.

Several minor non-substantive modifications were made to the text of the provision for purposes of clarity and style.

(l) Section 655.105(m) Timeliness of Fee Payment

The Department received one comment on this section and has addressed it in the comments on § 655.118 on debarment, below.

(m) Section 655.105(n) Notification of Departure Requirements

The Department did not receive any comments on this provision. For purposes of simplicity, and to avoid any potential conflict with DHS's regulations, the phrase ''another employer and that employer has already filed and received a certified *Application for Temporary Employment Certification* and has filed that certification in support of a petition to employ that worker with DHS'' has been deleted from the Final Rule and replaced with the terms ''another subsequent employer.'' This change is non-substantive; subsequent employers still cannot legally employ H–2A workers without an approved labor certification.

(n) Section 655.105(o) and New Section 655.105(p) Prohibition on Cost-Shifting

The Department included in the NPRM a provision prohibiting employers from shifting costs for activities related to obtaining labor certification to the worker and further requiring the employer to contractually forbid its agents from accepting money from the H–2A worker for hiring him or her. The Department received several comments in relation to this provision.

A State Workforce Agency expressed concern that this prohibition will create another disincentive for U.S. employers to use the program because it gives the impression that workers will be able to request reimbursement from the employer for any monies paid to a recruiter. The Department notes in response that the H–2A rule does not require the employer to reimburse the H–2A worker for any recruitment-related fees he or she may pay. Rather, with an exception discussed below, the rule requires the employer to contractually forbid any foreign recruiters it hires from charging the H–2A worker any fees in order to be hired or considered for employment. This may mean that employers are required to pay foreign recruiters more than they do today for the services that they render, but the Department considers this a necessary step toward preventing

the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.

One group of farmworker advocacy organizations believes this rule does not go far enough to protect workers from exploitation by recruiters. The commenter specifically suggested that DOL should require employers to attest that they are ''directly paying the entire recruiting/processing fee charged to any foreign labor contractor whom they engage to perform international recruitment of H–2A workers.'' Employers are permitted to pay fees to recruiters for their recruiting services, and indeed the Department expects that they will have to do so, as it is unlikely that recruiters will work for free. The Department sees little value, however, in an over-complicated and over-prescriptive rule allowing foreign recruiters to charge H–2A workers recruiting fees, but then requiring the employer to pay the fee directly. Moreover, this rule represents the Department's first effort to regulate in this area under the H–2A program and we decline to go further, at this time. We will consider further actions if experience dictates that they are necessary, if specific actions are identified that would be effective, and if those actions are within the Department's enforcement authority, taking into account limits on the Department's territorial jurisdiction.

Several farmers commented that they need agents to find H–2A workers because they are unable to travel to different countries to find employees, interview them, and help them process all the necessary paperwork to obtain their visas. Employer commenters believe that an H–2A worker receives a substantial benefit from the job, including more money than he or she is able to earn in his or her home country. Therefore, workers should also bear some of the financial responsibility for the opportunity in the form of paying for the services that enable that worker to find his or her way through the bureaucratic maze both in the worker's country and the U.S. Consulate. According to these commenters, many of these workers would never be able to apply for H–2A visas without help because they do not have passports from their own countries and they may not have the required computer and internet access for applying to the U.S. Consulate for the visa.

While the Department does not disagree that this provision will result in an additional expense for employers, the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who have heavily indebted themselves to secure a place in the H–2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions resembling those akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic. We believe that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. Employers may easily band together for purposes of recruitment to defray costs. To ensure that employers do not attempt to use surrogates to attempt to extract recruitment fees from H–2A workers, the Final Rule has been modified to specify that employers must attest that they and their ''agents'' have not sought or received payment of any kind for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs.

The Department notes, however, that it is only prohibiting employers and their recruiter agents from shifting to workers the cost of recruiting for open job opportunities. This rule does not prevent a person or entity (which could be a ''facilitator'' under the DHS Final Rule) from charging workers reasonable fees for rendering assistance in applying for or securing services related to passports, visas, or transportation, so long as such fees are not made a condition of access to the job opportunity by the recruiter, employer, or facilitator. The Department will, however, monitor such activities to the extent possible to ensure that any such charges are not ''de facto'' recruitment fees charged for access to the H–2A program. In addition, government processing fees and document preparation fees related to securing a passport and visa to prepare for travel to the United States are the responsibility of the worker and the employer is not required to pay those fees. We note that the DHS Final H–2A Rule also precludes the approval of an H–2A petition, and provides for possible revocation of an already approved H–2A petition, if the employer knows or has reason to know that the worker has paid, or has agreed to pay fees to a recruiter or facilitator as a condition of gaining access to the H–2A program. Many employer advocates noted that there is no definition of ''recruiter'' and it is unclear whether ''facilitators'' who help the H–2A workers apply for visas are included in this prohibition. This is a concern to employers because DHS, in its companion H–2A proposed regulation, requires disclosure of payments to ''facilitators,'' whether by the alien or the employer. The Department, on the other hand, forbids employers and their agents from receiving remuneration from the H–2A worker for access to job opportunities and further requires the employer to contractually forbid its agents from accepting money from the H–2A worker for hiring him or her. To allay any confusion, we note that our own proposed regulation was intended to prohibit foreign labor contractors or recruiters, with whom an employer in the U.S. contracts, from soliciting or requiring payments from prospective H–2A workers to secure job opportunities in the U.S. The Department believes that this is consistent with the DHS position of disclosure, which is presumably intended to deter such payments. The Department has not defined ''recruiter'' as we believe this term is well understood by the regulated community. Many commenters believe that the new rule prohibits the use of foreign recruiters. It does not. It requires employers to contractually forbid foreign recruiters from receiving payments directly or indirectly from the foreign worker. Employers who would be unable to find workers without recruiters are not prohibited from hiring such recruiters. When they do, they must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the alien recruited in exchange for access to a job opportunity. As noted above, reasonable payments from workers in exchange for rendering assistance in applying for or securing services related to passports, visas, or transportation is not prohibited by this rule.

Some commenters opined that the Department does not have the authority to regulate cost-shifting abroad. The Department recognizes that its power to enforce regulations across international borders is constrained. However, it can and should do as much as possible in the U.S. to protect workers from unscrupulous recruiters. Consequently, the Department is requiring that the employer make, as a condition of applying for labor certification, and therefore, as a condition to lawful H–2A employment within the U.S., the commitment that the employer is contractually forbidding any foreign

labor contractor or recruiter whom the employer engages in international recruitment of H–2A workers to seek or receive payments from prospective employees in exchange for access to job opportunities. As stated above, we will examine program experience in this area and will consider further actions as experience dictates.

One commenter suggested that we certify recruiting agencies to ensure against exploitation of workers whereas two other commenters thought we should make employers attest that the fee employees paid to foreign recruiters was reasonable or did not go above a reasonable market-based ceiling set by the Department. The Department simply does not have the infrastructure or expertise to assess on a country-by-country basis what a reasonable fee would be. The prophylactic rule adopted by the Department guards against worker exploitation in a manner that is enforceable. If a U.S. employer cannot find foreign workers without the help of a recruiter, then the U.S. employer must bear the cost of such recruitment efforts.

One commenter requested that we provide clarification on several terms used in this section. The first is ''received payment * * * as an incentive or inducement to file * * *.'' The second is ''* * * from the employee or any other party, except when work to be performed by the H–2A worker * * * will benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer.'' For reasons discussed below, we have removed this language from the Final Rule to provide greater clarity to the provision's effect.

Some commenters expressed concern that the rule passed on too many costs in recruitment to the employer. One commenter estimated that the recruitment cost to each employer would be $1,000 per H–2A worker. We believe these estimates were not supported by data and note that employers can collaborate with respect to recruitment to defray costs.

A farmworker advocate argued that new labor contractors are often undercapitalized and can barely meet their payroll obligations. The commenter claimed that labor contractors' primary source of income is from the foreign recruiters who give them payments from the recruitment fees paid by the aliens. It is precisely this type of activity that the employer assurances are meant to prevent, for all of the reasons previously mentioned.

In addition, and based upon the comments received, the Department has revised the provision on cost-shifting to provide for greater clarity. As mentioned above, the Department has added language to the Final Rule clarifying that the provision only applies to payments by employees. This rendered the language providing an exemption for certain payments to employers by third-parties unnecessary, and it has accordingly been deleted to avoid confusion. We have also eliminated the qualifying language stating that the provision applied to payments made as an ''incentive and inducement to filing,'' again for purposes of simplification and clarity. By simplifying the provision to prohibit employers from seeking or receiving payment for any activity related to the recruitment of H–2A workers, the Department hopes to achieve consistent and enforceable compliance.

In the Final Rule the Department has separated the provision on cost-shifting into two sections, again to achieve clarity regarding the use of foreign contractors. The Rule's new § 655.105(p) now contains the language that requires the employer to contractually forbid any foreign labor contractor whom they engage from seeking or receiving payments from prospective employees in exchange for access to job opportunities. In this manner the Department hopes to achieve clear and consistent compliance with the prohibitions contained in the Rule. To make the provision on cost-shifting by recruiters consistent with DHS's Final Rule, we have added clarifying language stating that the prohibition does not apply where ''provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A).'' This language clarifies that the prohibition does not apply to worker expenses such as the cost of transportation and passport, visa, and inspection fees, except where such shifting of expenses to the worker is expressly forbidden by law.

Paragraph (p) from the NPRM has now been redesignated as paragraph (q). The Department did not receive any comments specifically addressing this provision. Several minor non-substantive modifications have been made to the text of the provision for purposes of clarity and to conform to changes made elsewhere in the Rule. We have deleted what was paragraph (q) in the NPRM, an assurance on housing vouchers, because, for the reasons given in the discussion of § 655.104(d), we have decided not to implement housing vouchers.

Section 655.106 Assurances and Obligations of Farm Labor Contractors

(a) General Comments

As discussed earlier, the definition of *Farm Labor Contractor* in the Proposed Rule has been rewritten and is for purposes of H–2A now an *H–2A Labor Contractor (H–2ALC).* The Farm Labor Contractor definition in the NPRM was borrowed from MSPA and the Department has determined that definition causes confusion when applied to the H–2A program. A fundamental distinction between these two terms is the requirement that an H–2A Labor Contractor must employ the workers. This distinction addresses the concerns of commenters who mistakenly believed that agents and attorneys would have to register as Farm Labor Contractors (FLC) as a requirement of the H–2A program. In order for a person or entity under H–2A to meet the definition of an H–2ALC, that person or entity would have to employ the workers who are subject to Section 218 of the INA.

Other commenters believed that the definition of farm labor contractor also includes the activities of the foreign recruiters and obligates the employers to take on liabilities for the acts of the foreign recruiters because the definition of FLC in the NPRM was taken directly from the MSPA. The definition of an H–2ALC is no longer taken directly from MSPA.

While the Department cannot reach the conduct of foreign recruiters abroad, it can regulate the conduct of U.S. employers participating in the foreign labor certification process who do business with these recruiters. The Department cannot by regulation impose strict liability on employers for labor contractors' activities abroad, but the Department, as a condition for an employer to obtain approval of a temporary labor certification application, can require the employer to contractually forbid foreign recruiters that an employer uses as its agent from seeking or receiving payments from prospective employees, as discussed in the discussion of § 655.105(o) and (p), addressing the prohibition on cost shifting.

There was considerable comment about the lack of a provision in the NPRM addressing ''override fees,'' which is essentially the commission paid by employers to labor contractors for their services. One commenter elaborated on this point by explaining that employers in an area where labor contractors with U.S. workers are well established could bypass the labor contractor by hiring H–2A workers

directly and thus not have to pay an override fee.

Labor contractors operate in the free market system, both in hiring workers and in providing contract labor services, and do not require any special government provisions to ensure they are paid for the services they provide. Whether an employer chooses to utilize a farm labor contractor or hire workers directly is a decision to be made by the employer based on what best suits his business needs. Labor contractors typically enter into contracts with fixed site employers in advance of the season. The Department does not seek to regulate private transactions between employers and labor contractors with regard to the appropriate price of contract services. Employers are required to advertise before they can apply for H–2A workers, and both H–2ALCs and the U.S. workers employed by the H–2ALCs will have an opportunity to take the advertised jobs at the wage rates and subject to the terms and working conditions required by the Department. The Department is confident that the required wage rates, job terms, and working conditions are sufficient to prevent any adverse effect on U.S. workers.

One group of farmworker advocacy organizations complained that the Department has eliminated all requirements that employers contact and recruit through established FLCs (now H–2ALCs). This commenter believes that the elimination of this requirement allows growers to bypass H–2ALCs in favor of filing H–2A applications. The Department disagrees. As previously mentioned, employers are required to spread information about job opportunities in a variety of ways, and there is nothing that would prevent an H–2ALC from responding to such advertisements by offering its services.

Many commenters advocated the removal of labor contractors from the H–2A program. The use of labor contractors to supply workers, however, is a reality in the agricultural industry, and reflects the substantial need for a flexible labor supply in a sector characterized by many different crops requiring different work at different times, all of which are subject to seasons, weather, and market conditions. To forbid labor contractors from utilizing the H–2A program would only encourage them to operate outside the system and potentially use undocumented workers to fill their ranks. Labor contractors desiring to hire H–2A workers must apply for a labor certification, recruit for U.S. workers, and attest to the terms and conditions of H–2A employment, just like any other employer desiring to hire H–2A workers, and must also list the sites where work will occur.

One group of farmworker advocacy organizations commented that H–2ALCs, under the new rule, are not required to have a physical presence in the U.S. This commenter points out that even under the current system, which does require physical locations in the U.S., there is still room for deception by H–2ALCs. The commenter misreads the rule. The definition of an H–2ALC in the Final Rule requires H–2ALCs to meet the definition of an ''employer,'' and the definition of employer requires a place of business in the United States.

(b) Description of H–2ALC obligations

The Department's review of comments regarding the obligations of labor contractors under the proposed rule persuaded the Department that these obligations were poorly understood. To provide a clearer description of those obligations, and to avoid confusion on the part of employers, SWAs, workers, and worker advocates alike, the Final Rule has collected, consolidated, and refined the NPRM's description of H–2ALC pre-filing recruiting obligations. The Final Rule therefore splits proposed § 655.106 into two separate parts. Section 655.106(a) of the Final Rule consolidates, refines, and explains H–2ALCs' recruitment obligations under the H–2A program. Section 655.106(b) of the Final Rule contains all of the provisions proposed in the NPRM that impose additional obligations on H–2ALCs that do not apply to other types of H–2A employers.

Although the language of § 655.106(a) of the Final Rule is new, the substantive obligations it imposes on H–2ALCs are derived from the basic requirements that apply to other H–2A employers under the NPRM. The fact that H–2ALCs do not stay at one fixed location but travel from one worksite to another over the course of a season, and the fact that they frequently rely on the fixed site employers with whom they contract to provide housing and transportation to their workers, makes it operationally problematic to shoehorn H–2ALCs into the exact same recruitment framework that applies to fixed site employers. New § 655.106(a) refines for H–2ALCs the core recruitment requirements that apply to all other H–2A employers, including requirements that job orders be submitted to SWAs, that referrals of qualified U.S. workers be accepted during the recruitment period, that positive recruitment be conducted in advance of H–2A workers performing work in a given area of intended employment, that workers from the previous season be contacted and offered employment before H–2A workers can be hired, and that housing inspections be conducted in a timely manner.

New § 655.106(a)(1) acknowledges that, because of the itinerant nature of H–2ALCs, their job orders ''may contain work locations in multiple areas of intended employment.'' As with other employers with multiple work locations, H–2ALCs may submit job orders ''to any one of the SWAs having jurisdiction over the anticipated work areas.'' The SWA receiving the job order is responsible for circulating the job order to ''all States listed in the application as anticipated worksites, as well as those States, if any, designated by the Secretary as traditional or expected labor supply States for each area in which the employer's work is to be performed.'' The provision further clarifies how long SWAs receiving multiple-area job orders should keep the job orders posted, and specifies that they ''may make referrals for job opportunities in any area of intended employment that is still in an active recruitment period.''

New § 655.106(a)(2) clarifies that H–2ALCs with multiple work locations in multiple areas of intended employment are required to conduct separate positive recruitment, following all of the normal rules specified in § 655.102(g)–(i), but are not required to conduct separate positive recruitment for each work location within a single area of intended employment. Instead, positive recruitment within each area of intended employment is required to ''list the name and location of each fixed-site agricultural business to which the H–2A Labor Contractor expects to provide H–2A workers, the expected beginning and end dates when the H–2A Labor Contractor will be providing workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.'' Positive recruitment for each area of intended employment, including positive recruitment in any designated labor supply states associated with each area of intended employment, must, in accordance with the standard rule under these regulations, be conducted no more than 75 and no fewer than 60 days before the listed arrival date applicable to that area of intended employment.

New § 655.106(a)(3) specifies that H–2ALC recruitment, including both positive recruitment and job orders, may require that workers applying for jobs in any given area of intended employment ''complete the remainder of the H–

2ALC's itinerary.'' H–2ALCs are by nature itinerant, and the work that they offer is thus itinerant as well. Workers applying for labor contractor jobs cannot expect to selectively choose which work locations they are willing to work at, unless the H–2ALC permits them to do so. Certainly, U.S. workers applying to work for farm labor contractors that are not H–2ALCs have no ability to selectively choose which portion of a job offer they want to accept and which they will reject.

Without this rule, H–2ALCs would at times be placed in impossibly difficult hiring situations. For example, an H–2ALC might enter into contracts to serve work locations in three different areas of intended employment, requiring twenty workers in each area. If the H–2ALC is unable to recruit any U.S. workers in the first and third areas of intended employment, but finds ten U.S. workers in the second area of intended employment who are willing to complete its itinerary, then the H–2ALC should be allowed to hire ten H–2A workers for the duration of its itinerary, and ten H–2A workers for the dates of need applicable to the first area of intended employment (or, if these ten H–2A workers were initially hired with the expectation that they would complete the itinerary, the H–2ALC would be permitted to release them at the time its subsequent positive recruitment for the second area of intended employment resulted in the hiring of ten additional U.S. workers), ensuring that the H–2ALC would at all times have the twenty workers needed to fulfill its contracts. If, however, the ten U.S. worker applicants for jobs in the second area of intended employment were not willing to complete the H–2ALC's itinerary, and if these regulations nevertheless required the H–2ALC to hire those workers, the H–2ALC would be forced to choose between releasing ten of its H–2A workers at the time it hired the ten U.S. workers since only twenty workers were needed in the second area of intended employment. As a result, the H–2ALC would be left with only ten workers total to fulfill its contracts when it got to the third area of intended employment, or, to avoid this consequence, would have to keep all thirty workers on its payrolls during its work in the second area of intended employment, thereby incurring the significant additional cost of paying ten unnecessary workers. The Department declines to force H–2ALCs to make that unnatural choice, which would place them at a competitive disadvantage vis-à-vis farm labor contractors that hire all U.S. workers and that are thus free to require prospective workers to complete their remaining itinerary.

The Department considered, as an alternative, requiring H–2ALCs to file a separate application for work to be performed in each separate area of intended employment, but rejected the idea for several reasons. First, it is far more administratively convenient for both the Department and the employer if all of the employer's seasonal work for the year with the same initial date of need is included in a single application. Filing multiple applications in such a situation is needlessly duplicative, wasting valuable time and resources. In theory, an H–2ALC could be conceived of as having a separate date of need for each new work site or for each new area of intended employment, but the reality of labor contract work is that the responsibilities of workers to the labor contractor employer, as well as their associated job duties, continue from work location to work location and do not re-start with each new work site. Second, the ''single application'' method will maximize recruitment of U.S. workers through posted job orders, since the SWAs for all the areas of intended employment will refer workers for jobs opportunities in all of the other areas of intended employment. Third and finally, the ''single application'' method will better manage the expectations of incoming H–2A workers, who will know at the outset whether the H–2ALC expects to employ them for the entire season, or rather only for a more limited duration.

H–2ALCs are free to file separate applications for separate areas of intended employment where it makes sense for them to do so. Indeed, they may be required to file separate applications where, for example, they need extra workers with a different date of need to report for work in areas of intended employment that they will reach later in the season. For purposes of administrative convenience, however, and to comport with the realities of the nature of the underlying job positions, the Department will permit single applications to be filed by H–2ALCs covering extended itineraries.

New § 655.106(a)(4) provides that H–2ALCs that hire U.S. workers part-way through the season, whether through referrals or some other form of recruitment, may discharge a like number of H–2A workers and, in accordance with § 655.104(i)(4), are released from the three-quarters guarantee with respect to those workers.

New § 655.106(a)(5) explains the rules that apply to an H–2ALC's amendment of its application under § 655.107(d)(3). Because H–2ALCs are itinerant and because the timing of agricultural work is difficult to predict with precision, H–2ALCs may often need to amend their applications mid-season to include additional work locations or additional areas of intended employment. Amendments will be readily permitted, but special responsibilities attach to such amendments for H–2ALCs. Where an amendment adds a new area of intended employment, or where an amendment adds a new work site in an already-listed area of employment and the job duties at the new work site(s) are substantially different from those already listed, additional recruitment will be required. Because amendments of H–2ALC applications may often need to be made at the last minute to take into account changing weather conditions, the required additional recruitment may be completed on an expedited schedule. Housing inspections of any new housing arrangements that have not yet been inspected must also be secured in a timely fashion.

H–2ALCs are encouraged to attempt to avoid needing to make last-minute amendments to their applications by listing all reasonably probable work locations in their original application and job order. In doing so, H–2ALCs are reminded that the ''reasonably probable'' standard should be closely adhered to—purely speculative employment should not be listed on an application. While U.S. workers benefit from seeing in an advertisement or job order a list of all the locations that the H–2ALC is reasonably likely to service, information that is intentionally misleading detracts from the ability of U.S workers to make intelligent decisions about whether to apply. The Department assumes that H–2ALCs will be deterred from listing purely speculative work sites on their applications by the three-quarters guarantee and by the requirement that H–2ALCs secure written statements from fixed-site employers regarding housing and transportation if the H–2ALC will not be providing the required housing and transportation itself.

New § 655.106(a)(6) reiterates the obligation of SWAs to complete required housing inspections ''no later than 30 days prior to the commencement of employment in each area of intended employment in the itinerary of an H–2ALC.''

New § 655.106(a)(7) provides that H–2ALCs must contact all U.S. workers that worked for the H–2ALC during the previous season, and must advise each such worker ''that a separate job opportunity exists for each area of

intended employment that is covered by the application.'' A worker who applies for a job opportunity in an area of intended employment may be required to complete the remainder of the itinerary.

The additional obligations that the Department proposed in the NPRM to impose on H–2ALC employers have been consolidated in new § 655.106(b). Each provision is discussed separately below.

(c) Proposed Sections 655.106(a) and (b), New Sections 655.106(b)(1) and (2) Provide MSPA Farm Labor Contractor Certificate of Registration Number and Identify Authorized Activities

One commenter opined that MSPA is not explicitly included in the rule even though it is mentioned throughout. This commenter believes that legal services groups that file lawsuits under these regulations will be able to include claims based on MSPA as well. This commenter believes there are enough protections in the H–2A rule without including MSPA.

While references to certain specific provisions of MSPA have been included in the H–2A regulations, such language is not intended to apply MSPA to H–2A workers or employers. The provisions of H–2A and MSPA operate independently from one another and the inclusion of terms used in MSPA does not provide a legal basis upon which to hold H–2A employers to MSPA standards. Nothing in this rule expands the scope of MSPA or increases liabilities under it.

Some clarifying, non-substantive modifications have been made to the language of these provisions in the Final Rule, and a statutory citation to MSPA has been added.

(d) Proposed Section 655.106(c), New Section 655.106(b)(3) Disclosure of All Locations

One agricultural employer association asserted that it is not reasonable to require H–2ALCs to disclose all customers, clients, dates, and services, and that providing evidence that the customers and clients of H–2ALCs are established business operations should be sufficient because the proposed requirement would otherwise subject the labor contractor to disclosure of its clientele should an FOIA request be made, and also because a labor contractor should not have to know all of the locations so far in advance and should have the flexibility to change plans. The disclosure requirement is contained in the current regulations and has been for many years. The Department requires such information not for the purpose of forcing a labor contractor to disclose its clientele, but to ensure that the labor contractor has real employment opportunities available for the prospective worker. A good-faith compilation of the roster of clients and dates of arrangements with each is integral to ensure there is work available requiring the use of H–2A workers. It is also essential to ensure that recruiting is properly performed and that U.S. workers are given access to all job opportunities. With respect to the commenter's concerns about disclosure, if the list of clientele is properly considered confidential business information under FOIA, it would be exempt from disclosure.

One commenter suggested that wording should be added to allow labor contractors to add or change out growers during the season by informing the Department. These comments have been addressed in the discussion of § 655.106(a)(5), pertaining to the amendment of H–2ALC applications, above.

(e) Proposed Section 655.106(d), New Section 655.106(b)(4) Surety Bonds

The Department required in its NPRM that FLCs (now H–2ALCs) secure a surety bond as proof of their ability to discharge their financial obligations under the H–2A program. We received some comments opposing the surety bond requirement, and others insisting that the requirement did not go far enough.

One commenter suggested that the Department has no statutory authority to require H–2ALCs to be bonded. This commenter believes that the Department has plenty of methods available to it to weed out the abusive H–2ALCs and does not need the provision for bonding. The bonding requirement for labor contractors, who may be transient and undercapitalized, provides a basis to assure compliance with an attestation-based program. The language in the INA in Section 218(g)(2) which authorizes the Secretary to take such action as may be necessary to assure employer compliance with the terms and conditions of the Act provides the authority for the bonding requirement.

Another commenter believes that the surety bond required is woefully inadequate to guarantee H–2ALC compliance with program requirements, and that it only applies to those cases that come before the Administrator of the Wage and Hour Division (herein referred to as Administrator/WHD) and not to civil actions filed in state or Federal court. Another commenter believes that all H–2A employers should be required to post a bond.

The Department believes that the procurement of a surety bond will show that an H–2ALC is serious about doing business legitimately, and that a surety bond gives the Department leverage over the employer so that if the employer fails in performing its obligations, the bond will be available for the government to recover unpaid wages. The surety bond is simply a device to ensure the Department has reasonable assurance that the labor contractor will adhere to its program obligations; the labor contractor's ability to retain its interest in the bond depends entirely upon its adherence to performance obligations. The commenter is correct that the surety bond applies only to those cases that come before the Administrator/WHD. We have no authority to require it for actions beyond the Department's jurisdiction.

One agricultural employer association states that the bonding requirement is unrealistic because underwriters will not provide the bonds to anyone but the largest labor contractors. This in effect will eliminate smaller labor contractors from the program. This commenter proposes that this requirement be eliminated or in the alternative that the discretion of the Administrator/WHD to increase the bond requirements should be limited to the use of reasonable and objective criteria.

There is no evidence that only large labor contractors will be able to obtain surety bonds. The bond is a necessary compliance mechanism to ensure compliance with program obligations, namely the assurance of payment of the wages of H–2A workers covered by Section 218 of the INA. The Department can adjust bonds as necessary through notice and comment rulemaking to balance the requirement against the financial constraints faced by smaller employers.

(f) Proposed Section 655.106(e), New Section 655.106(b)(5) Positive Recruitment in Each Fixed-Site Location of Services

In § 655.106(e) of the NPRM, the Department proposed to impose additional recruitment obligations on FLCs (now H–2ALCs). One commenter, a large agricultural employer association, believes that the positive recruitment requirements should be the same as they are for non-H–2ALCs who have several fixed-site locations. The Department believes that the recruitment standards for H–2ALCs in the Final Rule spring from the same principles that apply to fixed-site employers, but that some modification was necessary because of the level of mobility of H–2ALCs. To ensure that

U.S. workers are provided notice of all available job opportunities, H–2ALCs are expected to recruit in all areas in which employment will take place, rather than just the area where the work will begin or the greatest concentration of work will take place. The modified recruitment obligations of H–2ALCs under the Final Rule are examined at greater length in the discussion of new § 655.106(a) above.

(g) Proposed Section 106(f), New Section 106(b)(6) Housing and Transportation

The NPRM required a labor contractor to attest that it has obtained written assurances from fixed-site providers of housing and transportation that such housing and transportation complies with the applicable standards. One agricultural employer association observed that housing and transportation provided by H–2ALCs should be required to meet the same standards as the housing provided by any other H–2A employer. The Department agrees that H–2ALCs are to be held to the same standards, but disagrees that an H–2ALC can simply attest, without more, that housing it has not secured itself meets all of the applicable standards. Because many H–2ALC s rely upon the activities of others in meeting their own obligations, the Department requires the contractor to obtain written assurances so that the contractor can, in turn, fully attest to the conditions required to employ H–2A workers. The Department also deleted the reference to H–2A workers in this section to conform to § 655.104(d) and to clarify the issue raised by commenters on § 655.104(d) regarding the need to have housing meet local, State, and Federal standards and guidelines for all agricultural workers, not just H–2A workers. Other minor, non-substantive modifications have been made to the language of this provision to conform to other provisions of the Final Rule.

Section 655.107 Processing of Applications

The Department promulgated in its proposed rule the general parameters for the submission and processing of applications. Section 655.107 of the NPRM laid out the process by which the Department intends to review applications and included provision for the modification of deficient applications as well as the amendment of pending and approved applications. Several commenters expressed concern with this section, specifically in the area of deficient applications. These specific areas of concern are addressed below.

As a general matter, one employer suggested that § 655.107 should include a provision that the Department will have an adequately staffed information service to answer employer questions and help employers comply with the process. The Department appreciates the need for such services, particularly among first-time program users. However, existing program resources are limited and the funding of such a specialized information service does not appear possible at this time. The Department is committed to conducting briefings for users of the program to acquaint them with the terms and processes of the regulation prior to its implementation. The Department is also examining other ways to make program information and instructions available to users on an ongoing basis, particularly through its Web site.

(a) Proposed Sections 655.107(a)(1) and (a)(2) Review Criteria

The Department, in describing the review process for each application, stated in the NPRM that each application ''will be substantively reviewed for compliance with the criteria for certification'' and further defined criteria for certification to ''include, but not be limited to, the nature of the employer's need for the agricultural services or labor to be performed is temporary; all assurances and obligations outlined in § 655.105 in this part; compliance with the timeliness requirements as outlined in § 655.102 of this part; and a lack of errors in completing the application prior to submission, which would make the application otherwise non-certifiable.'' A major trade association of agricultural employers believed this language contained ambiguous phrases, particularly ''include but not be limited to'' and ''errors * * * which would make the application otherwise non-certifiable'' and, as a result, the phrase ''criteria for certification'' was largely undefined. A farmworker/community advocacy organization commented the language incorporates no actual determination of whether the application complies with the statutory requirements for labor certification unlike the current regulations, which require a determination at the outset as to whether an application is ''acceptable for consideration'' based on compliance with the adverse effect and timeliness criteria. This organization maintains that the lack of substantive review in processing attestation-based applications violates the statute. The Department has previously addressed that argument in the discussion of § 655.101, which has now been rewritten to address many of these concerns. To avoid the possibility that vague and ambiguous terminology in the provision could cause confusion, however, proposed § 655.107(a)(1) and (a)(2) have been combined in the Final Rule, and the applicable criteria for certification have been listed through cross-references. Furthermore, to avoid confusion regarding the timing requirements set forth in the NPRM, § 655.107(a)(2) of the Final Rule specifies that when the Department issues a notice or a request requiring a response by an employer, it will use means normally assuring next-day delivery, which may include e-mail and fax. It further specifies that an employer's response to such a notice or request will be considered to be filed with the Department on the date that it is sent to the Department, which may be established, for example, by a postmark.

The trade association also pointed out that, although the language related to the nature of the employer's need included ''temporary,'' it did not also include ''seasonal.'' In addition, the association suggested the phrase ''assurances and obligations related to the recruitment of U.S. workers'' in proposed § 655.107(a)(3) [new § 655.107(b)] be clarified and recommended that if the language is intended to be construed broadly, the Department should include all of the required assurances and obligations to make this clear.

The Department, as mentioned above, agrees this section of the NPRM was confusing and has accordingly clarified the regulatory text. The new § 655.107 references the general criteria for certification that ensures the application will be evaluated for whether the employer has ''established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H–2ALC by § 655.106; complied with the timeliness requirements in § 655.102; and complied with the recruitment obligations required by § 655.102 and § 655.103.'' By referencing back to these sections rather than enumerating the assurances and obligations in this provision, the Department both provides a clear frame of reference for the evaluation of obligations and also puts employers on notice of the review process.

New language has been inserted in § 655.107(a) in the Final Rule stating that ''[a]pplications requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number

of U.S. workers must comply with other requirements for H–2A applications and must be supported by a recruitment report, in which case the application will be denied.'' The reasons for the insertion of this new language are explained below in the discussion of § 655.110(e) of the Final Rule.

(b) Proposed Section 655.107(a)(3), New Section 655.107(b) Notice of Deficiencies

Several minor, non-substantive modifications were made to the language of the proposed provision for purposes of clarity and to conform it to changes made elsewhere in the Final Rule. One significant clarification was also added at § 655.107(b)(2)(iv) of the Final Rule to specifically address the handling of applications initially rejected for failure to comply with the Final Rule's recruitment obligations. Some employer and trade association commenters noted that the structure of the processing procedures in the NPRM would have required an employer whose application was rejected for failing to recruit properly to begin the entire pre-filing recruitment sequence over again. As a result, approval of the re-filed application would have been substantially delayed by the minimum period specified that positive recruitment must be conducted in advance of the date of need (75 days in the NPRM, 60 days in the Final Rule).

Recruitment is an essential part of the H–2A program, and is necessary for the Department to be able to certify that no qualified U.S. workers are able, willing, and available for the job opportunity, and that hiring H–2A workers would not adversely affect the wages and working conditions of U.S. workers similarly employed. Although the positive recruitment requirements will not be waived, the Department will allow re-recruitment to be conducted on an expedited schedule so that employers can secure H–2A workers in a timely fashion where no U.S. workers are available. Even with an expedited schedule, however, failure to properly recruit will inevitably delay approval of an application to at least some extent, and the Department encourages employers to be mindful of all of the recruitment requirements specified in the Final Rule.

(c) Proposed Section 655.107(a)(5), New Section 655.107(c) Modifications

The proposed regulations retain the process for issuance of a Notice of Deficiency by the CO and the submission of a modified application by the employer. However, under the current regulations, applications are received, modified if required, and accepted prior to the employer's recruitment efforts. Under the proposed rule, recruitment will be conducted prior to submission of the application.

A major trade association requested clarification on the effect a modification will have on the validity of the recruitment effort and recommended the regulations state that if an application is ultimately accepted, even after modification, any required modifications to the application will not invalidate any recruitment conducted based on the application as originally submitted. A professional association recommended that if an initial application contains a deficiency related to recruitment, the CO could require remedial recruitment efforts to be completed prior to the final determination and the remedial recruitment efforts and the date of need extended to accommodate the required recruitment efforts. This association believed such a process would be better than the issuance of a denial, which would require the employer to begin the process, including the pre-filing recruitment, over again and, therefore, be unable to complete the process in time to meet the employer's actual date of need. As discussed above, the Department has clarified the effect of deficient recruitment in § 655.107(b)(2)(iv) of the Final Rule. This revised procedure will allow modified applications to move forward after the application originally submitted is found to have deficient recruitment.

The NPRM proposed to revise the current timeframe for an employer to submit a modification to the application from 5 calendar days to 5 business days, and this change was supported by a major trade association. However, the association commented that 5 business days still is not sufficient time for an employer to decide whether to modify the application or submit a request for an expedited administrative judicial review. The association requested the timeframe for requesting an expedited review should be extended to 7 business days. The Department has decided to retain the requirement for submission of either a modification or a request for administrative review within 5 business days, as proposed, which will allow the Department to meet the timeframes for review that are established by statute. The Department believes that due to the time-sensitive nature of the H–2A program, the majority of employers also prefer a speedy timeline that ensures disputes and deficiencies are resolved as quickly as possible.

The Department also deleted the word ''amendment'' from the regulatory text in this section to prevent confusion. Modifications and amendments are, in fact, different actions under this Rule and amendments are described in § 655.107(d).

(d) Proposed Section 655.107(a)(6), New Section 655.107(d) Amendments

The Department did not propose to change the requirements from the current regulation for amendments to an application seeking additional workers. An association of growers/producers requested that the requirement in proposed § 655.107(a)(6)(i) limiting the increase in the number of workers to not more than 20 percent (or 50 percent for employers of fewer than 10 workers) be changed to allow employers of fewer than 10 workers to increase the number of workers in their initial application by up to 10 workers. A State government agency noted its agreement with retaining the current limitations.

The Department has decided to retain the provisions from the NPRM regarding the number of workers that may be requested through amendments. Our experience indicates these limits are necessary to discourage employers from requesting a lower number of workers than actually needed and subsequently submitting an amendment to increase the number. Moreover, the exception for employers of 10 or fewer H–2A workers has not been changed, as interest in such a change was not widespread.

In the NPRM the Department included new provisions relating to amendments to reflect the shift to an attestation-based process. A group of farmworker advocacy organizations commented that they believed the new language is weaker than the language in the current regulations. The organization objected to the deletion of language making explicit that labor certifications are subject to the conditions and assurances made during the application process and recommended this language be included. The Department did not deem this change necessary, as it is already clear from the text and structure of the Final Rule. The organization also recommended the language prohibiting changes to the benefits, wages, and working conditions as contained in the current regulation should be included in the new rule. The Department believes the language in the Final Rule specifying that in deciding whether to accept an amendment, the CO must ''take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity'' fulfills

this function. An amendment to effect a non-trivial increase in the offered wages, for example, would likely render the job more attractive to U.S. workers, and such an amendment would not be approved without new recruitment being conducted. However, the Final Rule clarifies that amendments should be approved by the CO ''if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109.''

Finally, the organization believed that the provision in proposed § 655.107(a)(6) (now § 655.107(d)(2)), which allows minor changes in the period of employment, and also requires an assurance that U.S. workers will be provided with housing and subsistence costs under certain circumstances when the season is delayed, does not go far enough because it does not address problems that H–2A workers might encounter related to housing, subsistence, lost work opportunities, and an employer's failure to meet its obligation under the three-fourths rule. The Department does not agree with this characterization. Both the DOL and DHS Final Rules allow for minor modifications in the period of employment that do not change any of the employer's responsibilities with respect to its workers. All of an employer's obligations, attested to in the original application, apply to any amendment thereto.

A sentence was added to the Final Rule clarifying that the CO will transmit accepted amendments to SWAs, where necessary, so that posted job orders can be modified. A further sentence was added clarifying that the Department will review proposed amendments as quickly as possible, ''taking into account revised dates of need for work locations associated with the amendment.''

(e) Proposed Section 655.107(a)(7), New Section 655.107(e) Appeal Procedures

Some minor, non-substantive changes were made to the language of this provision in the Final Rule for purposes of clarity and consistency. The language has also been modified to specify that ''the denial of a requested amendment under paragraph (d) of this section'' and ''a notice of denial issued under § 655.109(e)'' do not constitute final agency action, and may be appealed pursuant to the procedures set forth in § 655.115.

Section 655.108—Offered Wage Rate

A number of commenters questioned the continued need for an adverse effect wage rate (AEWR). An association of growers commented that ''there is no valid basis for setting an adverse effect wage rate, separate and distinct from the prevailing wage for the occupation in the area of intended employment, and requiring the payment of such a wage if it is higher than the prevailing wage.'' An association of growers commented that ''DOL's discussion in the preamble to the proposed regulation makes the case against an AEWR.'' Another grower's association doubts the Department's assertion ''in the preamble that the wages and working conditions of agricultural workers are depressed by the presence of a high proportion of illegal aliens.'' This organization further asserts that field and livestock workers' average wages have increased at a faster rate than those for non-farm workers. Other comments focused on an apparent inconsistency between the H–2A program and other temporary worker programs, none of which requires an AEWR in addition to a prevailing wage.

Congress did not mandate the creation of an adverse effect wage rate for the H–2A program. Rather, Congress provided in sec. 218(a)(1)(B) of the INA that before an employer is permitted to hire an H–2A worker, the Secretary of Labor must certify that the hiring of the H–2A worker ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' This language is identical to the general labor certification language in sec. 212(a)(5)(A)(i) of the INA, which provides that ''[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined'' that hiring that alien ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.''

For most of its temporary and permanent foreign worker programs, the Department applies the assumption that U.S. workers in the same occupation will be adequately protected from having their wages adversely affected by the hiring of foreign workers so long as the workers are paid prevailing wage rates. Congress itself has applied this assumption by statute with respect to the granting of labor certifications under the H–1B program. See Sections 212(n)(1)(A) and 212(p) of the INA. For historical reasons, however, the Department established special ''adverse effect'' wage rates for the H–2A program. The Department comprehensively recounted the history of adverse effect wage rates in its last major rulemaking on the H–2A program in 1989. 54 FR 28037, 28039–28041 (July 5, 1989).

Adverse effect wage rates were established for the first time in 1961 pursuant to an agreement with Mexico, which provided that the wages offered under the Bracero program could be no less than an adverse effect wage rate determined by the Secretary of Labor. The H–2 program, which is the predecessor to the H–2A program, was initially created in 1952. H–2 workers were initially required to be paid only prevailing wage rates. Adverse effect wage rates were extended to the H–2 program for the first time, however, in 1963, as the Bracero program was being phased out. Two circumstances motivated the creation of these wage rates. First, the federal minimum wage had not yet been extended to agricultural workers. Second, concerns were raised that large numbers of foreign workers, many of whom were undocumented, had depressed wage rates in the agricultural sector. 54 FR 28041.

Between 1963 and 1989, the Department applied a variety of methodologies to determine how adverse effect wage rates should be set. It is clear that the Department has always been motivated in setting adverse effect wage rates to counteract the potential impact on the wages of U.S. workers of the large numbers of foreign workers, particularly undocumented workers, in the agricultural sector. *Id.* The Department's comprehensive 1989 study of adverse effect wage rates came to several important conclusions, however. First, none of the methodologies employed by the Department ''ever has purported to add an enhancement'' to wage rates calculated by the United States Department of Agriculture (USDA). 54 FR 28040. Second, although some adverse effect wage rates did exceed the wage rates set by the USDA, that was ''an unintended result of the application of the various methodologies used in the 1960s'' and ''cannot in any way be viewed as a measurement of the quantum of adverse effect.'' *Id.* Indeed, the Department concluded that some of its past methodologies for calculating adverse effect wage rates ''led to AEWRs which were higher than Statewide agricultural earning in some states and lower in others,'' a result that the Department labeled ''erratic.'' 54 FR 28041.

The Department stated in 1989 that the adverse effect wage rate ''is a 'method of avoiding wage deflation.' '' 54 FR 28045, citing *Williams* v. *Usery*, 531 F.2d 305, 306 (5th Cir. 1976). Thus, the Department performed a comprehensive study of the then-existing literature on agricultural wages

to determine whether wage depression in fact existed in the agricultural sector, and if so, what its likely sources were. The Department concluded that ''there is a tendency for illegal alien workers to adversely affect wage rates.'' 54 FR 28041. The Department relied in part on a General Accounting Office report finding that ''illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage low-skilled jobs in certain labor markets.'' 54 FR 28042, quoting General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMD–88–13BR) (March 1988). The Department also relied on a study published by the National Commission for Employment Policy, which found that ''[u]ndocumented workers do displace some native-born U.S. workers and do lower wages and working conditions in some occupations and geographical areas.'' 54 FR 28042, quoting National Commission for Employment Policy, *Illegal Immigrants and Refugees—Their Economic Adaptation and Impact on Local U.S. Labor Markets: A Review of the Literature* (October 1986). The Department also relied on a study conducted by Dr. Phillip L. Martin, Professor of Agricultural Economics, University of California at Davis, who concluded that ''[t]he removal of illegal alien workers should raise farm wages.'' 54 FR 28043, *quoting* Dr. Phillip L. Martin, *IRCA and the U.S. Farm Labor Market* (February 1988).

There were, however, countervailing findings indicating that any adverse effects on agricultural wages caused by illegal alien workers at that time were ''minor and localized.'' 54 FR 28041. The Department noted that ''the only wage depression shown in agricultural employment in the GAO report appeared in two limited, localized studies of San Diego County, California, pole tomatoes and Ventura County, California, citrus,'' and that ''GAO itself noted that these studies were probably atypical.'' 54 FR 28042. The National Council for Employment Policy study found that ''[t]he evidence regarding the labor market impact of undocumented entrants is mixed and somewhat inconclusive.'' *Id., quoting Illegal Immigrants and Refugees, supra.* And Dr. Martin noted that ''the evidence of these possible wage-depressing effects of illegals is sparse.'' 54 FR 28043, *quoting* Martin, *supra.*

The Department thus drew three significant conclusions in the 1989 rulemaking. First, ''DOL views the data and literature as inconclusive on the issue of adverse effect or wage depression from the presence of illegal alien workers on the USDA data series.'' 54 FR 28043. Second, ''[t]o the extent that there is some anecdotal evidence of wage depression from these sources, the evidence also suggests that the adverse effects are highly localized and concentrated in specific areas and crop activities.'' *Id.* Third, an ''explicit enhancement'' to agricultural wages can only be justified ''if the extent of the depression can be measured.'' *Id.*

In 1989, the Department decided that, taking all of these considerations into account, ''setting the AEWR at the level of average agricultural wages, as determined by the USDA survey, is the correct approach.'' 54 FR 28043. The Department noted that the ''new methodology ties AEWRs directly to the average wage, as opposed to the old methodology which resulted in AEWRS substantially higher than agricultural earnings in many States, and lower for some States.'' 54 FR 28038. The Department found that the use of an average wage rate as the adverse effect wage rate was particularly appropriate because ''AEWRs, if set too high, might be a disincentive to the use of H–2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044.

Having determined to use average agricultural wage rates to set the H–2A program's adverse effect wage rates, the Department chose the USDA survey to measure average agricultural wage rates for two main reasons. First, the Department found that at that time the USDA survey of farm and livestock workers ''presents the best available data on hourly wages in the agricultural sector.'' 54 FR 28041. The Department noted in this regard that ''all crops and activities now covered by the H–2A program will be included in the survey data and the peak work periods also will be covered.'' *Id.* Second, although the Department had found that evidence concerning wage depression in the agricultural sector caused by undocumented workers was inconclusive, ''[t]o the extent the wage depression does exist on a concentrated local basis, the average agricultural wage does not appear to be significantly affected by wage depression. Further, none of the studies reviewed by DOL here quantifies or measured any wage depression that might exist in the USDA series.'' 54 FR 28043. Thus, although ''the evidence is not conclusive on the existence of past adverse effect,'' any adverse effect ''which might have occurred may not be reflected in the USDA data series.'' *Id.*

The Department's decisions to use average agricultural wage rates to set the H–2A program's wage rates, and to use the USDA survey to measure average agricultural wage rates, were challenged but were upheld by the DC Circuit. *AFL-CIO* v. *Dole,* 923 F.2d 182 (DC Cir. 1991). The Court noted that there is no ''statutory requirement to adjust for past wage depression,'' and that in determining appropriate wage rates there is a ''range of reasonable methodological choices open to the Department.'' *Id.* at 187. The Court further noted that the Department had expressed that one of its objectives in adopting the new wage methodology was to avoid impeding ''IRCA's goal of replacing illegal aliens with documented foreign workers.'' *Id.* at 186. Where ''the data is inconclusive,'' the Department merely needs to ''identify the considerations it found persuasive in making its decision'' as to what methodology to apply. *Id.* at 187.

(a) Retaining the Adverse Effect Wage Rate

Many commenters who opposed retaining the adverse effect wage rate seemed to believe that the AEWR is intended to be an enhanced wage rate, and that its existence must be predicated on the existence of wage depression in the agricultural sector. Both of those views were squarely rejected by the Department in the 1989 rulemaking, when the Department expressly declined to adopt any form of enhancement to the average agricultural hourly wage rate, and when it retained the adverse effect wage rate despite its finding that evidence of generalized wage depression in the agricultural sector was inconclusive.

The Department is retaining the concept of the adverse effect wage rate, despite the fact that is adopting a methodology that will actually set AEWRs at prevailing wage rates, for three reasons. First, by definition, the adverse effect wage rate is the wage rate at which the wages of U.S. workers will not be adversely affected. The Department is firmly committed to the principle that the wage rates required by the H–2A program should ensure that the wages of U.S. workers will not be adversely affected by the hiring of H–2A workers, and therefore declines to jettison the ''adverse effect wage rate'' concept. Second, as is explained further below, the Department was guided in its choice of methodologies for determining prevailing wage rates, and in its ultimate selection of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey, by its commitment to selecting the methodology that will best prevent an adverse effect on the wages of U.S.

workers. Thus, the adverse effect concept will continue to exert an important influence on the wage rates actually supplied by the H–2A program. Finally, § 655.108(a) of the Final Rule requires employers to pay ''the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.'' The ''prevailing hourly wage rate'' referred to in this provision is defined to mean ''the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.'' A similar formulation is used under the current rule. Retaining the phrase ''adverse effect wage rate'' to describe the wage level that is determined by the Department to be prevailing in accordance with Federal wage surveys will retain this traditional State/Federal distinction and avoid the confusion that might result from calling two different wage levels both the ''prevailing'' wage rate.

(b) Evidence of Wage Depression at the National Level

In 1989, the Department concluded that evidence of wage depression in the agricultural sector was inconclusive. 54 FR 28043. The Department noted that some studies had identified wage depression in specific agricultural labor markets, but labeled that evidence ''anecdotal.'' *Id.* The Department further noted that even this anecdotal evidence of wage depression was ''highly localized and concentrated in specific areas and crop activities.'' *Id.*

Evidence developed during the last 20 years has not added any additional clarity on the issue of wage depression. Some experts continue to claim that undocumented workers cause wage depression. *See, e.g.*, Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails,* 2007 U.Chic.Leg. For. 193, 215 (2007) (''[T]his has almost certainly contributed to the depression of wages and working conditions for U.S. workers.''). One comment submitted by a group of farmworker advocacy organizations acknowledged that the impact of undocumented workers on wages at a broad national level ''is under dispute,'' but asserted that wage depression is clearly evident in the agricultural sector. This commenter did not provide any wage data supporting this assertion, however. Rather, the commenter relied on data indicating that undocumented workers are more prevalent in the agricultural sector than they are in most other sectors of the labor force. In fact, none of the comments that were submitted to the Department and none of the studies that the Department reviewed in response to those comments provided a methodology that would allow for the quantification of any agricultural wage depression that might exist.

On the other hand, many experts assert that evidence indicating that undocumented workers cause wage depression remains mixed. For example, Jeffrey S. Passel of the Pew Hispanic Center recently stated that ''I don't know if there's anything in the data that clearly points one way or the other. At one level, it's a lot of people: 11.5 million to 12 million. But it's about one in 20 workers, so it's not a huge share of the labor market.'' *The Immigration Debate: Its Impact on Wages, Workers, and Employers,* in Knowledge@Wharton at p. 4 (May 17, 2006). Bernard Anderson, who served as Assistant Secretary for the Employment Standards Administration during the Clinton Administration, has opined that with respect to the question of ''what impact there is on wages, economic status and employment for American workers * * * you get a clear divide in the economic literature. The evidence produced by economists who have studied this question is mixed.'' *Id. See also several studies on the effects of immigration generally: Robert D. Emerson, Agricultural Labor Markets and Immigration* at p. 57 (Choices, 1st Quarter 2007) (''While some economists suggest that increased immigration has reduced wage rates for native-born, unskilled workers * * * most have found negative wage effects of increased immigration extremely difficult to demonstrate once all appropriate adjustments are made.''); Pia Orrenius, *The Impact of Immigration,* Commentary, The Wall Street Journal (April 25, 2006) (''[M]ost studies find immigrants have little effect on average wages.''); Gianmarco I.P. Ottaviao and Giovannit Peri, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.* at 28 (August 2005) (''It turns out empirically and theoretically that immigration, as we have known it during the nineties, had a sizeable beneficial effect on wages of U.S born workers.''). Several grower and employer groups commented that they do not believe there is reliable evidence of wage depression in the agricultural sector. They did not, however, provide any data or analysis of existing studies to support this assertion.

The assertion of one group of farmworker advocacy organizations that the unusually high concentration of undocumented workers in the agricultural sector must necessarily result in a particularly depressive effect on the wages in that sector does not appear to be borne out by the facts. A study analyzing changes in the median weekly earnings for selected occupations between 1988 and 1999 found that median weekly earnings for ''farm occupations, except managerial'' had increased 21 percent between 1988 and 1993, and 20 percent between 1994 and 1999, while median earnings for ''farm workers'' increased 22 percent between 1988 and 1993, and 20 percent between 1994 and 1999. This compared favorably to increases in the median weekly earnings for all workers, which increased 20 percent between 1988 and 1993, and 18 percent between 1994 and 1999, as well as to workers in many other specific low-wage occupational categories (cooks: 17 percent and 19 percent; butchers: 13 percent and 22 percent; laundry and dry cleaning operators: 17 percent and 16 percent; sewing machine operators, 17 percent and 19 percent). *See* Philip Martin, *Guest Workers: New Solution, New Problem?* at Table A3–4 (Pew Hispanic Center Study, March 21, 2002). Although the Department assumes that it is true that undocumented workers are more prevalent in the agricultural sector than they are in many other sectors, the available data does not support the notion that they have had a disproportionately depressive impact on wages in the agricultural sector.

In sum, after considering the comments received on the subject of wage depression, and after reviewing relevant literature in an attempt to identify empirical support for the assertions made in those comments, the Department reaffirms its conclusion in the 1989 rulemaking that evidence of wage depression in the agricultural sector is inconclusive.

(c) Evidence of Wage Depression at the Local Level

In the 1989 rulemaking, the Department found that ''[t]o the extent that there is some anecdotal evidence of wage depression * * *, the evidence also suggests that the adverse effects are highly localized and concentrated in specific areas and crop activities.'' The Department did not find that there was in fact wage depression in local markets, specific areas, or specific crop activities, but rather noted that the anecdotal evidence of wage depression that existed at that time was confined to those settings. The relevant facts concerning concentrations of illegal workers in specific local markets and crop activities have changed substantially in the intervening 20 years, however.

A group of farmworker advocacy organizations commented that ''[t]imes have changed since 1987.'' This group stated that undocumented workers in the agricultural sector are now ''spread throughout the nation.'' This group noted that ''undocumented workers now dominate in the agricultural sector'' and ''constitute a majority of the farmworkers in the United States.'' This group argued that the factual change in the prevalence of undocumented workers in the agricultural sector is so significant that ''DOL may not legally ignore [it].'' It further provided an impressive compilation of statistics from a variety of studies showing that undocumented workers are now pervasive in the agricultural sector, rather than a sparse or localized phenomenon. Specifically, the studies cited found that ''[i]n California, where 35 percent of the nation's farmworkers are employed, 57 percent of farmworkers were undocumented as of 2003–05,'' that in Florida, ''50 percent of farmworkers were unauthorized immigrants [in 2004] and the percentage was increasing,'' that ''[m]ore than 60 percent of agricultural workers in Washington are believed to be undocumented,'' that ''in New York State approximately 70 percent of farmworkers are undocumented,'' and that ''45 percent of the Mountain region's farmworkers report they were working illegally in the U.S.''

A variety of experts have similarly concluded that the presence of undocumented workers in the United States is now a widespread phenomenon rather than a localized one. A 2005 study by the Pew Hispanic Center found that ''since the mid-1990s, the most rapid growth in the immigrant population in general and the unauthorized population in particular has taken place in new settlement areas where the foreign-born had previously been a relatively small presence.'' Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics* at p. 11 (Pew Hispanic Center, June 14, 2005). ''The geographic diversification of the unauthorized population since 1990 is very evident * * *.'' *Id.* at p. 13. A 2006 study by the Department of Homeland Security reached a similar conclusion. *See* Michael Hoefer, Nancy Rytina, and Christopher Campbell, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006* at p. 4 (Office of Immigration Statistics, August 2007) (''Growing geographic dispersion of the unauthorized immigrant population is reflected by an increase in the share of the population living in all other states.''). In many respects the growing dispersion of unauthorized workers is unsurprising, as the number of unauthorized workers in the United States has dramatically increased from an estimated 2.5 million in the late 1980s to an estimated 12 million or more today. *See* Passel, *Unauthorized Migrants: Numbers and Characteristics* at p. 10, *supra*; Hoefer et al. at p. 1, *supra*.

Recent literature also suggests that, even if there are some areas in the agricultural sector in which particularly high concentrations of illegal immigrants remain, such concentrations may not adversely affect U.S. workers. Jeffrey S. Passel of the Pew Hispanic Center has noted that high concentrations of illegal workers in particular markets are generally correlated with lower local unemployment rates for native workers:

> The presence of illegals is not associated with higher unemployment among natives and it seems to me you would have to see that kind of thing for there to be true displacement in any sense. Geographically, it tends to be the reverse: Places with large numbers of illegals tend to have lower unemployment than places without illegals.

The Immigration Debate: Its Impact on Wages, Workers, and Employers, in Knowledge@Wharton at pp. 4–5 (May 17, 2006). And David Card concluded in a study analyzing the effects of immigration generally (rather the effects of unauthorized immigration in particular) on U.S. workers that ''[a]lthough immigration has a strong effect on relative supplies of different skill groups, local labor market outcomes of low skilled [U.S.] natives are not much affected by the relative supply shocks.'' David Card, *Is the New Immigration Really So Bad?*, National Bureau of Economic Research (August 2005).

The Department concludes that there is no conclusive evidence one way or the other regarding the existence of wage depression in localized agricultural labor markets. There is strong evidence that there has been a seismic shift in the demographics of the agricultural labor market in the United States since the Department's last rulemaking in 1989, and that undocumented workers have in the intervening years come to dominate that market throughout the United States. In light of the pervasive presence of undocumented workers in the agricultural sector today, it is substantially less likely than it was in 1989 that wage depression could uniquely be found in highly localized agricultural labor markets and specific crop activities. Moreover, even if pockets of unusually high concentrations of illegal workers continue to exist in some places in the agricultural sector, the evidence concerning the effect high concentrations of illegal workers have on the wages of U.S. workers itself remains equivocal.

(d) Inability To Measure Wage Depression

None of the commenters and none of the literature reviewed by the Department suggested a reliable methodology for measuring any wage depression that may exist in the agricultural sector. Indeed, one group of farmworker advocacy organizations submitted an analysis prepared by a PhD economist from the University of California, Berkeley, that concluded that ''[g]iven the extremely large share of illegal immigrants working in agriculture, it is unknowable, absent them, how many U.S. workers would be willing to and at what price work in the agricultural sector.'' As the Department explained in 1989, ''an explicit enhancement could only be justified if alien agricultural employment has depressed average agricultural earnings, and if the extent of the depression can be measured at the aggregate level.'' 54 FR 28043. With no conclusive evidence showing that wage depression exists in the agricultural sector, and with no reliable methodology to measure any wage depression that does exist, the Department declines to adopt an adverse effect wage rate that is deliberately set above market rates.

(e) The Impact of Undocumented Workers vs. Guest Workers on U.S. Worker Wages

To the extent that wage depression may exist in the agricultural sector, the evidence does not indicate that it has been caused by the H–2A program. Rather, all of the information available to the Department strongly indicates that the presence of large numbers of illegal, undocumented workers in the agricultural sector poses a much greater potential threat to the wages of U.S. workers than guest workers do.

The Department has reviewed anew the studies that it relied on in 1989 when it issued the last rule governing the adverse effect wage rate. Virtually all of those studies focused on the effect that undocumented alien workers have on the wages of U.S. workers. *See, e.g.*, National Commission for Employment Policy, *supra* (''Undocumented workers do displace some native-born U.S. workers and do lower wages and working conditions in some occupations and geographical areas.''); Martin, *IRCA*

and the U.S. Farm Labor Market, supra (''[t]he removal of illegal alien workers should raise farm wages.''). Indeed, the GAO study that was relied upon by the Department examined the impact of undocumented workers not just on the wages of U.S. citizen workers, but on all legal workers in the United States with low-wage, low-skilled jobs, including guest workers. *See Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMD–88–13BR) (March 1988) (''illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage low-skilled jobs in certain labor markets.'').

Other sources also support the notion that any threat that foreign workers may pose to the wages and working conditions of U.S. workers is primarily caused by direct competition from a large undocumented workforce within the United States. Illegal aliens may be willing to work for illegally low wages that are paid off the books, and may be reluctant to report an employer's violations of the labor and employment laws. A group of farmworker advocacy organizations submitted an analysis prepared by a PhD economist from the University of California, Berkeley, which stated that:

> There are other reasons that employers in the U.S. hire undocumented workers over U.S. workers. Undocumented workers—afraid of deportation—are perceived to be less demanding in terms of non-pecuniary benefits and are less likely to form unions or make demands from employers, as well as accept pay below legal standards.

Senators from both political parties remarked upon this phenomenon during the recent immigration debates in Congress.[5] As Senator Kennedy stated in May 2007,

> [W]e have, unfortunately, employers who—are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] ½ million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.[6]

The U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. *See Sure-Tan* v. *NLRB,* 467 U.S. 883, 892 (1984) (''acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *'').

A group of farmworker advocacy organizations suggested that guest worker programs may also threaten the wages and working conditions of U.S. workers. These organizations primarily cited studies finding that between 1950 and 1964, the period of time during which the Bracero Program was operating, real wages for agricultural workers remained flat. Even if these studies are correct about the impact of the Bracero Program, however, the Department does not consider the Bracero Program to be representative of the impact of guest worker programs generally. The Bracero Program was notorious for rampant employer abuses and lack of government enforcement. *See, e.g.,* Alma M. Garcia, *The Mexican Americans* at pp. 30–33 (2002). If employers are regularly able to get away with violating program requirements and paying sub-standard wages, such rogue activity may of course have a depressive effect on overall wage rates. H–2A program enforcement, however, is more rigorous than Bracero Program enforcement was, and is substantially aided by watchdog farmworker advocacy organizations that help to ensure that workers hired through the H–2A program are paid properly.

The commenter cited only one other supposed example of wage depression caused by the H–2A program: The Florida sugar cane industry. The commenter noted that the sugar cane harvest in Florida was mechanized in the early 1990s, and that the industry therefore no longer uses substantial numbers of H–2A workers. The commenter asserted, however, that in the late 1980s and early 1990s, while H–2A workers were still being used, their presence depressed the wages of U.S. workers. As support for this proposition, the commenter cited statistics indicating that sugar cane producers that hired only U.S. workers paid their employees substantially more per hour than producers that hired H–2A workers. The Department does not consider this to be evidence of wage depression; if anything, the wage gap between U.S. workers and H–2A workers shows that the AEWR paid to H–2A sugar cane workers did not function as the maximum hourly rate that U.S. workers in the area could make. Rather, U.S. workers were able to secure jobs that paid substantially higher wages than H–2A workers. Economically speaking, that result is not at all surprising; employers generally should be willing to pay U.S. workers higher wages than the required wage rate for H–2A workers, since H–2A workers impose a number of additional costs on employers, including housing, transportation, and application fees, that make them relatively more expensive to employers than U.S. workers.

Whatever effect guest workers may have on the wages of U.S. workers, however, there appears to be virtually unanimous agreement among the experts and commenters that undocumented workers have a greater impact and pose a greater threat. Indeed, the very same group of farmworker advocacy organizations that argued that guest worker programs have a depressive effect on wages submitted a PhD economist's analysis concluding that ''the H–2A program and the AEWR are severely undermined by the employment of hundreds of thousands of undocumented immigrant workers.'' The economist further opined that ''[f]irst and foremost, it is in the best interest of U.S. domestic and H–2A workers to mitigate the effects that such a large share of illegal workers has on wages and employment conditions in the agricultural industry.'' *See also* Peter Cappelli, *The Immigration Debate: Its Impact on Wages, Workers, and Employers,* in Knowledge@Wharton at p. 3 (May 17, 2006) (''While it is true that low-skill workers who enter the United States legally also exert downward pressure on wages, there is a significant difference between them and their undocumented counterparts.''). Of course, guest worker programs could, in the abstract, pose a significant threat to the wages of U.S. workers, if, for example, the required wage rate was set substantially below the prevailing market rates, or if enforcement of the required wage rates was so lax that substantially below-market wages were regularly paid. There is no indication, however, that those conditions currently exist in the H–2A program, nor does the Department have any intention of allowing them to occur under the Final Rule.

Thus, the Department concludes that while evidence of wage depression in the agricultural sector remains inconclusive, it is quite clear that the most likely source of any wage depression that does exist is the hundreds of thousands of undocumented workers in the agricultural labor market.

(f) The Department's Decision To Use More Precise Adverse Effect Wage Rates

Although evidence of actual wage depression in the agricultural sector is equivocal, the Department believes it is appropriate to select a wage-

[5] *See e.g.,* 152 Cong. Rec. S9773 (2006) (statement of Senator Dianne Feinstein); 153 Cong. Rec. S441–S442 (2007) (statement of Senator Larry Craig); and 153 Cong. Rec. S6590 (2007) (statement of Senator Edward Kennedy).

[6] 153 Cong. Rec. S6590 (2007).

determination methodology that will help to prophylactically guard against wage depression. As the Department noted in the NPRM, one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H–2A program sufficiently functional that agricultural employers will hire H–2A workers, with all their accompanying legal protections, rather than hiring undocumented workers. The Department has concluded that this can best be achieved by setting adverse effect wage rates that (1) are not below the prevailing wages being earned by U.S. workers and (2) are not so far above local market rates that they encourage employers to hire undocumented workers instead. Achieving these objectives requires setting AEWRs that appropriately reflect market realities and labor costs.

There are currently not nearly enough U.S. workers in the agricultural sector to perform all of the agricultural work that needs to be performed. When agricultural employers cannot find U.S. workers, they must of necessity turn to some other labor source. The H–2A program was created by Congress to be the alternate source of choice for agricultural labor. The program is clearly failing to fill the role envisioned for it, however, as approximately ten times more undocumented workers than H–2A workers are employed in the agricultural sector today. Agricultural employers may or may not realize that specific individuals they are hiring are in the United States illegally, but undocumented workers have clearly become the agricultural sector's alternate labor market of choice. The Department believes that the current methodology for determining adverse effect wage rates, which is not keyed to actual local labor market conditions, may be partly responsible for the program's failure.

It is obvious that an AEWR that is set too low is likely to harm U.S. workers. It is no secret that foreign workers may be willing to work for wages that are lower, and often substantially lower, than wages that are typically paid to U.S. workers. Allowing foreign workers to work at substandard wages would likely harm U.S. agricultural workers by causing them to be displaced or by forcing them to accept lower wages to secure jobs. As will be discussed later, there is reason to believe that in some geographic areas and for some occupations, current AEWRs are set artificially low, resulting in an adverse effect on U.S. workers similarly employed. *See* Gerald Mayer, *Temporary Farm Labor: The H–2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate* (''CRS Report'') at 8 (CRS Report for Congress, November 6, 2008) (''Currently, the AEWR applies equally to all crop workers, livestock workers, and farm equipment operators in a region or state. However, within a region or state, [market] wages for the same occupation may vary because of differences in the cost of living or in the relative supply of or demand for workers.'').

Conversely, an AEWR that is artificially set too high can also result in harm to U.S. workers. If the AEWR is set so high that it does not reflect actual local labor market conditions, many agricultural employers may be priced out of participating in the H–2A program. When employers cannot find U.S. workers, and also cannot afford H–2A workers because they are required to pay them above-market wage rates, some will inevitably end up hiring undocumented workers instead.

The resulting influx of undocumented foreign workers into the agricultural sector threatens to erode the earnings and employment opportunities of U.S. workers in agricultural occupations. U.S. workers may have a difficult time fairly competing against undocumented workers, who may accept work at below-market wages, are viewed by employers as less troublesome and less likely to assert their rights, and are cheaper to employ than H–2A workers because they do not require the additional payment of H–2A program costs such as transportation and housing. Although the threat of legal sanctions and attendant risks of work disruption will constrain some employers from knowingly employing undocumented workers,[7] the greater the gap between the true market rate for farm labor and the total cost to employers of H–2A workers, including artificially inflated wage rates plus all other attendant H–2A program costs, the greater the likelihood that employers will forego using the H–2A program and will instead risk hiring undocumented foreign labor. The undocumented foreign workers whose hiring is incentivized when AEWRs are artificially set too high lack the legally enforced protections and benefits that the H–2A program provides, further threatening to degrade U.S. workers' working conditions.

The Department was concerned about precisely this phenomenon in the 1989 rulemaking. The Department presciently observed that ''AEWRs, if set too high, might be a disincentive to the use of H–2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044. The Department's choice of the USDA average agricultural wage to set AEWRs at the time was predicated on the assumption ''that IRCA will achieve its states purpose of removing illegal aliens from the labor force. * * * Agricultural employers who have employed illegal alien workers in the past then must fill their labor needs with U.S. workers * * * or with H–2A workers.'' *Id.* IRCA did not, of course, succeed in eradicating the employment of illegal aliens in the agricultural sector, a fact that the Department must now take into account in determining what wage-setting methodology is most appropriate.

As noted above, there is demand for hundreds of thousands of agricultural workers beyond what the domestic labor market is able to supply. If any wage depression does currently exist in the agricultural sector, the presence of a large number of undocumented workers is the most likely cause. Replacing the hundreds of thousands of undocumented agricultural workers currently employed in the U.S. either with U.S. workers or with H–2A program workers who are paid a legally required wage would substantially help to protect U.S. workers from adverse effects caused by the undocumented work force. For this reason, the Department believes that it should select a methodology for setting adverse effect wage rates that is as precise and refined as possible.

A group of farmworker advocacy organizations commented that rather than adopt a wage-setting methodology that may reduce required wage rates in some areas, the government should get rid of undocumented workers by more vigorously enforcing the immigration laws. Primary enforcement responsibility in these areas is entrusted to DHS and the Department of Justice. The Department notes, however, that during the last several years the federal government has in fact embarked upon unprecedented efforts to enforce the immigration laws, both at the border and in the interior. In fact, this rulemaking effort is part of a comprehensive 26-point immigration reform plan that was announced by the present Administration in August 2007.

[7] Some commenters noted that the Department's discussion of this point in the NPRM preamble appeared to suggest that the Department believed agricultural employers intentionally set out to hire illegal workers. The Department did not intend to suggest such motives. As noted above, many illegal workers in the U.S. possess documentation indicating they are legally authorized to work and all employers (not just those in agriculture) are required by current law to accept at face value documentation that appears valid.

See Fact Sheet: Improving Border Security and Immigration Within Existing Law, http://www.whitehouse.gov/news/releases/2007/08/20070810.html (August 10, 2007). This rulemaking is designed to work in tandem with those enforcement efforts. The Department does not believe that it is necessary to choose between a functional H–2A program and effective immigration enforcement; we can and should have both, as having both will maximize protections for U.S. workers.

The same commenter argued that if agricultural employers substantially hiked their wage rates, U.S. workers would re-enter the agricultural labor market to secure the higher wages, thus substantially reducing the need to resort to foreign labor in the agricultural sector. Although the Department assumes that substantially higher agricultural wages would indeed induce some reentry by U.S. workers into the agricultural labor market, the commenter did not provide any data suggesting what level of wage increases would be required to make such a re-entry phenomenon substantial, or whether agricultural employers could remain competitive if required to pay those wages. As the Department noted in 1989, there is an upper ceiling to how much U.S. agricultural employers can even theoretically afford to pay in labor costs, as they must ultimately compete not only with other U.S. producers, but also ''with foreign imports.'' 54 FR 28044. The Department believes that it is also relevant that U.S. workers have steadily left the agricultural sector over the last two decades, despite the fact that agricultural wages have increased during that time, suggesting that factors other than wages may be causing many U.S. workers to view agricultural jobs as undesirable.

Finally, the same commenter argued that the Department's rationale effectively calls for a continuous lowering of agricultural wage rates, because in this commenter's view (1) the Department's real objective is to lower wage rates and (2) the only way to actually replace undocumented workers with H–2A workers is to set adverse effect wage rates at the level of wages that undocumented workers are willing to accept. As an initial matter, the commenter misunderstands the Department's objective. The Department seeks to ensure that AEWRs are precisely tailored to the conditions of specific agricultural occupations in specific labor markets. Although it is true that the Department's preamble analysis in both the NPRM and the Final Rule explains in detail how artificially high AEWRs can hurt U.S. workers, that does not reflect any belief on the part of the Department that all AEWRs are currently artificially high and that they therefore should all be lowered. In fact, the Department's preamble analysis also explains how AEWRs that are set too low hurt U.S. workers. The Department seeks to avoid both effects by adopting a more precise methodology. Because the USDA survey that is currently used is an average wage rate that is set across broad, typically multi-state regions, the actual wages of individual labor markets within the USDA regions are necessarily in some instances above, and in some instances below, the USDA average. In fact, the statistics provided by this commenter show that even according to the commenter's calculations, the average BLS OES wage for crop workers is higher than the average USDA wage for field workers in several States, including three of the ten biggest H–2A using States (Louisiana, New York, and Virginia). A recent report of the Congressional Research found that even OES Level I wages are higher than the current AEWR for some occupations in some geographic areas. CRS Report *at 13–17*.

The Department also rejects the notion that the only way to replace undocumented workers with U.S. workers and H–2A workers is to lower AEWRs to the levels that undocumented workers are willing to accept. That might be true if agricultural employers viewed U.S. workers, H–2A workers, and undocumented workers as completely fungible, but they do not. Many employer and grower association commenters emphatically stated that they want to comply with the law, and that in fact they would generally prefer to hire U.S. workers over H–2A workers or undocumented workers if U.S. workers were available. Moreover, agricultural employers who even unknowingly hire undocumented workers risk losing their labor force part way through the season due to an immigration raid, and those who knowingly hire undocumented workers risk criminal penalties. These risks are particularly pronounced today because of the government's recent highly publicized increased worksite immigration enforcement efforts. For all of these reasons, agricultural employers are generally willing to pay substantially more to hire a U.S. worker or an H–2A worker than they are to hire an undocumented worker. This observation is borne out by actual data showing that undocumented workers typically make less than U.S. workers and H–2A workers do.

After reviewing the comments received, the Department continues to believe that precise tailoring of H–2A wages to local labor market conditions is the most critical factor in preventing an adverse effect on the wages of U.S. workers. For example, a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas. If the AEWR in any given area does not reflect market wages, it will either harm U.S. workers directly by artificially lowering wages, or it will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers. AEWRs covering large multi-state regions suffer from similar flaws. In an agricultural sector where prevailing labor conditions make the need for precision in AEWR determinations paramount, it is essential that a methodology be adopted that allows for as great a degree of geographic refinement as possible. Improving the geographic precision of the AEWR is essential to ensuring that the AEWR meets its statutory objective.

The Department is aware that its rationale for establishing precise, localized wage rates is quite different than the rationale that motivated it in 1989 to establish aggregated, regional wage rates.[8] That decision was reached under very different factual circumstances, however. In 1989, the Department found that there was no conclusive evidence of generalized wage depression in the agricultural sector, but noted that there was some anecdotal evidence suggesting that wages in particular local labor markets might be depressed. The Department chose at that time to use USDA data to set AEWRs largely because it believed that USDA's aggregation of wage data at broad regional levels would immunize the survey from the effects of any localized wage depression that might exist. 54 FR 28043. As discussed above, however, undocumented workers are substantially more dispersed throughout the agricultural sector today than they were in 1989. Not only are undocumented workers no longer confined to particularized local labor markets, but recent studies have also called into question whether the concentration of undocumented workers in particular labor markets actually causes localized wage depression.

In light of these developments, the one key advantage the Department believed in 1989 was afforded by the USDA survey's broadly aggregated data—its ability to avoid localized wage

[8] The Department's underlying motivation—to protect the wages and working conditions of U.S. workers—remains the same.

depression effects—has been substantially diminished. On the other hand, the fact that undocumented workers have come to dominate the agricultural labor force in the intervening years has rendered the imprecision of USDA wage data vis-à-vis local labor market conditions a substantial drawback that may sometimes actually encourage employers to hire undocumented workers. In fact, the Department expressed concern in the 1989 rulemaking that precisely this phenomenon might develop, stating that ''AEWRs, if set too high, might be a disincentive to the use of H–2A workers and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044. Many commenters argued that the large numbers of undocumented workers in the agricultural sector adversely affects U.S. workers. After weighing all of these considerations, the Department has determined that under the present factual circumstances, the advantages of tailoring AEWRs to better reflect the actual wages earned by specific occupational categories in specific local labor markets outweigh the potential disadvantages.

(g) The Department's Decision To Use the Occupational Employment Statistics Survey

Having determined that the Department can best safeguard the wages and working conditions of U.S. workers from adverse effect by encouraging employers to replace undocumented workers with either U.S. workers or H–2A workers, and having further determined that tailoring AEWRs to local labor market conditions is the best way to foster this replacement process, the Department made two independent decisions. First, the Department decided to use the BLS OES survey to set AEWRs, rather than the USDA Farm Labor Survey (FLS). Second, the Department decided to attain further precision in setting AEWRs by breaking the OES wage rates down into four different skill levels, rather than using a single average OES wage rate for each agricultural occupation. While the Department viewed the ability to break OES data into four separate skill levels as an advantage of that survey, its decision to use the OES survey to set AEWRs was not dependent on this feature.

The FLS and the OES survey are the leading candidates among agricultural wage surveys potentially available to the Department to set AEWRs. Neither survey is perfect. In fact, both surveys have significant shortcomings. On balance, however, the Department has concluded that in light of the current prevalence of undocumented workers in the agricultural labor market, AEWRs derived from OES survey data will be more reflective of actual market wages than FLS data, and thus will best protect the wages and working conditions of U.S. workers from adverse effects.

The present methodology for settings AEWRs, which was established by the 1989 final rule, calculates regional AEWRs based on the previous year's annual combined average hourly wage rate for field and livestock workers in each of 15 multi-state regions and 3 stand-alone States, as compiled by the USDA quarterly FLS Reports. The aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone states) results in extremely broad generalizations that fail to account for specific market conditions at the local level. Wage data collected at each individual State and even substate level would be more appropriate for purposes of computing an accurate, sub-regional AEWR that reflects local market conditions. Indeed, market-based wage survey data at the State or substate level is the standard for calculating comparison wages in other temporary worker programs administered by the Department, including the H–2B program that is the non-agricultural counterpart of H–2A and the H–1B specialty occupation worker program.[9]

The Department's reliance on USDA FLS data creates several problems for functional program administration. The USDA quarterly FLS does not provide refined wage data by occupations or geographic locale. Additionally, the USDA FLS does not account at all for different skill levels required by agriculture occupations. Moreover, the wage levels reported in the USDA FLS are skewed by the inclusion of wages that are paid to many agricultural occupations that are not typically filled by H–2A workers, such as inspectors, animal breeding technicians, and trained animal handlers.

The accuracy of AEWRs based on the USDA FLS is further diminished because the FLS is not based on reported hourly wage rates. Instead, USDA's FLS asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this limited information, the survey constructs annual average wages for the broad general categories of field workers and livestock workers. The AEWR is then calculated by combining the average of the annual wage for field workers and the average annual wage for livestock workers into one annual wage rate covering both of those general occupational categories. The survey thus determines the hourly AEWR based not on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

Moreover, the USDA FLS is administered and funded through USDA, giving the Department no direct control over its design and implementation. USDA could terminate the survey at any time and leave the Department without the basic data, problematic as it is, used to calculate the AEWR. In fact, USDA announced that it would suspend the survey in February 2007 due to budget constraints. Ultimately, USDA resumed the survey in May 2007. The possibility that USDA may suspend the survey at some point in the future adds a measure of instability and uncertainty for AEWR determinations in future years. USDA's control over the survey also prevents the Department from making improvements to it that could help to correct its shortcomings and set more market-reflective AEWRs.

In 1989, the Department determined that the USDA survey was the best available ''barometer'' for measuring farm wages on a nationwide basis. In the succeeding years, however, the Department has gained vast knowledge and experience in applying wage data that simply did not exist in 1989. The OES wage survey is among the largest on-going statistical survey programs of the Federal Government. The OES program surveys approximately 200,000 establishments every 6 months, and over 3 years collects the full sample of 1.2 million establishments. The OES program collects occupational employment and wage data in every State in the U.S. and the data are published annually. The OES wage data is already utilized by the Department for determining comparison wages in other temporary worker programs and has proven to be an accurate, statistically valid, and successful wage reference. In 1989, when the Department established the current AEWR methodology, the OES program was not well developed and thus was not an effective alternative for the USDA Labor Survey. In the intervening nearly 20 years the OES program has in several respects

[9] Calculation of the applicable wage by a SWA using the OES survey is, in fact, a ''safe harbor'' providing presumption of correctness in the H–1B labor condition application. 20 CFR 655.731(a)(2)(ii)(A)(3).

surpassed the USDA Labor Survey as a source for agricultural wage data.

Farm labor comprises a number of occupations and skills, and both the demand for and supply of farm workers with a particular skill or experience level varies significantly across geographic areas. The farm labor market is not a monolithic entity, but rather is a matrix of markets across a spectrum of occupations, skill or experience levels, and local areas. Effectively protecting U.S. workers from unfair competition by undocumented workers by setting an AEWR that is neither too high nor too low requires that the AEWR be specifically tailored to the local labor markets, and must take into account such factors as specific occupation, skill or experience, and geographic location. The Department thus strongly values the geographic and occupational precision of the OES estimates as well as the ability to establish four wage-level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty within a given occupation. These features are unique to the OES survey, and it is in part for this reason that the survey is also used in other foreign worker programs administered by the Department, including the H–1B and H–2B programs.

The Department acknowledges that OES agricultural wage data is far from perfect. Perhaps most significantly, as several opposed commenters pointed out, ''BLS OES data do not include wages paid by farms.'' Rather, ''[t]he OES focuses on establishments that support farm production, rather than engage in farm production, and many of these establishments are farm labor contractors.'' These commenters argued that ''[t]he employees of such non-farm establishments constitute a minority of the overall agricultural labor supply and are not representative of the farm labor supply.'' They argued that this effect is exacerbated by the fact that ''BLS OES results are obtained by using the results of a separate BLS survey, the National Compensation Survey (NCS),'' which ''does not survey any agricultural establishments.''

The Department is confident in the quality of the agricultural workers wage estimates calculated using the OES survey, even with its lack of direct coverage of agricultural establishments. As noted by one major farm association, ''the OES's agricultural wage information is based on data collected from farm labor suppliers, individuals who specialize in finding, pricing, and placing agricultural workers with local farm employers.'' Indeed, workers provided by farm labor suppliers are for most agriculture employers the closest substitute for H–2A workers; both represent an alternate labor source to which an agricultural employer can turn if it is unable to locate a sufficient numbers of U.S. workers through its own direct recruiting efforts.

Moreover, as one group of farmworker advocacy organizations noted, the USDA FLS shows that ''[a]gricultural service employees on farms and ranches made up * * * about 30 percent of hired workers.'' Such workers appear to be spread across virtually all geographical areas and crop activities, and 30 percent is certainly a statistically valid sample size. Nonetheless, the Department recognizes that it is reasonable to consider the survey's nonfarm scope to be a shortcoming, and the Department will work with BLS to expand the coverage of the OES to include agricultural establishments, in keeping with recommendations from various commenters, including such disparate entities as growers' associations and state workforce agencies. One significant advantage of the BLS OES is that because it is within the control of the Department, it can be refined and improved over time with the specific needs of the H–2A program in mind.

One opposed commenter argued that the high concentration of FLCs in the OES survey data will necessarily lead to depressed AEWRs, because FLCs employ disproportionately high concentrations of undocumented workers and typically pay their employees low wages. If this assertion was true, one would expect that average OES wage rates for crop workers would always be below, and in many cases substantially below, the average FLS wage rates. The data presented by this commenter, however, show that this is not the case. According to that data, the average OES crop worker wage rates in many States (although not in a majority of States) are actually higher than average FLS field worker wage rates, including Idaho (12.16 percent higher), Louisiana (13.3 percent higher), New York (6.73 percent higher), Washington (5.78 percent), and Virginia (5.45 percent higher). Louisiana, New York, and Virginia are all in the top ten States among H–2A users. Unsurprisingly, because OES data is more refined than FLS data, it produces wage rates that are higher than FLS wage rates in some places, and lower than FLS wage rates in other places. For example, a recent CRS Report found that FLS data ''may overestimate the wages of crop workers and underestimate the wages of livestock workers and farm equipment operators.'' CRS Report at 16. Because the OES survey disaggregates this wage data, it would be expected that moving from the FLS to the OES survey for the calculation of AEWRs would result in crop worker wage rates going down in some places, and livestock and farm equipment operator wages going up in some places. In fact, this is precisely the effect that the CRS Report concluded was likely to occur. *Id.* at 15–17.

The data simply does not support the picture painted by the commenter of an OES survey producing wage rates that are uniformly low and severely depressed. Although the Department assumes that it is true that the wages paid to unauthorized workers are reflected in some OES data, *see* CRS Report at 18 (''In labor markets with a large concentration of unauthorized farmworkers, wage data from the OES survey may, to some extent, reflect the wages paid to unauthorized workers.''), that is undoubtedly true of FLS data as well. The PhD economist's analysis submitted by one commenter, for example, found that ''[a] second limitation regarding the FLS is that undocumented workers are no doubt in the survey and their wage is used in the calculation of AEWRs.'' This does not provide a sound basis for choosing between the two surveys.

Some commenters questioned the statistical reliability of OES wage estimates for detailed geographic areas, noting that more detailed areas have reduced samples and high relative standard errors. The Department's Foreign Labor Certification Data Center takes data quality into account when updating its Online Wage Library and adjusts the geographic areas used to derive wage estimates as needed to ensure data reliability. A ''GeoLevel'' variable indicates the kind of adjustment, if any, that has been made:

> If the data used to calculate the wage estimate came from the actual metropolitan statistical area (MSA) or balance of state (BOS) area the GeoLevel code will equal ''1.''
>
> If there were no releasable estimates for the desired area then the wages are for the area indicated plus its contiguous areas. This is signified by a GeoLevel ''2.''
>
> If there were no releasable estimates for the area, or for the area plus contiguous areas the wage is calculated from statewide data, indicated by a GeoLevel equaling ''3.''
>
> Finally, if there is no releasable estimate for the state, the national average is used. This is indicated by GeoLevel ''4.''

The application of these statistically sound methodologies takes into account the fact that wage data in some local labor markets is limited, and provides the best wage rate approximations available. No wage survey is perfect. The OES accounts for those places

where data is limited by borrowing aggregate data to produce the best local wage rate approximation possible. The OES surely is not always precisely correct as to the going wage rates for every occupation in every geographic locale, but its statistically sound methodology will on the whole produce wage rates that are far more refined and accurate than the broad, region-based FLS.

One commenter considered the Department's criticism of the multi-state nature of the USDA surveys to be misplaced: ''[w]hile agricultural labor markets for seasonal, labor-intensive crops have a local component, an interstate character to these markets emerges in the presence of migratory workers that move from State-to-State and crop-to-crop.'' The commenter went on to note that ''Broad regional wage standards are appropriate in this context, where more localized rates might unfairly disadvantage workers employed in areas with only a small number of potential employers, who can collude to keep wages low.'' Even if the commenter's view about an interstate market for wages of migratory workers were correct, however, the current structure of the AEWR offers no support for the argument that the USDA survey should be retained. The FLS's regional divisions bear virtually no resemblance to any traditional interstate agricultural markets or traditional migratory work patterns or flows. Wage estimates from the OES are well suited to capture substate wage differences such that the Department may tailor H–2A certification decisions and required wage rates to reflect local labor market conditions.

A group of farmworker advocacy organizations criticized the Department for failing to provide a better explanation of how AEWRs will be calculated using OES data. The calculation of OES wage rates is no great mystery, as OES wage rates are currently used for both the H–1B and H–2B programs. A recent CRS report explains how wage rates are determined using FLS and OES survey data. *See* CRS Report at 3–10. The underlying statistical methodologies for determining OES wage rates are, of course, quite complex. Nevertheless, the Department will attempt to distill the process for determining wage rates using both the FLS and the OES survey here:

The FLS surveys between 11,000 and 13,000 farms and ranches each quarter on multiple subjects, including the number of hired farm workers, the gross wages paid to workers, and their total hours worked. Only farms and ranches with value of sales of $1,000 or more are within the scope of the survey. ''Hired farm workers'' are defined as ''anyone, other than an agricultural service worker, who was paid for at least one hour of agricultural work on a farm or ranch.'' The survey seeks data on four types of hired workers: field workers, livestock workers, supervisors, and other workers.

USDA, through the National Association of State Departments of Agriculture, uses four collection methods for the FLS: mail, CATI (computer-assisted telephone interviews), personal visits (for larger operations), and online (only about 2 percent of respondents). The FLS sample is distributed across the entire country; however, the geographic detail covers just 15 multi-state regions and 3 stand alone states and thus is much more limited than the OES survey. The table below lists the sample size by region.

QUARTERLY FARM LABOR SAMPLE SIZE, BY REGION, 2008–09 [1] (OCTOBER, JANUARY, AND APRIL) [2]

Region	Sample
Northeast I	570
Northeast II	498
Appalachian I	546
Appalachian II	654
Southeast	588
Florida	604
Lake	846
Corn Belt I	840
Corn Belt II	672
Delta	534
Northern Plains	846
Southern Plains	960
Mountain I	354
Mountain II	309
Mountain III	263
Pacific	526
California	1,329
Hawaii	404
U.S.	11,343

[1] Includes Ag Services for CA and FL

[2] July sample is approximately 13,000 at U.S. level.

Source: National Agricultural Statistics Service, USDA.

USDA calculates and publishes average wage rates for four categories of workers each quarter. Wage rates are not calculated and published for supervisors or other workers, but just for field workers, livestock workers, field and livestock workers combined, and total hired workers. Within the FLS, the ''wage rates,'' or average hourly wage, by category are defined as the ratio of gross wages to total hours worked. To the extent workers receive overtime or other types of incentive pay, the average wage rate would exceed the workers actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, other statistics agencies, such as BLS, refer to the ratio as ''average hourly earnings,'' and not as hourly wages or wage rate.

The FLS-derived wage rate estimate for the four categories is published quarterly, and annual averages are published as well. With wage information on just two agricultural occupation categories, the FLS has very little occupational detail relative to OES. The FLS also calculates average wage rates in two other categories by combining the average wages of other types of workers. The Department uses the regional annual average for the category ''field and livestock workers combined'' as the annual AEWR for each state within a given geographic region.

In contrast, the OES survey directly collects a wage rate (within given intervals) by occupations defined by the Office of Management and Budget's (OMB) occupational classification system, the Standard Occupational Classification (SOC) system code. Specifically, ''wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous-duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. Excluded is back pay, jury duty pay, overtime pay, severance pay, shift differentials, nonproduction bonuses, employer cost for supplementary benefits, and tuition reimbursements.''

The OES survey collects occupational employment and wage data by means of a matrix in which employers report the number of employees in an occupation and in a given wage range. The wage intervals used for the May 2007 estimates are as follows:

Interval	Hourly wages	Annual wages
Range A	Under $7.50	Under $15,600
Range B	$7.50 to $9.49	$15,600 to $19,759
Range C	$9.50 to $11.99	$19,760 to $24,959

Interval	Hourly wages	Annual wages
Range D	$12.00 to $15.24	$24,960 to $31,719
Range E	$15.25 to $19.24	$31,720 to $40,039
Range F	$19.25 to $24.49	$40,040 to $50,959
Range G	$24.50 to $30.99	$50,960 to $64,479
Range H	$31.00 to $39.24	$64,480 to $81,639
Range I	$39.25 to $49.74	$81,640 to $103,749
Range J	$49.75 to $63.24	$103,480 to $131,559
Range K	$63.25 to $79.99	$131,560 to $166,399
Range L	$80.00 and over	$166,400 and over

The mean hourly wage rate for all workers in any given wage interval cannot be computed using grouped data collected by the OES survey. Instead, the mean hourly wage rate for each of the 12 intervals is calculated using data from BLS's National Compensation Survey (NCS). Although smaller than the OES survey in terms of sample size, the NCS program, unlike OES, collects individual wage data.

Once the mean hourly wage rates for the 12 intervals are determined, the mean hourly wage rate for a given occupation is calculated. It is defined as:

Total weighted wages that all workers in the occupation earn in an hour/ total weighted survey employment of the occupation.

Because the OES wage data are collected in intervals (grouped), it does not capture the exact wage of each worker. Therefore, some components of the wage variance are approximated using factors developed from NCS data. A Taylor Series Linearization technique is used to develop a variance estimator appropriate for OES mean wage estimates. The primary component of the mean wage variance, which accounts for the variability of the observed OES sample data, is estimated using the standard estimator of variance for a ratio estimate. Within each wage interval, there are also three types of variance estimated from the NCS. They represent the variability of the wage value imputed to each worker; the variability of wages across establishments; and the variability of wages within establishments. In short, the estimates of OES relative standard errors for wages take into account the sampling error associated with OES components of the wage estimator and also error associated with the NCS components of the estimator that are used for the mean wages for each interval.

The Department hopes this explanation helps.

Some commenters critiqued the OES survey as not being as timely as the FLS. A group of farmworker advocacy organizations claims that ''OES is out of date and harms U.S. workers.'' It is true that the lag between the survey reference period and data publication can be greater for OES than for FLS. But such lag simply reflects the greater scope of the OES survey, which collects detailed employment and wage data from approximately 200,000 establishments every six months. The rolling three-year sample used in OES reduces year-to-year volatility in the wage estimates, and as a result, it is highly unlikely that the one-year period between the reference period and data publication would result in substantively different wage estimates if the lag were reduced.

One commenter considered it problematic that the OES reference months are May and November, which they said ''may not be the best approach if one is interested in farm workers.'' This commenter's presumption appears to be that farm workers on payrolls in some other unspecified months may have higher wages than those during the OES reference months. The Department did not identify any evidence, however, to support this hypothesis. The criticism could be equally applied to the reference months used in the USDA FLS. Available data indicates that virtually all workers are paid a constant minimum hourly rate during their tenure and are not paid different rates in different months. Estimates from the FLS do not show a clear cyclical pattern in wage rates, suggesting that there is little seasonal variation at an aggregate level.

The Department has considered these comments and re-examined the wage surveys. Taking into account the pros and cons of both surveys, the Department concludes that the advantages to the OES survey make it the best data source available for determining applicable wages in the H–2A program. In fact, a recent CRS Report found that the Department's proposal to use the OES survey to calculate AEWRs would likely have precisely the effect the Department intends it to. The report concluded that ''[u]nder the proposed rule, the AEWR should more closely reflect the wages of farmworkers in local labor markets.'' CRS Report at 18. Furthermore, in those local labor markets where AEWRs are currently above true market rates, and the Final Rule's new wage-setting methodology therefore results in lower AEWRs, ''the rule should create an incentive for employers to hire more H–2A, as opposed to unauthorized, workers.'' *Id.* at 13. While the full impact of the new wage-setting methodology cannot be forecast with precision, *id.* at 18, the Department on the whole believes that these predicted changes will better protect the wages and working conditions of U.S. workers.

Therefore, the Final Rule adopts the NPRM's proposal to institute an alternative methodology for determining the AEWR that will more accurately measure market-based wages by occupation, skill level, and geographic location. A more accurate and refined AEWR methodology will produce an AEWR that more closely approximates actual market conditions, which will, in turn, help protect the wages and working conditions of U.S. workers. Under the Final Rule, the Department will utilize the BLS OES data instead of USDA FLS data.

(h) The Department's Decision To Set Wages for Four Skill Levels

Independent of its decision to use the OES survey to set AEWRs, the Department has decided to take advantage of the OES data feature that allows wage levels for each occupational category in each geographic locale to be set at four skill levels. The Department made this decision for a variety of legal and policy reasons.

First, the Department believes that it is required by statute to supply wages at the four separate skill levels. Section 212(p)(4) of the INA states that ''[w]here the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' Although this provision was enacted in the context of H–1B

reform, it is the only paragraph in Section 212(p) that does not reference any specific immigration programs to which it applies, and there is no legislative history indicating that it was meant to apply only to the H–1B program. Although OES data is being used in this particular instance to set AEWRs, the provision on its face still seems to apply, since the OES is ''a governmental survey to determine the prevailing wage,'' and since the Department has decided to set AEWRs at prevailing wage rates. Thus, the Department believes that it is bound by Section 212(p)(4) to offer four wage levels.

Second, even if the Department were not legally required by Section 212(p)(4), the provision does represent a congressionally approved method for setting prevailing wage rates. The Department uses four wage levels both in the H–1B program, which is limited to skilled workers, and the H–2B program, which primarily serves low-skilled jobs. The Department is thus familiar with the administration of a four-level wage system, and believes that its use in these other programs has proved successful.

Finally, the use of four wage levels that are roughly tied to skills and experience will add further precision to the AEWRs, thus serving the Department's above-discussed objectives. Although the four wage levels are determined arithmetically rather than by surveying the actual skill levels of workers, the resulting wage rates reflect the Department's experience that within occupational categories, workers that are more skilled and more experienced tend to earn higher wages than those that are less skilled and less experienced. This is apparently Congress's experience as well, as it has expressly approved the use of four wage levels when setting prevailing wages.

The CRS Report on the Department's proposal, for example, found that the Level I wage for agricultural equipment operators is above the current AEWR in many areas, and that the Level III and Level IV wages for agricultural equipment operators were generally much higher. CRS Report at 17. The Department believes that more highly skilled and experienced agricultural equipment operators generally are paid higher wages than novice ones, and the wage scale that will be used by the Department thus seems fully appropriate. Indeed, if the Department failed to set higher adverse effect wage rates jobs requiring greater skills and experience, U.S. workers capable of performing such jobs might find their ''true market'' wages undercut by employers' ability to fill the jobs with H–2A workers making merely average wages.

A group of farmworker advocacy organizations, as well as many other commenters, argued that allowing employers to pay wage rates that are below the average for an occupational category will necessarily adversely affect U.S. workers. The purpose of the four-tier wage system, however, is to generate the best approximation possible of the actual prevailing wage rate for jobs requiring various levels of experience or skill. When the required wage rates are accurate, they do not represent a below-average wage rate, but rather represent the wage rate that is prevailing for that particular kind of job. Using a single average wage rate for all jobs performed within a particular occupational category ignores the fact that certain jobs require higher levels of experience and skill, and may adversely affect U.S. workers who are capable of performing such jobs. It is also worth noting that Congress has directed that, when determining prevailing wage rates, the Department should ''provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' Although this Final Rule is actually changing the methodology for determining adverse effect wage rates, the Department's determination to set AEWRs at locally prevailing wage rates makes it fully appropriate to borrow Congress's prescribed prevailing wage rate methodology.

The same commenter objected that the ''proposed methodology for the wage levels is purely an arithmetical formula'' and ''does not relate to skills or experience in agriculture.'' It is true, as the Department has already noted, that the skills-based wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. Congress has explicitly endorsed the use of such an arithmetic approach, however: ''Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the last level.'' INA sec. 212(p)(4). No methodology for determining prevailing wage rates will be perfect, but this methodology is currently used in both the H–1B and the H–2B programs. Moreover, the recent CRS Report that studied the Department's proposal in detail did not conclude that use of the congressionally created arithmetic formula is particularly problematic.

The same commenter argued that the use of four wage levels would be too complicated for the Department to administer. This comment ignores the fact that the Department already administers a four wage level system for the H–1B and H–2B programs.

For purposes of clarity, and in response to comments questioning the application of a four-tiered wage system, the Department has inserted text into the Final Rule specifying how the four H–2A wage levels will be applied. The inserted language is substantially similar to existing provisions establishing the four skill levels for the H–1B and H–2B programs, which most commenters assumed would apply. The four skill levels will afford the Department and employers using the H–2A program the same opportunity that is available under other similar programs administered by the Department to more closely associate the level of skill required for the job opportunity. This skill level precision complements the geographic and occupational specificity of the OES wage estimates. The Department considers the lack of such precision to be a shortcoming of the current AEWR.

There also appeared to be some confusion among some of the commenters who believe the NPRM language allows an employer to choose the level and the wage survey and propose its ''offered wage rate'' to the NPC for approval. That is not the case. After reviewing the employer's request for a wage rate, including job description and skill level, the Department will compare the AEWR, state and federal minimum wage, and piece rate to determine the highest wage applicable to the job opportunity described in the employer's request. The Department will assign the appropriate wage (the offered wage rate) to the employer's job opportunity and that wage must be utilized in recruiting for the position.

(i) Other Considerations Affecting the Department's Decision

Although the changes in wage rates that will result from the Department's decision presumably will make local AEWRs more reflective of actual local labor market conditions, to counteract the potential for wage reductions in some areas, the Department has decided to retain in the Final Rule the NPRM's proposal to use the future (effective July 24, 2009) FLSA minimum wage of $7.25 as the floor for any OES-derived AEWR. This basic wage floor will provide a fundamental protection to both foreign temporary workers and U.S. workers that will ensure that AEWRs cannot be

lower than the new federal minimum wage even though that wage will not be legally required until 2009.

Moreover, even in those instances where the use of OES data may result in lower AEWRs for H–2A workers in the short term as compared to the current AEWR methodology, the Department is confident that the wages and working conditions of U.S. workers will be protected because the total costs of hiring H–2A workers are higher than the hourly AEWR alone reflects, and employers focus not only on wages when making hiring decisions, but on a workers' total cost.[10] The program requirement that employers pay for H–2A workers' transportation and lodging, as well as the administrative expense of filing H–2A applications with several different Government agencies, add substantial additional costs to the employment of H–2A workers. The additional costs beyond wages associated with utilization of foreign labor under the H–2A program are an important consideration that provides significant protection for U.S. workers.[11] It is expected that U.S. workers in similar occupations, with similar skills and working in the same locality, would likely be able to command higher hourly wages than H–2A workers and at least equivalent benefits because the additional cost considerations associated with utilization of the H–2A program provide an economic incentive for employers to seek out and hire U.S. workers instead of H–2A workers.[12] And of course, U.S. workers also have the protection of the rule requiring agricultural employers to first attempt to recruit U.S. workers before they can employ H–2A workers.[13]

A group of farmworker advocacy organizations commented that many employers use piece rates abusively and in a manner that undermines the AEWR. Of course, as the commenter acknowledges, piece rates cannot in and of themselves lead to the payment of sub-standard wages, since § 655.104(l)(2)(i) requires an employer to supplement a piece-rate worker's effective hourly rate of pay to the level of the applicable AEWR if the pay would otherwise be less. This commenter argued that many employers avoid the obligation to supplement by deliberately underreporting the number of hours worked by piece-rate workers during a pay period. Such fraud is already clearly prohibited by the Final Rule, however. The commenter also argued that piece rates are abusive because they ''induce workers to higher levels of productivity'' by providing ''the opportunity to earn more than the worker would earn on an hourly rate.'' The Department does not consider the opportunity to earn average hourly wages that are higher than the AEWR through more industrious work to be abusive; it is an opportunity to earn higher pay, nothing more.[14] If the worker fails to earn enough under the offered piece rate to meet the applicable AEWR, the worker is not penalized for it; to the contrary, as mentioned previously, under such circumstances the worker's pay is required to be supplemented to the level of the AEWR. Of course, if the worker was in fact penalized by the employer in some way for failing to accomplish enough piece rate work, the penalty would effectively convert the piece rate into a productivity standard. Such productivity standards are policed through § 655.104(l)(2)(ii) and (iii) of the Final Rule, however, which require that piece rates be no less than the piece rates prevailing and that productivity standards be normal, meaning that productivity standards may not be unusual for workers performing the same activity in the area of intended employment.

For the reasons discussed above with respect to § 655.105(g) of the Final Rule, the Department has inserted language in this section specifying that employers are required to adhere for the duration of a work contract to the AEWR rate that is in effect at the time recruitment for a position is begun. Newly published AEWRs shall not apply to ongoing contracts, but only to new contracts the recruitment for which is begun after the publication of the new AEWR. The Department has also added a new § 655.108(h) specifying that employers are required to retain NPC wage determinations for a period of three years, which is consistent with the general record keeping provisions of the Final Rule. Other changes to the text of this section in the Final Rule are non-substantive and were made for purposes of clarity.

Section 655.109—Labor Certification Determinations

(a) Section 655.109(b)—Timeframes for Determination

The Department did not propose any changes to the requirement that it issue a determination on an application no later than 30 calendar days before the date of need. An individual employer suggested that certifications should be issued 60 to 90 days before the employer's date of need rather than the 30 days currently required. A State government representative suggested the CO should be required to issue the determination by the earlier of 15 days after receipt of a complete application or 30 days before the date of need to allow USCIS and the State Department more time to process a petition. A professional association suggested no more than 40 days and no less than 30 days before the date of need for issuance of the final determination. An association of growers/producers recommended the timeframes should be simplified and standardized to encourage grower participation. Specifically, it recommended the pre-filing recruitment be conducted 90 days prior to the date of need and approval occur no later than 45 days prior to the date of need.

The requirement that, if an application is timely filed, complete and approvable, or is modified to be approvable within the statutory timeframes, the Department issue a certification no later than 30 days prior to the date of need, is statutory and cannot be changed by regulation. While employers can file earlier in anticipation of their date of need, statutory limitations prevent the Department from requiring employers to file any more than 45 days before their date of need. The Department believes the adjustments made to recruitment and filing timeframes adequately address the issue of filing times. Employers are encouraged to file as early as possible and to take care that their submitted applications are complete to minimize potential delays.

[10] *See* CRS Report at 18.

[11] One commenter pointed out that H–2A workers are also relatively cheaper than U.S. workers in some respects, because employers do not have to pay Social Security or unemployment insurance taxes for H–2A workers. On the whole, however, the substantial costs to house and transport H–2A workers, together with the not insignificant costs of the application process, substantially exceeds these savings, making H–2A workers on the whole more expensive to employ than U.S. workers who are being paid the same wage rates.

[12] U.S. workers hired in response to recruitment required by the H–2A program are entitled to at least the same benefits received as those received by H–2A workers.

[13] A group of farm worker advocacy organizations argued that the AEWR becomes the effective maximum wage for U.S. workers. Available data does not support this assertion, however. Indeed, this same commenter stated that a Pennsylvania tomato farmer paid his workers $16.59 an hour on average, even though the 2008 AEWR in Pennsylvania is only $9.70.

[14] The Department notes that the same opportunity to earn average hourly rates of pay that are above the AEWR must under the Final Rule be offered to U.S. workers before it can be offered to H–2A workers.

(b) Section 655.109(b)—Criteria for Determination

The Department included a provision in the NPRM to outline the criteria upon which a determination is made. As commenters noted, however, the criteria stated in this provision were redundant of other provisions in the regulation. The Department has accordingly revised this provision to eliminate unnecessary duplication within the rule, which could have caused confusion among program applicants.

(1) Labor Disputes—§ 655.109(b)(4)(i)

Two associations of growers commented on the certification criteria in proposed § 655.109(b)(4)(i). These commenters stated that labor disputes in agricultural employment are not covered by the National Labor Relations Act and, therefore, there is no official process for determining the existence of a labor dispute. The proposed language in § 655.109(b)(4)(i) of the NPRM was intended to replicate the language in the current regulations at § 655.103(a), which examines whether the ''specific'' job opportunity for which the employer is requesting H–2A certification is vacant because ''the former occupant'' is on strike or being locked out in the course of a labor dispute. That provision was carefully crafted to bar only certification of the single job opportunity vacated by each particular worker who went on strike or was locked out, and not all jobs requested to be certified. However, proposed § 655.109(b)(4)(i) was in conflict with proposed § 655.105(c). The Department has removed the language in § 655.109 of the NPRM regarding labor disputes because of the redundancy and overlap with the labor dispute provision in § 655.105. As explained in the discussion of § 655.105(c), the Department has also reverted in § 655.105(c) to the language concerning labor disputes that is found in the current regulations. The Department believes these changes adequately address the comments on this provision.

(2) Job Opportunity—§ 655.109(b)(4)(vi)

A professional association commented that the job requirements, combinations of duties, or other factors that may make a specific application unique should be acceptable if justified by business necessity. This association asserted that nothing in the INA requires that a specific employer perform any job in exactly the same way as other employers perform the job. An association of growers/producers agreed and also pointed out that under the proposed provisions a grower using technology not yet considered normal practice could be denied H–2A workers due to its job requirements and/or combination of duties.

As is explained above in the discussion of § 655.104(b), the Department agrees that, as a general matter, employers are in a far better position than the Department to assess what job duties workers at a particular establishment in a particular area can reasonably be required to perform. The Department has therefore altered § 655.104(b) to conform more closely to the language of the statute, and has limited its application to job qualifications. Where a listed job duty serves as a de facto job qualification because the listed duty requires skills or experience that agricultural workers do not typically possess, however, the Department reserves the right under § 655.104(b) to treat the listed job duty as a job qualification, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and recapitulated in the regulations in determining whether the qualification is appropriate. Because § 655.104(b) of the Final Rule contains the Final Rule's restrictions on job duties and job qualifications, § 655.109(b)(4)(vi) of the NPRM has been eliminated as redundant.

(3) Extrinsic Evidence

A group of farmworker advocacy organizations suggested the regulation should be clear that the CO can consider extrinsic evidence in making a final determination. The organization believed the CO should be able to deny certification to an employer who has engaged in violations of employment-related laws whether or not there has been a final finding to that effect and whether or not the employer has previously participated in the H–2A program. The commenter also suggested that if the CO has reason to doubt the accuracy of any of the attestations or assurances, the CO should have the authority to request additional information and the authority to deny the certification. In the same vein, the commenter recommended the regulations should include a process by which the CO will receive and consider supplemental information from SWAs, workers and others.

The Department does not agree that adding explicit language to provide the CO with authority to consider extrinsic evidence is necessary. The Final Rule allows for certification to be based solely on the criteria outlined in § 655.107(a). Adding a process for the provision of extrinsic evidence would create an adversary process for the granting of a benefit, with COs at a loss as to how to evaluate such evidence in the context of the application and unable to evaluate its authenticity, particularly in light of the tight statutory timeframes given to the Department to adjudicate applications. Workers who are affected by an agricultural clearance order have a complete process in 20 CFR Part 658, subpart E (incorporated by reference in § 655.116) through which to submit and obtain resolution of their complaints. Anyone having information bearing upon an H–2A employer may avail themselves of the protections contained within these regulations and all other mechanisms, such as filing a complaint with WHD. Following these procedures will ensure that the Department receives the information in a way in which it can be most useful.

(c) Section 655.109(d)—Accepting Referrals of U.S. Workers

A large association of agricultural employers suggested that the proposed regulations and the Final Determination letter should clarify that the obligation to continue to accept referrals of eligible U.S. workers continues only until the employer has accepted the number of referrals of eligible U.S. workers equal to the number job openings on the *Application for Temporary Employment Certification.* The Department agrees with this statement and has included new language to that effect in § 655.109(d). The Department has also modified the provision to conform to the Final Rule's new definition of the ''end of the recruitment period'' that is set forth in § 655.102(f)(3).

(d) Section 655.109(e)—Denial Letters

A major trade association pointed out the proposed regulation at § 655.109(e) states that if the certification is denied the Final Determination letter will state ''the reasons the application is not accepted for consideration.'' The association commented it was their presumption this language was used inadvertently but asked for clarification if its use was intentional. The Department's use of the language ''not accepted for consideration'' was, in fact, inadvertent. Section 655.109(e) has now been revised to read: ''the reasons certification is denied.'' The Final Rule also clarifies that the Department will send determination letters to employers ''by means normally assuring next-day delivery,'' which may include e-mail or fax.

(e) Sections 655.109(e), (f), and (g)—Appeal Process for Denied and Partial Certifications

The proposed regulation did not explicitly reference appeal procedures in either the Denied Certification (§ 655.109(e)) or Partial Certification (§ 655.109(f)) provisions. Although the proposed ''Administrative review and de novo hearing'' procedures (§ 655.115) do reference a decision by the CO to deny, a major trade association commented that the regulation should be clarified by specifying the appeal procedures in § 655.109. The Department appreciates this comment and has inserted text in paragraphs 655.109(e), 655.109(f), and 655.109(g) stating that the final determination letter will provide the procedures for appeal in either situation. Employers should be aware that, if a partial certification is received, only the period of need or the availability of U.S. workers are at issue and thus subject to appeal.

(f) Partial Certifications—§ 655.109(f)

The proposed regulations contained a provision at § 655.109(f) for partial certifications. The provision stated that ''the CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H–2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.'' Although the current regulations at § 655.106(b)(1) do not contain the phrase ''partial certification,'' they do provide that the Administrator/OFLC shall grant the temporary agricultural labor certification request ''for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available.'' A farmworker/community advocacy organization voiced its concern that the deletion of the language in the current regulation and the addition of language providing for discretionary partial certifications violates the statutory precondition for certification that the employer not have U.S. workers available to fill its job opportunities. This organization expressed the opinion that the new language would allow employers to import more foreign labor than they actually needed.

The Department has retained the provision regarding partial certifications, with one modification. The Department believes that the language describing partial certifications provides more clarity regarding the process of obtaining a certification where the Department determines that fewer workers than were originally requested in the application are required. A lack of available U.S. workers is a necessary precondition to filing an application. Allowing a partial certification covers situations where the employer recruited for a need of X workers, finds sufficient workers to meet only a part of its need, and thus still needs X workers minus the number of workers successfully recruited. An employer who finds sufficient workers to meet its entire need cannot, by statute and this pre-filing recruitment model, receive a certification. The Department retains the authority to reduce the number of positions requested in the event the information contained in the application demonstrates an availability of workers who were eligible and applied for the position. Since a partial certification is issued by subtracting the number of available workers from the total number of workers requested, the Department does not believe this provision will allow employers to import more workers than they actually need. To make it clear that the deduction of able, willing, qualified, and available U.S. workers is non-discretionary, the Department has added language to the provision stating that ''[t]he number of workers certified shall be reduced by one for each referred U.S. worker who is qualified, able, available, and willing.''

A major trade association commented that the proposed provision has no counterpart in the existing regulations and that the Department articulates no rationale for why such a provision is necessary or how it will ensure compliance. The association recommended the provision be deleted from the final regulations. The association also expressed concern that there was no due process for an employer whose application was arbitrarily changed. This association believed the CO should issue a Notice of Deficiency, require the submission of a modification and offer an appeal process.

As explained above, the ability to issue a partial certification is necessary where the Department receives an application with respect to which eligible and qualified U.S. workers have been or are subsequently successfully recruited prior to certification. A modification process is one option the Department considered to address such a situation, but given the likely time frame of filing by employers, a modification would often not be possible. In response to the comment regarding an appeal process, the Department has added language regarding appeal provisions to this provision in the Final Rule.

(g) Proposed § 655.109(g), New § 655.109(h)—Fees for Certified Applications

The Department proposed the following new fee structure: an application fee of $200 for each employer receiving a temporary agricultural labor certification plus $100 for each H–2A worker certified; an application fee of $200 for each employer-member of a joint employer association receiving a certification plus $100 for each H–2A worker certified for that employer-member; and a processing fee of $100 for any amendments accepted for processing plus $100 for each additional H–2A worker certified. The proposal did not set a cap on the amount of fees to be charged as provided in the current regulations. The Department received numerous comments about the proposed fees. Many of the commenters acknowledged that an increase was warranted but strongly objected to the amount of the increase. Several commenters requested a justification for the amount of the increase and further detail regarding the activities and related costs involved in processing since the Department stated in the preamble to the proposed rule that it was updating the fees to align with ''the reasonable costs of processing'' H–2A applications, as authorized by the INA. Also in this context, commenters questioned why the fees would increase to such an extent since the Department was proposing to improve and increase access to the H–2A program. One association of growers/producers recommended that the Department determine a more reasonable processing fee and explore adding to those revenues from another source rather than seeking to recover processing costs through processing fees. A State government agency suggested that fees should be used to fund program costs incurred by the SWA instead of being deposited in the Treasury. Another commenter asserted that under the Treaty of Guadalupe Hidalgo, the application and processing of the application for H–2A temporary workers who are Mexican citizens must be free of charge and, therefore, employers seeking to employ such nonimmigrant workers should not be charged processing fees.

A number of associations of growers/producers, a trade association, and several individual employers commented that the increased fees would add to the cost of an already

expensive program and, if the application process is to become more efficient as proposed, believed a fee increase would be counterproductive. Some commenters stated the increase in fees, when coupled with other increased costs, could drive farmers out of business or dissuade many from participating in the program at all. Another association of growers/producers suggested the fee structure should take into consideration all of the fees growers must pay and suggested a fair compromise would be to reduce the fees for farmers using H–2A workers, ask workers to pay for costs incurred in traveling to the U.S. port of entry closest to the employer, and require the employer to bear the costs from the point of entry to the farm. A trade association also commented that many growers utilize workers for a short period only and that they believed under the proposed regulations a grower's cost for 10 H–2A workers would increase to $10,000 in application fees and the total cost could rise to almost $20,000 before any revenue would be gained through harvesting of the crop.

Several commenters offered specific suggestions for setting the fee amounts. One association of growers/producers suggested that any increase in fees should be tied to the cost of inflation or the consumer price index and not related to the cost of processing. A United States Senator and others stated a doubling of the fees would be acceptable. One individual employer/farmer suggested the fees should remain at current levels. A trade association commented that fees should be based on the number of employers certified rather than the number of applications.

Many commenters specifically requested the inclusion of a cap on the amount of fees and commented that the elimination of a cap might cause participants to abandon the program.

Following consideration of all the comments, the Department has decided to retain the current fee structure rather than that proposed in the NPRM. At this time, the Department believes that it is of utmost importance to increase accessibility to the program and recognizes that the proposed increase in fees could have discouraged both potential new users and current users of the program. Accordingly, the Department has reverted to the current fee structure for both employers and for associations. Moreover, the increased fee would not have helped the program operate more efficiently at this time because the H–2A fees received by the Department are, pursuant to statute, deposited directly in the Treasury as miscellaneous receipts. Any change in that requirement would require a statutory change by Congress.

The Department may, in the future, revisit the fee structure and propose changes in the amount of the processing fees. The Department appreciates the many comments received requesting additional information on the actual costs involved in the processing of applications and finds these requests to be reasonable. Since the Department is changing the program to an attestation-based process, it does not have experience with the actual operation of the program under the new process and, therefore, agrees that it should not revise fees until cost information using the new model is available.

As noted above, the Department has decided to retain the current fee structure, which includes a limit on the fee amount to be paid by one employer. The Department agrees with the commenters and believes a cap on fees paid by an applicant is appropriate and should be included in any future proposal. The failure to include such a cap in this proposal was an oversight.

The Department also received comments on the proposed $100 processing fee for an amendment, coupled with a fee of $100 for each additional H–2A worker certified on the amendment. A trade association noted that amendments to applications can be for many reasons, including increasing the number of workers requested, adjusting the date of need, and making minor technical amendments to the application. It commented further that while it is reasonable to charge the additional certification fee for an amendment to increase the number of workers in order to avoid creating a disincentive for understating the number of workers on the original application, it is not reasonable to charge a fee for other amendments, including minor technical amendments.

The parenthetical phrase ''(except joint employer associations)'' was clarified in the Final Rule by replacing it with ''(except joint employer associations, which shall not be assessed a fee in addition to the fees assessed to the members of the association).''

In keeping with the retention of the current fee structure, no fee for amendments is included in the final regulation.

Section 655.110—Validity and Scope of Temporary Labor Certifications

Several minor, non-substantive changes were made to the language of this provision for purposes of clarity and to conform to other provisions of the Final Rule. All substantive changes to the text of this provision are addressed below.

(a) Scope of Validity—Associations—§ 655.110(c)

The Department made no changes in the proposed regulation regarding certifications provided to associations acting as joint employers. A farmworker/community advocacy organization suggested that the Department should include language currently in the H–2A Program Handbook limiting such applications (and certifications) to those involving ''virtually identical job opportunities.'' The Department declines to adopt this suggestion. The governing statute expressly provides at § 218(d)(1) of the INA for the filing of H–2A applications by associations of agricultural producers, but does not provide a ''virtually identical'' limitation. Individual employers are permitted under the current regulations to offer job opportunities with a variety of non-identical job duties, and the Department has seen no evidence that this has adversely affected U.S. workers.

Section 655.104(b) of the Final Rule limits the job qualifications that employers may impose to those that are normal and accepted qualifications required by non H–2A employers in the same or comparable occupations and crops. Where a combination of job duties or job opportunities serves as a de facto job qualification because the listed duties and opportunities require skills or experience that agricultural workers do not typically possess, the Department reserves the right under § 655.104(b) to treat the listed job duties or job opportunities as job qualifications, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and recapitulated in the regulations. The Department believes that this framework is most consistent with the statute and will adequately protect U.S. workers from adverse effects.

(b) Redetermination of Need—Section 655.110(e)

The proposed regulations omitted the provision in current regulations allowing employers to request an expedited ''redetermination of need'' if a labor certification is denied, or a partial certification is granted, because U.S. workers are available and, subsequent to the denial or partial certification, the U.S. workers identified as available are no longer available. The Department received several comments objecting to the deletion of this provision and requesting its inclusion in

the final regulations. Two commenters pointed out the requirement in Section 218(e) of the INA mandating a new determination within 72 hours in cases of unavailability. A trade association also mentioned that Congress was sufficiently concerned about the failure of domestic workers to report that it included a heavy obligation on the Department to re-establish need. Others commented that the need for a redetermination procedure is even greater since the pre-filing recruitment efforts will put job commitments farther in advance of the dates of need and thereby increase the likelihood of U.S. workers not reporting. A trade association provided data from a farmer to illustrate the need for a process for redetermination and also described a procedure they would like implemented wherein U.S. workers referred by the SWA would be asked to sign a form indicating their intention to return for work on the date of need and to work for the duration of the contract. The goal of this process would be to not have the number of jobs certified be reduced by the total number of referrals but rather by the number of workers who signed the form.

In response to the comments, the Department has included a new section, § 655.110(e), addressing the procedures for requesting a redetermination of need. The Department appreciates the suggestion for an additional requirement for U.S. workers to sign a form stating they will report to work but has determined such a requirement does not appear likely to alleviate the problem of ''no-shows'' among the U.S. worker population the employers seek to address. The Department, therefore, did not add the requirement.

A trade association also posed a question about handling a situation where the employer obtains sufficient commitments from qualified U.S. workers for the job opportunity during the pre-filing recruitment and is precluded from filing an application but subsequently learns that some of these workers will not honor their commitments. Since no application was filed, technically, the employer in this situation would not be able to request a redetermination. The association claimed the Congress clearly did not intend to leave employers without an adequate workforce and stated it is incumbent upon the Department to accommodate employers who are in this situation.

While the Department agrees it is unlikely Congress intended that employers should be left without an adequate workforce, the Department cannot add a provision to allow an employer who does not submit an application due to the availability of able, willing and qualified U.S. workers sufficient to meet their needs, but who subsequently discovers that not all the workers will be able to honor their commitments, to request an expedited redetermination. The Department lacks such authority under the INA; Section 218(e)(2) of the INA only authorizes the Secretary to make such expedited determinations for a certification that was denied in whole or in part because of the availability of qualified workers. However, The Department will permit an employer to file an application requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number of U.S. workers. Such applications must comply with other requirements for H–2A applications to be considered complete and must be supported by a recruitment report, in which case the application will be denied. Such a denial will provide no immediate benefit to the employer, but the employer will thereafter be permitted under the statute and regulations to request an emergency reconsideration of the denial should the U.S. workers fail to show up or later abscond, leaving the employer with a rejuvenated need for H–2A workers. Language to this effect has been added to § 655.107(a) of the Final Rule.

Section 655.111—Required Departure

The Department included language in the NPRM explaining the relationship between the labor certification's validity period and the foreign worker's period of stay in the U.S. and informing employers of their obligation to notify H–2A workers who begin employment with them of the worker's responsibility to register their departure if and when required by the DHS. A trade association questioned the inclusion of this section in the Department's regulations. This association commented that it has no bearing on either the issue of the availability of U.S. workers, or whether the employment of aliens will adversely affect U.S. workers, the two issues which are within the statutory purview of the Department. A professional association commented that the Department's language in the proposed § 655.111 did not allow for transit time for workers after the expiration of the labor certification and was, therefore, in conflict with the USCIS requirements which provide a specified period of time after expiration of the labor certification before departure from the country is required.

The Department believes the provision is useful, as it strikes at the heart of the relationship between the Department's findings and the entry of workers to fulfill the terms of the labor certification. This provision does not usurp any role held under the statute by another agency; it merely emphasizes for the employer its obligation to notify workers to return home at the end of their authorized period of stay. Moreover, the Department does have an interest in ensuring that H–2A workers return to their home country at the end of their authorized work period, as they would otherwise become undocumented workers inside the United States. As described in the discussion of § 655.108, undocumented workers compete with U.S. workers for agricultural job openings without any of the protections associated with the H–2A program applying, and thus are likely to have an adverse effect on the wages and working conditions of U.S. workers.

The Department does agree, however, with the comment regarding the lack of clarity in the language used in the proposed rule. The Department notes that DHS provisions (in current regulations) require the worker be given a period of 10 days of valid status beyond the validity period of the labor certification in which to depart, and has extended that time to 30 days in their recent companion H–2A rulemaking. We have revised the regulation to acknowledge this period granted by DHS, to provide greater certainty for both employer and worker.

Section 655.112—Audits and Referrals

In the NPRM, the Department proposed the initiation of post-certification audits of applications to ensure quality control, to review compliance, and to identify abusers of the program, among other goals. The Department received several comments on these audit provisions.

One commenter felt that there was no policy or legal rationale given by the Department for this new system that includes audits. The Department believes that a sufficient policy rationale for the necessity of audits was provided in the NPRM. Reviewing the documentation attached to and supporting the attestations made by an employer in the context of an H–2A application is an essential element of the shift of the program to an attestation-based certification system. The Department, to protect the basic integrity of the process of H–2A certifications, must ensure the applications are filed in accordance with the basic obligations of the

program. The Department has the authority to enforce program responsibilities with respect to those who seek its benefits, and in particular with respect to those who receive them. The audit provides reassurance to the employer, the Department, and the affected employees that all program obligations are understood and followed.

Another commenter stated that 30 days to respond to the audit request was not enough time during growing season. The Department does not believe that audit requests will be so burdensome that they cannot be complied with relatively quickly as long as the employer has retained the required documentation contemporaneously with performing the required actions, such as keeping the tear sheet of the advertising, and retaining the final recruitment report. To partially address this commenter's concern, however, language has been added to the Final Rule specifying that employers will be provided at least 14 days to comply with an audit request.

A SWA suggested that every application be audited and some SWAs suggested they should participate in audits, and should be provided funds to do so. The Department declines to delegate the audit function to the SWAs. Audits will be conducted by the Department based on the presence or absence of certain criteria, as well as on a random basis to ensure program integrity. Moreover, dispersing audit activity among SWAs, would be at odds with the re-engineering of the H–2A process. SWAs will no longer possess the underlying documentation necessary to adequately evaluate the audit factors that will be built into the new program.

One commenter stated that ''non-program'' participants should not be included in the audit process. The Department believes participation by others in the audit process would be disruptive to program operations and therefore declines to add such a provision in the Final Rule.

A farm worker advocacy organization expressed the belief that the proposed increase in audits and penalties would not adequately address concerns related to worker protections and remarked the penalties would come too late in the process to benefit U.S. workers searching for work.

The Department believes, on the contrary, that the audit process will address concerns about worker protections. The Department will audit applications based on selected criteria as well as on a random basis. Worker protections are at the root of the H–2A program and will provide many of the criteria for audits. In addition, WHD's investigative authority is an additional and comprehensive tool to address these concerns and benefit U.S. workers. U.S. workers, additionally, have at their disposal a complaint system (found in the Job Service Complaint system regulations at 20 CFR 658 *et seq.*) to address complaints arising from agricultural job orders, such as an improper failure to accept a referral. The use of all such tools will help to ensure employer compliance with the requirements of the program.

Another commenter stated that the penalties enumerated will do little to deter abuses and that the Department should consider the complementary tool of civil money penalties for lesser violations found in the audit process. The Department cannot assess civil monetary penalties without statutory authority to do so.

One commenter stated that the enumerated penalties are so severe that farmers could go out of business and that employers should therefore be informed, in detail and in advance, about the methods, criteria and scope on which these audits and potential sanctions will be based. In addition to the explanation of the audit procedures and sanctions already provided in the Rule, the Department will develop materials for employers to assist them in understanding the various aspects of the program, including audits. However, the Department cannot reveal its audit criteria, which must be kept confidential to ensure program integrity.

One commenter suggested that the Department conduct pre-audit inspections of applications and issue a notice of violations so that there is an opportunity to correct mistakes without penalty. The Department will be reviewing applications prior to certification (and thus prior to any potential audit) as part of the approval process, and intends to issue Notices of Deficiency when such correctable deficiencies are found. We cannot, however, complete full audits in the 15 day statutory window the Department is afforded to review and certify applications.

Many commenters expressed skepticism about enforcement, saying the Department's prior enforcement in the H–2A arena has not been as vigorous as they would like. One commenter also doubted the ability of adjudicators to discover fraud and did not believe that sufficient resources existed to accomplish this function.

This Rule introduces new enforcement measures, such as certification revocation, and new grounds for the Department to impose sanctions to more effectively address violations of the terms and conditions of the labor certification. Accordingly, the Department will have greater flexibility than under the current regulation to initiate and impose sanctions. Additionally, the Department has assigned dedicated resources for these enforcement and compliance activities.

Several commenters opined that the rule will not prevent international recruitment system abuses. The Department has little control over international recruitment system abuses unless U.S. employers or their agents are involved. The new rule allows the Department to sanction the U.S. parties involved in abuses.

One commenter believed that the Department should create a new division within ETA to conduct audits and report to the Secretary on the efficacy of the H–2A program. A new division is unnecessary as the audits will be undertaken in connection with OFLC program operations and, as noted above, the Department has assigned additional resources to perform the audit function.

A farm bureau offered a rewrite of § 655.112, believing that audits should only be conducted on the recruitment portion of the application and employers should be told specifically what criteria could lead to an audit. We thank the commenter for its detailed analysis of the audit requirements, but we do not agree with its premise that audits should be limited to the recruitment portion of the application. The Department has been consistent in its refusal to disclose its audit criteria in its foreign labor programs; it cannot disclose these without risking the very integrity of the programs. The Final Rule delineates more clearly which documents employers are required to retain during the document retention period, and any of these documents may be requested during an audit.

Other changes to the language of this provision are minor and non-substantive, and were made for purposes of clarity, to insert cross-references, or to conform to changes made elsewhere in the Final Rule. For example, the reference to auditing of denied applications has been deleted to reflect the decision not to require employers whose applications are denied to retain records, explained in the discussion of § 655.102(c). Similarly, the statement that an employer's obligation to comply with the Department's audit process includes ''providing documentation within the specified time period'' has been deleted as superfluous, as the consequences of

an employer's failure to comply with the audit process are now more explicitly addressed in §§ 655.117 and 655.118.

Section 655.113–H–2A Applications Involving Fraud or Willful Misrepresentation

The NPRM proposed a new § 655.113, creating a process whereby a finding of fraud or willful misrepresentation would result in termination of processing of current applications.

One commenter expressed concern that proposed § 655.113 did not go far enough to give the CO explicit authority to deny an application because of suspected fraud or factual inaccuracy. The commenter suggested that the regulation should set forth a process that allows SWAs, workers, and others to send in information and allow the CO to consider such documentation. The same commenter feared that without a definition of ''possible fraud or willful misrepresentation'' that the Department will only use a criminal standard of guilt and thereby allow many employers who engage in lesser fraud to go unsanctioned. The Department agrees and will define such terms and evidence to be used in policy guidance rather than in the rule itself. The Department declines to permit COs to deny applications based solely on suspicion of wrongdoing. Such an undefined standard fails to put program users on notice of what is expected of them. The CO must articulate the specific criteria the applicant failed to meet and which resulted in the application being denied, as explained in § 655.109(e).

Another commenter believed that it is unfair to put the full burden on the employer for employing undocumented workers if the employer has limited capacity to verify the legality of the worker documents and whether or not they are fraudulent.

The rule is not meant to and will not punish the employer for complying with the requirements in the I–9 form to verify employment eligibility. There is nothing in the Department's regulation that would impose liability on an employer for unknowingly accepting fraudulent documents that appear authentic.

The Department has added language to this provision in the Final Rule clarifying that ''[i]f a certification has been granted, a finding under [§ 655.113(b)] will be cause to revoke the certification.'' Paragraph (b) of the NPRM has been deleted in the Final Rule as unnecessary and redundant.

Section 655.114—Setting Meal Charges; Petition for Higher Meal Charges

In the NPRM, the Department outlined the procedures for employers to petition to charge more than the established amount for meals and for appealing the denial of such a petition. In the Final Rule, the Department has revised the section to more clearly address both the establishment of the annual allowable meal charge amount and the procedures for petitioning for a higher amount. One commenter noted that the allowable amount published in the NPRM was out-of-date. This commenter is correct and the Department has updated the amount in the Final Rule. Another commenter requested that the Department define ''representative pay period'' as used in § 655.114(b). The Department believes that no further definition is necessary since the term ''representative'' is commonly defined to mean ''typical.'' In addition, the header for this section has been changed to indicate both topics that are discussed.

In addition, this section has been revised for clarity in the Final Rule. The language about petitions for higher meal charges has been removed from the first sentence of paragraph (a). All material about petition for higher meal charges is found in paragraph (b). The effective date provision concerning granted petitions for higher meal charges has been separated out and provided its own paragraph in order to enable employers to more easily understand when the higher meal charge applies. The material on the procedures for appealing denied petitions has been moved from proposed paragraph (a) to a new paragraph (c). A new sentence has also been added to the end of paragraph (a) reminding employers that all deductions for meal charges under this provision must comply with the FLSA's recordkeeping requirements, which will become relevant if the deductions bring the employee's hourly wages below the federal minimum wage.

Section 655.115—Administrative Review and De Novo Hearing Before an Administrative Law Judge

The NPRM contained a provision setting out the procedure by which an employer could request a review on the record of a certification denial, including a de novo hearing. The Department received several comments on this section.

One commenter requested that copies of certified case files should be delivered to the employer within two business days. This would require the additional expense for overnight courier service, and the Department declines to adopt such a requirement. The Department also notes that an employer would be expected to already possess copies of all of the relevant documents relating to his application.

The same commenter suggested that the rule be amended to include explicit language that hearings for debarments are available and specify the procedures for them, and state that all relevant documents and other evidentiary material, including exculpatory evidence, must be provided to the employer. The Department has adopted the suggestions of the commenter but has done so outside of § 655.115. Given the severity of debarment and revocation, the short timeframes set forth in § 655.115 are neither necessary nor appropriate for these types of determinations. Accordingly, the Department has addressed the administrative appeals procedures for debarment and revocation in § 655.118 and § 655.117, respectively. Under the Final Rule, debarment decisions are stayed pending the outcome of any requested administrative hearing and subsequent appeals.

Another commenter suggested that workers and their representatives should be allowed to intervene in administrative review proceedings. The Department does not agree that determinations on labor certification applications should be turned into multiparty adversary proceedings, which would likely become unwieldy and time-consuming. Workers and their representatives may file complaints as appropriate in accordance with other provisions in the Final Rule.

One commenter suggested the rule should also specify that the removal of the requirement to answer the notice of complaint in the de novo hearing does not preclude the ALJ from requiring an answer or its equivalent as a matter of discretion or from limiting the discoverability of information. The same commenter believed the rule should specify that the Department bears the burden of proof in the proceedings, because otherwise the employer would effectively be presumed guilty and required to prove its innocence.

The Department does not believe there is any reason to add additional language to the rule, which already states that 29 CFR part 18 governs the rules of procedure. Specifically, 29 CFR 18.1(b) and 18.5(e) cover the ALJ's discretion to request an answer or require discovery. The burden of proof is governed by common law principles in which the moving party has the burden of proof. In this case, the burden

would be on the applicant to provide a complete application in the first instance, and if it is found to be incomplete by the Department's Certifying Officer, then it is the appellant/applicant's burden to prove that it submitted the requisite information. The burden does not shift to the government because it is not the government that is requesting a benefit.

To ensure an expeditious review process, the Final Rule provides that ALJs conducting de novo hearings must schedule such hearings within 5 calendar days, rather than 5 business days, at the employer's request. It further clarifies that new evidence may be introduced at such hearings. Employers will not be prejudiced by this provision, since the expedited scheduling is to be performed only at the appealing employer's request. The Final Rule further provides that ALJs must render decisions within 10 calendar days after a de novo hearing.

Section 655.116—Job Service Complaint System; Enforcement of Work Contracts

The NPRM contained the provision in the current regulations regarding complaints filed through the Job Service Complaint system. Several commenters suggested that site visits be implemented, employer and worker interviews be added, a 24/7 anonymous call-in number be created, and mediation offices (called ''work visa representational offices'' by the commenter) be created where contract disputes can be discussed between the employer and laborer. The Department declines to create such additional measures as a complaint system already exists in the Job Service complaint system found in 20 CFR Part 658, subpart E, and any similar system specific to H–2A agricultural clearance orders or applications would result in the duplication of effort and be a waste of already scarce government resources.

Some commenters believe that this rule is still too onerous, and that the audits and compliance requirements will continue to discourage farmers from using the program. The program is complex due to statutory requirements and historical practice. However, the Department has attempted, in this Final Rule, to simplify the procedures where appropriate while still ensuring program integrity and worker protection. The Department believes that this rule is significantly easier to understand and comply with than its predecessor.

One commenter stated that workers should be punished by being permanently barred from the program if they move to an unauthorized employer or overstay their visa. This is not an issue for the Department, which certifies positions as being available to be filled by H–2A workers. The Department does not control the work status of H–2A workers; that is a function performed by DHS.

Another commenter suggested that a mechanism should be created to pre-certify employers as being in compliance with program requirements and obligations prior to the issuance of the Labor Certification. This is something the Department will consider implementing at a future time, when employers have compiled an established record of compliance with program requirements.

A commenter suggested that the Department institute procedures for workers and their advocates to raise grievances or lodge complaints for Departmental review and expedited resolution. The Department again notes that the Job Service complaint system referenced in § 655.116 and detailed in 20 CFR part 658, subpart E, which handles complaints arising from employer actions, and WHD's authority under 29 CFR part 501, whose provisions include the investigation and prosecution of valid complaints, provide two effective mechanisms for resolving complaints. The commenter also requested that a graduated system of fines be created, allowing a ''learning curve'' for agricultural employers to become more familiar with the H–2A requirements. The Final Rule at 29 CFR 501.19 provides a number of factors that the WHD takes into consideration when assessing CMPs, including the type of violation committed, efforts made in good faith to comply, and the explanation of the person charged with the violation.

Section 655.117—Revocation of Approved Labor Certifications

Several minor, non-substantive changes were made to the language of this provision for purposes of clarity and to conform to other provisions of the Final Rule. All substantive changes made to the text of this provision are addressed below.

(a) Comments Opposing Revocation Because Other Penalties Sufficient

Several employers and employer associations objected to revocation of labor certifications on the grounds that other penalties for non-compliance are sufficient, citing the Department's increase in both the penalties for non-compliance and the bases upon which non-compliance can be asserted, along with the new document retention, audit process, and expanded bases for debarment. Similarly, several commenters cited the Department's existing ability to provide evidence to the DHS supporting the revocation of a petition.

We disagree that the existence of these other penalties makes revocation an unnecessary remedy. The Department's obligation to ensure program integrity is self-evident. The Department's ability to revoke an application is essential to maintaining and enhancing program integrity and a necessary companion to the flexibility of a self-attestation model. The Department should not have to rely on DHS to ensure the integrity of its programs.

(b) Revocation Too Severe a Penalty

Several employers and employer associations objected to revocation of labor certifications because of the negative impact that it would have on an employer's business. A commenter also stated that revocation could effectively result in an employer violating state law in Wyoming, which assertedly prohibits sheepherders from abandoning sheep. Given that revocation is meant to be a sanction against employers who have violated the terms and conditions of the certification or for whom the initial certification is demonstrated to have been unwarranted, it should be no surprise that the employer may face serious consequences as a result. It is in the best interest of the Department to ensure that the integrity of the H–2A labor certification program is upheld. If the granting of a labor certification was not justified, revocation of such certification is a reasonable measure for the Department to take.

(c) Interference With DHS Authority

An association of growers requested that the Department clarify the legal basis for exercising the enforcement of DHS regulations and the rationale for doing so, stating that employers should not have to face two enforcement authorities with different policy objectives enforcing the same regulations. We agree with the commenter's concern that the Department should not be enforcing DHS regulations and accordingly have deleted the reference to 8 CFR 214.2(h)(5) in § 655.117(a)(1).

(d) Grounds for Revocation

(1) Certification Not Justified—§ 655.117(a)(1)

A law firm questioned the Department's authority to revoke a labor certification application under Section 218 of the INA simply because the Department has decided to revisit the

merits of the application, stating that the Department would need authority comparable to that provided in Section 205 of the INA to do so. Additionally, one law firm interprets Section 218(e) to authorize the Department to revoke certifications only in the case of fraud or criminal misconduct. We disagree. Section 218(e) of the INA addresses the authority to revoke a certification and does not specify any limitations on the bases for which such authority may be exercised.

Nevertheless, the Department does agree that it should not revisit the merits of a labor certification determination in the absence of some form of willful misconduct on the part of the employer. Taking this concern into account, as well as the seriousness of revocation as a penalty, the Department has decided to impose a stricter standard on revocation as a penalty based upon the CO's finding that a certification was not justified. Given the immediate and devastating consequences revocation could have on an employer's business, the Department has determined that revocation based on a finding that the certification was not justified at the time it was granted is appropriate only when the employer made a willful misrepresentation on the labor certification application. In such an instance, the employer's willful misconduct has presumably contributed to the Department's initial erroneous determination, making revocation fully appropriate. Accordingly, we have removed ''based on the criteria set forth in the INA'' so that § 655.117(a)(1) now reads ''The CO finds that issuance of the Temporary Agricultural Labor Certification was not justified due to a willful misrepresentation on the application.''

(2) Violation of Terms and Conditions of Labor Certification—§ 655.117(a)(2)

An employer suggested that the employer's violation of the terms and conditions of the labor certification under § 655.117(a)(2) should be qualified with ''knowingly and willfully.'' An association of growers suggested that the revocation could only be exercised when the employer willfully misrepresents a material fact in the application. Similarly, an association of growers suggested that the Department should clarify that technical or good faith violations of the regulation should not result in an enforcement action. After reviewing these comments, the Department agrees that the standard set forth in the NPRM allowing revocation for any violation of an approved temporary agricultural labor certification was too broad. The Department has attempted to address the commenters' concerns by setting forth in greater detail the types of violations warranting revocation. Given the seriousness of revocation as a penalty, and in response to the comments, we added in this Final Rule an intent requirement (''willfully'') with respect to violations of the terms or conditions of the labor certification, and we also added the condition that the violation must be of a material term or condition. We have also listed separately in paragraphs 655.117(a)(2)(ii)—(v) other serious violations which the Department would have few other available remedies to enforce and which may not necessarily involve a willful violation of a material term or condition of the labor certification. These violations include: The failure to cooperate with a DOL investigation into the current certification; the failure to comply with one or more sanctions or remedies imposed by the ESA or one or more decisions or orders of the Secretary or a court order secured by the Secretary resulting from Department-initiated legal action (not private suits) regarding the current certification; and the failure to cure, after notification, a substantial violation of the applicable housing standards regarding the current certification.

A group of farmworker advocacy organizations suggested that the regulations should clarify that a revocation may occur where the employer does not offer the job terms required in the regulations or does not comply with the job terms required in the regulations. Assuming that the employer's actions were willful, we believe that this basis for revocation is already covered by § 655.117(a)(2), since the terms and conditions of the labor certification incorporate the employer attestations set forth in the regulations under § 655.105.

A group of farmworker advocacy organizations suggested that revocation should be utilized when an employer has an active certification and intends to bring additional workers but is unwilling or unable to provide the terms and conditions of the work promised. We believe that the grounds that the commenter cited for revocation are incorporated in § 655.117(a)(2), assuming that the employer's unwillingness or inability to provide the terms and conditions of the work promised manifests itself in the willful violation of a material term or condition of the labor certification.

A group of farmworker advocacy organizations suggested that revocation should be used if a timely audit discovers that U.S. workers had been discouraged or denied employment. Again, we interpret § 655.117(a)(2) to cover such a violation, if willful, since an employer must attest on its labor certification application that any U.S. workers who applied for the job were rejected only for lawful, job-related reasons.

A group of farm worker advocacy organizations suggested that revocation of a current job order should be allowed based on violations of prior job orders. Substantial violations of prior job orders are covered in the debarment section at § 655.118. We believe that debarment is the more appropriate remedy for substantial violations of prior job orders since a revocation is meant to address problems with the existing labor certification.

(3) Referrals From WHD—§ 655.117(a)(3)

A private citizen objected to the inclusion of a recommendation by WHD as a ground for revocation. The Department believes that WHD plays a critical role in upholding the integrity of the labor certification process by enforcing an employer's obligation to provide the wages, benefits, and working conditions required under the terms and conditions of a labor certification. Accordingly, their input in the revocation process would help to protect workers from additional violations or abuse by unscrupulous employers. However, we have clarified that the CO must actually find a violation of sufficient gravity that leads to the recommendation of revocation by WHD and that 29 CFR 501.20 sets forth the grounds under which WHD may recommend revocation, which are nearly identical to ETA's grounds for revocation provided under § 655.117(a)(2). Any WHD recommendation for revocation must be based on violations of the certification in effect at the time of the recommended revocation.

(4) Fraud or Willful Misrepresentation—§ 655.117(a)(4)

The Department has included an additional provision which sets forth the Department's authority to revoke a labor certification based on a finding of fraud or willful misrepresentation in that certification, as provided in §§ 655.112 and 655.113. Section 655.117(a)(4) provides that the Department may revoke a certification if a court or the DHS, or, as a result of an audit, the CO, determines that there was fraud or willful misrepresentation involving the application.

(e) Procedure—§ 655.117(b) and Hearing—§ 655.117(c)

An association of growers suggested that the Notice of Intent to Revoke should include the statement of factual grounds for the alleged basis for revocation. The regulation already provides that the Notice of Intent to Revoke is to contain a detailed statement of the grounds for the proposed revocation and thereby would include the factual grounds for the proposed revocation. Accordingly, we do not believe that it is necessary to change the proposed language of the provision.

One commenter suggested that employers should be able to request a hearing with respect to the Notice of Intent to Revoke. The Department does not believe that a hearing is strictly necessary in all cases, but has added language to § 655.117(a) of the Final Rule specifying that a revocation may only be made ''after notice and opportunity for a hearing (or rebuttal).'' The regulations also allow an employer to file an administrative appeal of a revocation and provides for notice of the opportunity to appeal in the CO's final decision.

While a group of farm worker advocacy organizations expressed concern that a final determination should not be required to revoke a labor certification, the Department received a number of comments from a large number of employers and employer associations objecting to revocation taking effect immediately at the end of the 14-day window for the employer to submit rebuttal evidence, if the employer fails to do so. The commenters cited due process concerns and the devastating and irreversible impact that revocation would have on farms while the matter was being adjudicated. The Department does not agree that allowing the CO's decision to become final if the employer fails to submit rebuttal evidence within 14 days constitutes a violation of due process; an employer should reasonably be able to compile a response to the CO's notice within 14 days.

To address legitimate due process concerns, however, the Department has changed the language in § 655.117(b)(3) to provide that the filing of an administrative appeal stays revocation. Accordingly, an association of growers' suggestion that the effective date of revocation should be one day after the appeal period expires so that the employer would not be required to cease employing the worker while it decides whether to appeal is no longer relevant.

Two commenters expressed concern about the Department's ability to revoke a labor certification on a very broad range of criteria and suggested that the Department provide a standard for the Department's decision to revoke when the employer submits rebuttal evidence. We understand the commenters' concern and have articulated the standard for which the Department may revoke an application when the employer submits rebuttal evidence. Specifically, the regulations have now been revised to provide that the CO must determine that the employer more likely than not meets one or more of the bases for revocation under 655.117(a) in order to revoke the application.

An association of growers suggested extending the employer's rebuttal period from 14 days to 30 days with extensions granted by the CO on a reasonable basis, and if such a request is denied unjustifiably, the denial may be a basis of, or an additional reason for, reversal by the Department. Similarly, an association of growers suggested that employers should be given 14 instead of 10 days to file an administrative appeal. We disagree with the proposal to extend the time period for rebuttal with indefinite extensions by the CO, and particularly the suggestion that the denial of such a request for an extension should be a basis for reversal of the revocation, all of which would unnecessarily delay the revocation process. We also disagree with the proposal to extend the time period for an administrative appeal. We carefully considered what time period would be appropriate for employers to rebut the notice of intent to revoke and to file an administrative appeal. We would not be issuing a notice of intent to revoke if the reason for doing so did not seriously jeopardize the integrity of the H–2A labor certification process. Accordingly, it is imperative for the Department to be able to act quickly, especially if the livelihood of the workers and an employer's ability to plan for its labor needs are at stake. The addition of at least a minimum of 20 days to the process would not only impede the efficiency of the labor certification system but also prolong the period of time for which employers would be subject to uncertainty regarding their labor needs, a concern that was as raised by a commenter. As a result, we are maintaining the proposed rule's 14-day period for rebuttal and 10-day period for filing an administrative appeal.

An association of growers also suggested that the CO should have more than 14 days to reach a final decision—that the CO should in fact have all the time that he or she believes is necessary to reach the best possible decision on the record as it is presented. While we appreciate an association of growers' concern that the Department have a sufficient amount of time to render its decision, 14 days is an adequate amount of time for the Department to consider all the facts at hand to make a decision and to ensure that the revocation proceedings move along in an expeditious manner for the reasons stated in the previous paragraph.

The Department takes very seriously the commenters' concerns about having enough time and opportunity to reach the best decision possible pertaining to revocation. As a result, as discussed in the preamble to § 655.115, given the seriousness of the revocation penalty, the Department is creating a separate appeals process for revocation which allows for greater time for deliberation at the administrative appeals level. Instead of applying the administrative appeals process at § 655.115 to revocation, as provided in the NPRM, we have lengthened the timeframes for hearings, to 15 calendar days after the ALJ's receipt of the ETA case file, and for decisions, to 20 calendar days after the hearing. This appeals process provides the right balance between ensuring that revocation occurs in a timely manner before the expiration of the labor certification, while also providing a sufficient amount of time for deliberation.

Two commenters suggested revising the regulation so that an employer be provided 14 days from the date that it receives the Notice of Intent to Revoke to provide rebuttal evidence instead of from the date of the Notice. Given that the Notice will be sent by means ensuring next day delivery, the employer will essentially have 13 days, which is a reasonable amount of time to provide rebuttal evidence. In addition, because the date the employer actually receives the Notice is virtually impossible to verify, we have decided to retain the date of the Notice as the starting point for the 14 day rebuttal period.

One commenter suggested phasing-in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We do not believe that it is necessary to phase-in such measures. Employers have received notice of, and have had an opportunity to comment on, the measures that the Department has proposed. Employers certainly have had an opportunity to plan for such changes, and we do not believe that providing any additional time for employers to adjust to the new requirements is warranted.

(f) Worker Protections

A group of farm worker advocacy organizations suggested that ETA require employers with open job orders to accept the referral of H–2A workers who are already present in the U.S. and have been affected by revocation, and that ETA should deny job orders to employers who refuse such H–2A workers. We understand the serious toll revocation of a labor certification can take on an employer's workforce—both U.S. and H–2A workers alike—and agree that certain worker protections should be triggered in the event of revocation. We do not agree that the SWAs should be in the business of using taxpayer money to make referrals of temporary foreign workers to open job opportunities. However, we have added a new provision at § 655.117(c) setting forth an employer's obligation to its H–2A workers in the event of revocation. Upon revocation, if the workers have already departed the place of recruitment, the employer will be responsible for reimbursing each worker's inbound transportation and subsistence expenses, outbound transportation expenses unless the worker accepts other H–2A work in the U.S., any payments due to the worker under the three-fourths guarantee, and any other wages, benefits, and working conditions due or owing the worker under the regulations.

(g) Beyond the Scope of the Regulation

We received several comments that were clearly beyond the scope of the revocation provision. Among them were several comments regarding issues that touch upon agencies with responsibility for H–2A issues that have nothing to do with the labor certification process or the enforcement of the obligations and assurances made by employers with respect to H–2A workers.

For example, a group of farmworker advocacy organizations suggested that the Department should establish an MOU with ICE to alert ICE upon revocation that an employer's request for workers has been denied and to heighten inspections of that employer's I–9 forms to ensure that the employer does not attempt to recruit undocumented workers to fill the positions originally designated for H–2A workers. While we understand the concern of the commenter, we do not believe that the regulation is the appropriate place to address the details of the Department's coordination and communication with DHS in the event of revocation.

Section 655.118—Debarment

(a) The Department's Debarment Authority

The Department revised § 655.118(a) of the proposed rule to more closely parallel the language in Section 218 of the INA setting forth the Department's debarment authority. The Department is also clarifying that it interprets the requirement that ''the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer during the previous two-year period substantially violated a material term or condition of the labor certification'' to mean that the Department must notify the employer of the Department's intent to debar no later than two years after the occurrence of the violation (or in the case of a pattern or practice, two years after the occurrence of the most recent violation). The Department's rationale for this interpretation is discussed in greater detail in the Debarment Proceedings (20 CFR 655.118(e)) section of this preamble.

(b) Parties Subject to Debarment—§ 655.118(a)

(1) Successors in Interest

One organization objected to the debarment of an employer's successor in interest, rather than only those entities with a substantial interest in the employer. This commenter expressed concern that because debarment can result in the dissolution of the employer's business, debarring a successor in interest would impede the sale of assets and business to others who are not complicit in the cause of debarment. The Department's primary objective in debarring successors in interest is to prevent persons or firms who were complicit in the cause of debarment from reconstituting themselves as a new entity to take over the debarred employer's business. The final regulation includes a definition of successor in which the culpability of the successor and its agents for the violations resulting in debarment must be considered. This definition will avoid harm to successors that were not culpable in the violations resulting in debarment.

(2) Attorneys and Agents

One commenter suggested that agents of employers should be debarrable as well as employers, given that the substantial violations listed in § 655.118(d) could be committed by either the employer or the employer's agent. Another commenter also expressed concern that agents could not be sanctioned even though they may commit debarrable activities. We agree that agents should be included as debarrable parties if they have committed a substantial violation. To be consistent with the Department's permanent labor certification program, we believe that substantial violations should include acts committed by attorneys of employers and, accordingly, that attorneys of employers be debarrable parties as well. Additionally, the Department would consider an attorney or agent who had knowledge of or had reason to know of the employer's substantial violation to be complicit in the employer's violation and accordingly, should also be subject to debarment.

The preamble to the NPRM expressed the Department's intention to include actions by agents and attorneys of employers as debarrable offenses, and include agents and attorneys as debarrable parties. The regulatory text, however, did not make this clear. Some commenters expressed concern that this language would render attorneys and agents strictly liable for debarrable offenses committed by their employer clients. That was never the Department's intent. To clarify the provision, the Department has broken § 655.118(a) of the NPRM into three paragraphs. New § 655.118(b) specifies that agents and attorneys may only be debarred if they ''participated in, had knowledge of, or had reason to know of, the employer's substantial violation.'' New § 655.118(c) establishes the maximum debarment period of three years, which applies to debarments of employers, attorneys, and agents.

(c) Bases for Debarment—§ 655.118(d)

(1) General Opposition

Several commenters objected to the debarment provision on the grounds that it was too severe a penalty and would discourage participation in the H–2A program. Additionally, another commenter expressed concern that overly circumscribed debarment regulations would continue to impede enforcement by the Department. As discussed in the preamble to the NPRM, the proposed changes to the debarment provision responded to the unnecessarily narrow definition of employer actions warranting debarment in the current regulation, which has hampered effective enforcement of the H–2A program, and is also an important part of the program's shift toward an attestation-based application process. We have carefully considered the comments that we received in response to the NPRM and believe that the debarment provisions in the Final Rule

will uphold the integrity of the H–2A labor certification program without unfairly punishing employers who utilize the program. We believe that ETA debarment authority and WHD's authority to recommend debarment will help to strengthen the Department's efforts to enforce the program regulations.

The Department has reorganized this provision in the Final Rule in order to provide additional clarity to program users. In the NPRM, the bases for debarment were enumerated in § 655.118(b); in the Final Rule they are enumerated in § 655.118(d). The NPRM listed several violations in proposed § 655.118(b)(1) that the Department would consider to be debarrable substantial violations if ''one or more acts of commission or omission on the part of the employer'' could be shown. For reasons discussed below, the Final Rule distinguishes between program violations that do not rise to the level of debarrable substantial violations unless ''a pattern of practice of acts of commission on the part of the employer'' can be shown, which are listed in paragraphs 655.118(d)(1)(i)–(v), and program violations that are subject to some other standard, which are listed in paragraphs 655.118(d)(2)–(6).

Failure to cooperate with a DOL investigation and failure to comply with sanctions, remedies, decisions, and orders issued by the Department were listed as debarrable offenses under § 655.118(b)(1) of the NPRM. Those provisions have been broken out separately in the Final Rule as § 655.118(d)(4) and § 655.118(d)(5), emphasizing that such violations are not subject to § 655.118(d)(1)'s ''pattern or practice'' standard. For reasons described below, a new § 655.118(d)(6) has been added to the rule allowing the Department to debar for ''[a] single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.''

(2) Standards for Debarrable Offenses—Additional Conditions and Clarification, Including Pattern and Practice

Several commenters requested greater clarification of what actions would be subject to debarment and suggested including additional qualifiers or conditions to the various grounds for debarment. Two commenters stated that the listed grounds for debarment seem to empower the Department to debar for actions that merely ''reflect'' unlawful activity, even though the actions might not actually be unlawful. These commenters requested additional clarification as to what sort of activities would result in debarment. We disagree with the commenters' characterization that the listed grounds for debarment do not require a finding that the entity to be debarred engaged in unlawful activity. Mere suspicion of a violation of the law is not sufficient to warrant debarment. Rather, an actual violation would be necessary, in accordance with Section 218 of the INA which authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. In sum, the use of the term ''reflect'' in the Final Rule to describe debarrable ''pattern or practice'' violations in § 655.118(d)(1)(ii)–(v) does not mean that the Department is not required to prove actual underlying program violations.

Several commenters suggested that the Department should require a pattern or practice of substantial violations for debarment. Of particular concern was the prospect of debarment based on the commission of one violation which they alleged would deter participation in the program. Additionally, one of these commenters noted that employers who are less sophisticated in their business practices should be spared from debarment for innocent oversights or mistakes. We agree with commenters' concerns and have qualified the acts set forth under § 655.118(d)(1) with a pattern or practice requirement. However, the Department does not have any available remedy other than debarment to penalize and deter certain program violations, and believes that these violations constitute ''substantial violations'' warranting debarment even without a pattern or practice. These acts are set forth separately in paragraphs 655.118(d)(2)–(6). These include: fraud; the failure to pay the necessary fee in a timely manner; and the failure to cooperate with a DOL investigation or interference with a DOL official performing an investigation, inspection or law enforcement function; the failure to comply with one or more sanctions or remedies imposed by the ESA, or with one or more decisions of the Secretary or court (regarding a Department-initiated lawsuit); and a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

Several commenters requested that the Department clarify and distinguish what activity is debarrable from what activity is subject to other penalties. Many of the activities that would trigger debarment also trigger other penalties. We do not think that it is necessary to draw such a distinction. Generally, a non-willful violation will not be grounds for debarment unless it is part of a pattern or practice. Debarrable offenses are clearly delineated in § 655.118(d) of the Final Rule. Program violations that are subject to other penalties are listed elsewhere in the Final Rule.

(3) ''But Not Limited to''—Proposed § 655.118(b), New § 655.118(d)

Several commenters argued that the language ''but not limited to'' in proposed § 655.118(b)'s list of the available grounds for debarment was overly broad and raised due process concerns, as there would not be sufficient notice of what additional actions would be considered substantial violations. We agree with the commenters' concerns, and given that various grounds for debarment that are specified in the Final Rule, we do not believe that the ''but not limited to'' language is necessary. Accordingly it has been deleted from the regulatory text.

(4) Significant Injury to Wages, Benefits, and Working Conditions—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

An association of growers suggested that the Department clarify that the significant injury to wages, benefits, and working conditions be explicitly linked to the employer's hiring of H–2A workers, which the association interpreted as Congress's concern in establishing the labor certification process. Thus, in the opinion of this commenter, only significant injuries to U.S. workers that would not have occurred but for the hiring of H–2A workers in the occupation would be potentially relevant. We do not read Section 218 of the INA so narrowly. A substantial violation of a material term or condition of the labor certification with respect to the employment of U.S. or non-immigrant workers encompasses more than injuries arising directly from the hiring of H–2A workers. For instance, an employer may engage in a pattern or practice of intentionally paying its workers at a rate below the minimum wage. The debarment of the employer for such a flagrant violation both of the FLSA and the terms and conditions of the labor certification would be warranted under Section 218 of the INA, despite the fact the violation was not strictly dependent on the hiring of H–2A workers.

A group of farm worker advocacy organizations suggested that the Department should have the discretion to deny a certification to an employer who has previously engaged in

violations of employment-related laws, whether or not there has been a final administrative or judicial finding of such violations and whether the employer previously employed H–2A workers or sought to do so. The standard for debarment set forth under Section 218(b)(2)(A) of the INA provides that ''[t]he employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.'' The commenter's suggestion that the employer only need to have engaged in a violation of employment-related laws, regardless of whether there has been a final finding of the violation or whether the employer previously employed H–2A workers clearly goes beyond the Department's statutory authority to debar. Accordingly, the Department declines to debar.

(5) Ten Percent Threshold—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

An association of growers expressed concern that under proposed § 655.118(b)(1)(i), an employer's change in the health or retirement plans or benefits offered to its employees could rise to the level of a debarrable violation, even though the employer is in full compliance with the job order. The Department does not intend to penalize employers who are in compliance with the job order. Rather, the Department intends to apply debarment to acts that are significantly injurious to benefits required to be offered to employees under the H–2A program, as opposed to all benefits, such as health and retirement plans, that an employer may offer to its employees. Accordingly, the Department has added in paragraph (d)(1)(i) of the Final Rule as a qualifier for ''benefits,'' ''required to be offered under the H–2A program.''

Several employers objected to the 10 percent threshold required for a significant injury under proposed § 655.118(b)(1)(i) because it would disproportionately affect small employers—i.e., an action taken against one employee might be enough to trigger a substantial violation against a small employer. A group of farm worker advocacy organizations objected to the figure because it might allow egregious actions to be taken against numbers of employees that don't meet the 10 percent threshold. We recognize the concerns of both the employers and worker advocates and have eliminated the 10 percent threshold and replaced it with ''a significant number.'' Thus, small employers would not be disproportionately affected by this provision. At the same time, the provision makes it possible for a substantial violation to occur even if the injury affects less than 10 percent of employees if the number of affected employees is significant.

(6) Substantial Number of U.S. Workers Similarly Employed—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

Two commenters objected to the language in proposed § 655.118(b)(1)(i) providing for debarment based on actions significantly injuring the wages, benefits, or working conditions of ''a substantial number of U.S. workers similarly employed in the area of intended employment.'' These commenters expressed concern that this language might be read to extend beyond U.S. workers potentially employable in H–2A occupations, which are the workers that the statutory ''adverse effect'' concept is supposed to protect. These commenters believed that this language might allow an employer who fully complied with all program requirements to be debarred based on a finding by an economic expert that the employment of H–2A workers depressed the wages of other employers' similarly employed workers in the area of intended employment. Another commenter also expressed concern that it would be impossible for an employer to know in advance whether its actions would be significantly injurious to such workers. We recognize these concerns. The Department's various program requirements of this Final Rule have been established to protect U.S. workers from adverse effects, and an employer that has complied with all of these program requirements should not be held responsible for any arguable adverse effects that were unforeseen by the Department. The Department has accordingly deleted the reference to ''a substantial number of U.S. workers similarly employed in the area of intended employment'' from § 655.118(d)(1)(i) of the Final Rule.

(7) Significant Failure To Offer Employment to U.S. Workers—Proposed § 655.118(b)(1)(ii), New § 655.118(d)(1)(ii)

A group of farm worker advocacy organizations expressed concern that the use of the term ''significant'' under proposed § 655.118(b)(1)(ii) limits the authority of the Administrator/OFLC to debar an employer who has taken actions injurious to workers or refused to offer jobs to U.S. workers. We believe that any violation by the employer no matter how minor or how egregious should be met with the appropriate penalty. Given the severity of debarment as a penalty for employers, however, the violations constituting the grounds for debarment must be significant. Employer sanctions for violations which do not rise to the level required for debarment are available through other penalties, including civil money penalties.

(8) Failure To Recruit U.S. Workers—Proposed § 655.118(b)(1)(iii), New § 655.118(d)(1)(iii)

An association of growers suggested that the Department clarify that a violation in the form of ''a willful failure to comply with the employer's obligations to recruit domestic workers'' be subject to the following qualifications: (1) That there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed; and (2) such failure is material—that if the employer had done what was required, qualified U.S. workers willing to do the job would have been found. If an employer complies with the recruitment requirements of the Final Rule but fails to recruit U.S. workers due to the fact that such workers are unavailable, that would not violate the regulation. Where, however, an employer has willfully failed to comply with its obligations under the Final Rule to recruit U.S. workers, it may be difficult if not impossible for the Department to prove, after the fact, that workers would have been available if the proper steps had been taken. When an employer has purposely defaulted on its responsibility to recruit U.S. workers, a substantial violation of a material term of the labor certification exists and the debarment criteria are met. The Department therefore declines to adopt this suggested change.

(9) Failure To Comply With the Audit Process—§ 655.118(d)(1)(iv)

The Department has explicitly included in § 655.118(d)(1)(iv) of the Final Rule an additional ground for debarment for a significant failure to comply with the audit process. This potential ground of debarment was expressly stated in § 655.112 of the NPRM, but was inadvertently left out of the debarment provisions.

(10) Outside Area of Intended Employment—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

A law firm questioned how the employment of an H–2A worker outside the area of intended employment would support debarment under Section 218(b) of the INA. As discussed earlier, the statute authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. Section 655.105(b) requires the employer to attest that it is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are no less favorable than those offered to the H–2A workers and are not less than the minimum terms and conditions required under the regulations. Section 655.105(d) requires the employer to attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply for the job opportunity until the end of the recruitment period. Finally, § 655.110(b) limits the scope of validity of a certification to ''the area of intended employment.'' The area of intended employment thus plays a key role in determining the employer's particular obligations with respect to the terms and working conditions offered. An employer would not be able to abide by these attestations if it places its workers outside the area of intended employment and, accordingly, would be committing a substantial violation of a material term and condition of the labor certification with respect to the U.S. and H–2A workers alike.

An association of growers suggested that the Department apply a ''common sense'' interpretation of the regulations, particularly with respect to where a certification describes an area of intended employment which, for example, is within a 25 mile radius of a particular city, but the worker ends up working a field for a new customer that is 27 miles from that city. The Department understands the commenter's concern and expects the CO to exercise the appropriate judgment in the face of such circumstances.

(11) Incidental Work—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

A group of farm worker advocacy organizations supported the inclusion of the employment of H–2A workers in an activity not listed in the job order as a debarrable offense because it would guard against employers that ''have shown a total disregard for the very notion of corresponding employment, and the results are unfair to similarly employed U.S. workers.'' However, several commenters expressed concern that employers whose workers would be performing work that is incidental to the activity listed in the job order could be debarred under proposed § 655.118(b)(1)(vi) for ''the employment of an H–2A worker * * * in an activity not listed in the job order.'' ''Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (*i.e.*, less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought'' is included in the definition of agricultural labor and services at § 655.100(d)(1)(vi). Accordingly, work that is incidental to the particular agricultural labor or services that are listed in the job order would be considered to be part of the activity that is listed in the job order. Contrary to the assertion of some commenters, permitting H–2A workers to engage in incidental activity places those workers in the same position as similarly situated U.S. workers who would be expected to perform incidental agricultural work in addition to any specific tasks for which they may have been hired. The Final Rule therefore notes that the employment of H–2A workers in activities ''minor and incidental to the activity/activities listed in the job order'' does not constitute a program violation.

One commenter also suggested that the regulations should provide a means to modify the job description covered by a temporary agricultural labor certification should a situation arise that requires more than minor incidental work, such as an act of nature requiring structural repairs and/or clean-up, or the temporary incapacity of a worker due to illness or injury who could do other work. The Department agrees with the commenter's concern and believes the concern is adequately addressed by the amendment procedures provided at § 655.107(d)(3) of the Final Rule.

(12) After Expiration of Job Order—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

Although the Department did not receive any comments relating to this issue, the Department has replaced ''after the expiration of the job order and any approved extension'' in § 655.118(d)(1)(v) with ''after the period of employment specified in the job order and any approved extension'' and revised the corresponding heading for greater clarity.

(13) Fees—Proposed § 655.118(b)(2), New § 655.118(d)(2)

Several commenters noted the inclusion of acts of commission or omission that reflect the employer's failure to pay the necessary fee in a timely manner as being too severe a ground for debarment and questioned whether the inclusion of these grounds were within the Department's authority under the INA. The INA authorizes debarment for a substantial violation of a material term or condition of a labor condition application with respect to the employment of domestic or non-immigrant workers. Section 655.109(h) specifically provides that as a condition of the issuance of the labor certification, the employer must pay the processing fee in a timely manner, and § 655.105(m) provides that an employer must attest that all fees associated with processing the temporary labor certification will be processed in a timely manner. Additionally, a law firm objected to the inclusion of an employer's failure to pay the necessary fee in a timely manner because it does not comport with longstanding practice in other existing immigration procedures. However, an employer's failure to pay the necessary fee in a timely manner has been a ground for debarment under the H–2A regulations since July 1987, and the Department does not consider the absence of such a practice in other program areas to constitute a persuasive reason to eliminate it. Accordingly, the Department's retention of this ground for debarment supports the Department's longstanding practice and is necessary for the Department to administer effectively the H–2A labor certification process.

Additionally, a wool growers association was concerned that if the check arrived one day late, then the employer could be debarred under proposed § 655.118(b)(2). We do not read the provision to be that absolute and inflexible. Even though § 655.109(h)(2) provides that fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely, the language of ''timely manner'' provides the Department with some discretion so that a check that arrives on the 31st day would not automatically result in the debarment of the employer. The Department takes seriously its

responsibility to administer the H–2A program in a fair and reasonable manner.

The Department, however, has decided to add the qualifier of ''persistent and prolonged'' for the failure to pay fees in a timely manner in § 655.118(d)(2) to ensure a farmer cannot have a certification revoked for a single instance of a failure to timely pay the fee upon certification. Furthermore, the regulation now provides for the issuance of a deficiency notice to the applicant, allowing for a reasonable opportunity to pay its fees before the issuance of the Notice of Intent to Debar.

(14) Fraud and Material Misrepresentation—Proposed § 655.118(b)(3), New § 655.118(d)(3)

Although no comments were received with respect to this provision, we have simplified the language to eliminate redundant references to fraud and included fraud involving the *Application for Temporary Employment Certification* as a ground for debarment in accordance with § 655.112(d).

(15) Significant Failure To Cooperate With Investigations—Proposed § 655.118(b)(1)(v), New § 655.118(d)(4)

Several commenters objected to the inclusion of acts of commission or omission that reflect action impeding an investigation. Full cooperation with investigations to determine compliance with the terms of the labor certification application and the regulations is essential to the viability of the H–2A program. Accordingly, the labor certification application provides that the employer will cooperate fully with any investigation undertaken pursuant to statute or regulation. Impeding an investigation would therefore qualify as a substantial violation of a material term of the labor certification application.

The Department has revised the language in this provision to clarify that not only impeding an investigation but also a significant failure to cooperate with a DOL investigation would constitute a substantial violation. Accordingly, the Department has replaced ''actions impeding an investigation of an employer'' with ''[a] significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function'' and revised the heading accordingly.

(16) Civil Judgment/Court Orders—Proposed, § 655.118(b)(1)(iv), New § 655.118(d)(5)

A group of farm worker advocacy organizations suggested that an employer's failure to pay or comply with the terms of a civil judgment or court order in favor of any migrant or seasonal agricultural workers or H–2A workers should be an additional ground for debarment and that such debarment should remain indefinitely until an employer has paid all wages due and owing former workers. A group of farm worker advocacy organizations also suggested that at a minimum, the regulations should specify that an employer who has not paid assessed back wages or civil money penalties or complied with an injunction sought by the Department or paid a judgment for employment-related claims should not be permitted to receive a certification.

Several of the grounds for debarment suggested by these commenters reflecting substantial violations are already encompassed by these regulations. The three year time limit on debarment is specified in Section 218(b) of the INA; indefinite debarment is not permitted. Otherwise, the Department declines to interject any claim or remedy sought or any judgment awarded in private litigation into the labor certification process. To assure employers that the heavy sanction of debarment will not be imposed for trivial instances of non-compliance, the Department has clarified in the Final Rule that debarment is applicable only where an employer's non-compliance is ''significant.''

The Department has clarified that the failure ''to comply with one or more decisions or orders of * * * a court'' means that the order must be secured by the Secretary under Section 218 of the INA. Accordingly, the Department has replaced the reference to ''a court'' with ''a court order secured by the Secretary'' in § 655.118(d)(5).

(17) A Single Heinous Act—§ 655.118(d)(6)

As discussed earlier, a group of farm worker advocacy organizations objected to the 10 percent threshold in proposed § 655.118(b)(1)(i) because such a figure might allow egregious actions to be taken against a number of employees that don't meet the 10 percent threshold. The Department agreed and eliminated the 10 percent threshold and replaced it with ''a significant number'' under § 655.118(d)(1)(i). However, in further considering the commenter's concern, the Department decided that it was also necessary to address situations where a single egregious action would constitute a debarrable offense, yet, given the seriousness of debarment as a penalty, ensure that only the most serious violators would be subject to debarment. Accordingly, the Department has included as an additional ground for debarment a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(d) Debarment Proceedings—Proposed § 655.118(c), New § 655.118(e)

(1) Statutory Authority—Requirement for Notice and Hearing

Some commenters expressed concern that the regulations exceeded the statutory grant of authority for debarment provided to the Department under the INA. These commenters questioned whether the regulations were consistent with the statutory requirement that a determination of a violation can only be made after notice and an opportunity for hearing. We believe that the regulations as proposed were consistent with the statutory requirement for notice and an opportunity for a hearing. However, the Department has now included a Notice of Intent to Debar in the procedure to provide an additional opportunity for notice and rebuttal, which is consistent with the procedure under the Department's revocation provision at § 655.117. If the employer fails to rebut the allegations provided in the Notice of Intent to Debar, the Department will issue a Notice of Debarment. The employer may then request a hearing through the administrative appeals process. Accordingly, the regulation's debarment procedures are consistent with the statutory requirement that a determination of a violation be made after notice and an opportunity for hearing. These additional procedures provide even greater due process protections to employers facing debarment.

Additionally, several commenters questioned whether the Department was exceeding its statutory authority under the INA, given that a final determination of the violation would likely not occur until more than two years have passed since the violation. The INA provides that ''(A) the employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. (B) No employer may be denied certification under subpart (A) for more than three years for any violation described in such subparagraph.'' 8 U.S.C. 1188(b)(2).

The statute presents three requirements for denial of a certification. First, the employer must have employed H–2A workers within ''the previous two-year period;'' second, the Secretary must determine, after notice and hearing, that a substantial violation occurred during that two-year period; and third, denial of certification based on a finding of violations may not extend for more than three years. However, the statute does not place a time limit on when the Secretary's must issue a final determination that a substantial violation occurred. While a substantial violation must have occurred within the two-year period, so long as a determination is ultimately made that a violation occurred, a certification may be denied based on that violation. The most reasonable reading of the debarment provision, giving effect to all its language, is that Congress intended the Secretary to initiate an investigation leading to debarment within two years of the alleged violation and, by referring in Section 218(b)(2)(B) of the INA to a maximum three-year period, to permit any eventual debarment action to be for up to three years. The Department's interpretation of this provision was codified in the prior regulations at 20 CFR 655.110(a) and upheld in Matter of Global Horizons Manpower, Inc. and Mordechai Orian, ALJ No. 2005–TAE–00001 (June 16, 2006).

Several farm bureaus and growers' associations suggested that employers be provided with an opportunity to be heard before the issuance of a Notice of Debarment due to the concern that parties opposed to the H–2A program would initiate investigations that are not aimed at improving working conditions but rather seek to end an employer's ability to hire H–2A workers when qualified workers are unavailable. As discussed above, the Department already provides employers with an opportunity to be heard through the rebuttal process and with an opportunity for a hearing through the appeals process, and debarment is stayed upon the administrative appeal by an employer. Having an additional level of hearings would be overly cumbersome and impede the Department's administration of the H–2A program. Based on our experience with the permanent labor certification program, after which the H–2A program's debarment provision was modeled, we have concluded that the procedures set forth in the Final Rule, which provide the employer an opportunity to present rebuttal evidence before a Notice of Debarment is issued and an opportunity to appeal a debarment decision, provide employers sufficient protection against meritless claims.

The Department has also made several minor, non-substantive modifications to the text of this provision in the Final Rule for purposes of clarity.

(2) Timing

Commenters expressed conflicting concerns over the amount of time debarment procedures would entail. Two employer associations expressed concern that because of the length of the process, an employer could face uncertainty as to its debarment status and that the employer's ability to plan for its labor needs would be adversely affected. An association of growers proposed a much more drawn-out procedure starting with a detailed notice of an intent to debar from the Department, a disclosure of the full evidentiary record by the Department, a pre-notice hearing with a minimum of 30 days (with extensions), issuance of a formal notice of debarment by the Department which should include the factual and legal grounds for the intended action, prescribe an effective date that is after the time period for filing a timely appeal, provide at least 14 days to appeal, and administrative appeal by the employer, with the proceedings to be governed by 29 CFR part 18. We have already discussed the reasons we have not included a pre-notice hearing. The Final Rule already requires a Notice of Intent to Debar and a Notice of Debarment, both of which are required to state the reason for the debarment finding, including a detailed explanation of the grounds for the debarment. We believe that the commenters raised a valid point about prescribing an effective date that is after the time period for filing a timely appeal, and we have added to the regulation the requirement that the Notice of Debarment specify that the employer have 30 days from the date the notice is issued to file an administrative appeal before debarment becomes effective. Additionally, as we discussed in the preamble to § 655.115, the Department is creating a separate appeals process for debarment which allows for greater time for deliberation at the administrative appeals level, given the seriousness of debarment as a penalty. Accordingly, we have deleted the reference to § 655.115 as governing administrative appeal rights. Under the Final Rule, a debarred party may request a hearing which would be governed by the procedures set forth at 29 CFR part 18, and administrative law judge decisions are no longer required to be issued within a set period of time. We believe that the procedures set forth in these regulations provide a middle ground between these two sets of concerns by providing a period of time that is both sufficient for thorough consideration of the grounds for debarment and expedient enough so as to allow the Department to debar bad actors before they can cause any additional harm while also minimizing the period of uncertainty for employers in the case of a successful appeal.

(3) Review by the Administrative Review Board

Concerns by the commenters about the seriousness of debarment as a penalty has prompted the Department to include an additional level of Departmental review for debarment decisions. Accordingly, we are providing a debarred party with an opportunity to request a review of the decision of the administrative law judge with the Administrative Review Board (ARB). The procedures for ARB review are nearly identical to those provided at 29 CFR 501.42 through 501.45 for WHD. However, one major difference is that if the ARB fails to issue a final decision within 90 days from the notice granting the petition, the decision of the administrative law judge will be the final decision of the Secretary.

(4) Phasing In/Grace Period

Two commenters suggested phasing in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We have addressed this comment in the preamble discussion of § 655.117, which governs revocation of labor certifications.

(e) Debarment Involving Members of Associations—Proposed § 655.118(d), (e), and (f), New § 655.118(f), (g), and (h)

A group of farm worker advocacy organizations suggested that debarment should also apply to an association and its members' successors in interest so that associations and their principals will not be able to re-constitute themselves and continue business as usual. Because associations and/or their members operate as employers under the various scenarios addressed by the regulations in § 655.118(f), (g), and (h), the successor in interest language for employers in § 655.118(a) would also apply to associations and their members as well. Accordingly, we do not believe that it is necessary to change the language in § 655.118(f), (g), or (h).

Although the Department did not receive any other comments relating to these provisions, the Department has

decided that when a members of an associations or an association acting as a joint employer is disbarred, other members of the association who ''had knowledge of'' or ''had reason to know of'' the violation shall not be subject to debarment unless they participated in the violation. Because Section 218 of the INA requires that the employer substantially violate a material term or condition of the labor certification, an employer that merely had knowledge of, but did not actually participate in, the violation could not be debarred. The Department has never established program obligations requiring members of associations to report violations of other members or of associations that they have ''knowledge of,'' and mere knowledge of another entity's violation does not constitute a debarrable offense. Accordingly, the Department is removing the references to ''had knowledge of'' and ''had reason to know of'' from § 655.118(f) and (g). Where a member of an association both had knowledge of a violation and directly benefitted from that violation, however, the member will be considered to be complicit in the violation.

(f) Protections to Workers of Debarred Employers

A legal services provider suggested that the Department establish a system allowing H–2A workers from a debarred or decertified employer to be transferred to the next available H–2A employer in the state or region to protect these workers from becoming jobless due to enforcement actions against their employer. Because debarment applies only to an employer's ability to obtain future labor certifications, we believe that it is neither necessary nor useful to set up such a system, as a debarred employer would not have any H–2A workers.

(m) Beyond the Scope of the Regulation

Two grower associations suggested that the Department provide technical assistance to employers on complying with the H–2A program through training and a 1–800 hotline on selecting agents. The Department will provide guidance materials and training to the public to help explain how the H–2A program works. The Department does not intend at this time to establish a 1–800 phone number or referral system for selecting agents.

Timeline for Anticipated Training and Education Outreach Initiatives

Commenters suggested that the Department include a timeline for training and education outreach initiatives in the Final Rule and indicate who would be responsible for such training and outreach—the Department or the SWAs. The commenters also provided specific ideas for training and educational materials, including training on how to respond to the threat of litigation; how to respond to audits; how to comply with all program functions; the application process, and how to avoid violations and penalties. There were also requests for training in both English and Spanish.

The Department appreciates the input from commenters and the Office of Foreign Labor Certification will prepare and provide training based on these comments although at this time cannot describe the precise content and timing of such training.

B. Revisions to 29 CFR Part 501

Comments received that discussed whether the commenter was generally in favor of or generally opposed the proposed regulations typically did not differentiate between the proposed changes to 20 CFR part 655, Subpart B and 29 CFR part 501. Comments received on proposed changes in 29 CFR part 501 typically commented on a specific change proposed in this part. These are addressed below.

Section 218(g)(2) of the INA authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties, seeking appropriate injunctive relief, and requiring specific performance of contractual obligations, as may be necessary to ensure employer-compliance with the terms and conditions of employment under this section of the statute. The Secretary has determined that the enforcement of the contractual obligations of employers under the H–2A Program is the responsibility of the Wage and Hour Division (WHD). Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H–2A Program and the amendment of these regulations is part of this proposed rulemaking.

Concurrent with the Department's finalization of the proposed amendments to its regulations in 20 CFR part 655, Subpart B to modernize the certification of temporary employment of nonimmigrant H–2A workers, the Department is finalizing the proposed amendments to its regulations at 29 CFR part 501 regarding enforcement under the H–2A Program.

The changes proposed for enhanced enforcement to complement the modernized certification process, so that workers are appropriately protected when employers fail to meet the requirements of the H–2A Program, are incorporated into this Final Rule. Given the number of changes proposed for 29 CFR part 501 and the number of sections affected by the proposed changes, we have included the entire text of the regulation and not just the sections changed. We note that a number of comments suggested changes but that the existing text of the regulation, which was to remain unchanged, already addressed such issues in the manner raised in the comments. We will discuss comments received and any changes to the regulatory text in the NPRM in response to comments.

Based on comments received and our recognition of the need for clarification, we made changes to the following sections of the proposed rule: Sections 501.0, 501.1, 501.3 through 501.6, 501.8, 501.10, 501.15, 501.16, 501.19 through 501.22, 501.30 through 501.32, 501.41, and 501.42.

The following sections have not been changed from the notice of proposed rulemaking (other than inserting non-substantive references to the Administrative Review Board): Sections 501.2, 501.33, and 501.43 through 501.45.

The following sections were not included in the proposed rule and have not been amended (other than inserting non-substantive references to the Administrative Review Board) since publication in 52 FR 20527, June 1, 1987: Sections 501.7, 501.17, 501.18, 501.34 through 501.40, 501.46, and 501.47.

Nomenclature Changes

The proposed rule made a number of non-substantive nomenclature changes and technical corrections to 29 CFR part 501. These include: reflecting that the INA was amended in 1988 while the current regulations were published in June 1987 and H–2A provisions that were in section 216 are now codified in Section 218 of the INA; changing references from the State Employment Service offices to the SWA; reflecting that appeals from administrative law judge decisions are made to the Department's Administrative Review Board; and replacing in some sections references to the Secretary with references to the Administrative Review Board.

Section 501.0 Introduction

Language was added to the proposed introduction § 501.0 to update the reference to Section 218 of the Immigration and Nationality Act (INA) and provide that corresponding employment only includes U.S. workers who are newly hired by employers

participating in the H–2A Program. Two commenters disagreed with this change. One found the Department's argument for removing U.S. farm workers who are not newly hired from the protection of the H–2A provisions unpersuasive. The other noted that, while the Department justifies these changes by noting situations where H–2A workers are paid more than similarly employed U.S. workers will arise very rarely, if ever, in practice, the fact that an irrational result arises only rarely does not serve as a justification for ever allowing it to occur and requested the Department to withdraw this proposed change. As we stated in the preamble to the proposed rule, the INA only requires that the employment of the alien in such labor or services not adversely affect the wages and working conditions of workers in the United States similarly employed. Where an employee has agreed to work at a certain wage, and begins to receive that wage prior to the time an employer has hired an H–2A worker, the subsequent hiring and payment of the H–2A worker at a rate that is higher than the wage received by the U.S. worker will not adversely affect the wages and working conditions of the U.S. worker—rather, the U.S. worker will be paid precisely what he or she would have had the H–2A worker not been hired at all. As such, the Department lacks the authority to require that H–2A employers pay existing workers the rates paid to subsequently hired H–2A workers. The Department has clarified in the Final Rule that the phrase ''in the occupations'' in proposed § 501.0 means ''workers in the same occupations as the H–workers.''

One commenter proposed that the definition of ''corresponding employment'' be clarified to exclude those persons who may be willing to work limited hours or fewer days than those for which full-time workers are sought under an H–2A job order. These regulations are applicable to the employment of U.S. workers newly hired by employers of H–2A workers in the same occupations during the period of time set forth in the labor certification approved by ETA. These workers are engaged in corresponding employment. Any U.S. worker who is hired in corresponding employment must receive the benefits and protections outlined in the H–2A job order, the work contract, and the applicable regulations. Consequently, an employee who is hired to perform any work covered by the job order during the contract period is entitled to all the material terms and conditions of the job order or work contract for the corresponding employment, but not for any time spent in work not covered by the job order or work contract. If part-time workers are engaged in corresponding employment, they are entitled to the same rights as the H–2A workers, including payment of the AEWR (or highest applicable H–2A-required rate). The H–2A record keeping requirements mandate the recording of all hours offered. Hours offered but not worked by a part-time employee would count towards the employer's three-fourths guarantee obligation. Some minor, non-substantive changes were made to the language of this provision for purposes of clarity.

Section 501.1 Purpose and Scope

One commenter suggested that the Wage and Hour Division does not need to be an enforcement authority in connection with the H–2A Program. As discussed above, the Secretary determined that the enforcement of the contractual obligations of employers under the H–2A Program is the responsibility of the WHD and there is no clear rationale for discontinuing WHD's responsibilities.

This section in the regulations previously listed as an ETA responsibility determining whether employment had been offered to U.S. workers for up to 50 percent of the contract period. The proposed rule requested comments on this requirement and proposed eliminating the 50 percent rule and replacing it with expanded, up-front recruitment requirements. In the final rule in 20 CFR part 655, Subpart B, the requirement will now be whether employment has been offered to U.S. workers until the end of the recruitment period specified in § 655.102(f)(3), a change that is more fully discussed in the preamble to the final rule for 20 CFR part 655, Subpart B. The language regarding this requirement in the Final Rule has been modified accordingly. Language in this section also clarifies the WHD's role when U.S. workers are laid off or displaced, in light of § 501.19(e) discussing WHD's authority to assess civil money penalties for violations of these requirements. Also, a commenter noted that the statutory language indicated that the Secretary was authorized to take action as described in § 501.1(c) and the language has been changed to reflect the statute.

One commenter suggested that the proposed language for § 501.1(c)(2) could be interpreted as disjunctive. The comment contends that clarifying language would deter violations by preventing employers from shifting liability to other entities and ensure workers' access to a meaningful recovery from either a FLC (see § 501.10 definitions for H–2A Labor Contractor (H–2ALC) definition) or its bond insurer. Accordingly, § 501.1(c)(2) includes the term ''and/or'' to demonstrate the liability of H–2ALCs as well as their surety for violations of the H–2A rules and regulations. This change is intended to clarify the surety's and the H–2ALC's liability and to provide an additional means of wage recovery.

The language of this provision has also been modified to conform to changes that have been made in § 501.20 of the Final Rule to WHD's debarment authority. The Final Rule provides that WHD may ''recommend * * * debarment from future certifications,'' as WHD will not have authority under the Final Rule to itself debar from certifications.

Section 501.2 Coordination of Intake Between DOL Agencies

The proposed rule clarified the procedure for addressing contractual H–2A labor complaints filed with either the ETA or any State Workforce Agency (SWA). Such complaints will be forwarded to the WHD office of the Department and will be administratively addressed as provided in these regulations. No changes have been made to § 501.2 in the Final Rule.

Section 501.3 Discrimination

Proposed § 501.3(b) added two provisions to the existing regulation prohibiting discrimination against persons exercising rights under the H–2A statute. The section modified the debarment remedy to conform to proposed § 501.20, which provided the WHD with authority to debar violators under certain conditions. The section also added language codifying the existing procedure for forwarding complaints based on citizenship or immigration status to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices. Under this procedure, complaints based on citizenship or immigration status are forwarded to the Department of Justice, while aspects of the complaints which allege a violation of this section, or any other portion of the H–2A statute or regulations, are investigated by the WHD.

The Department received four comments on § 501.3. One private citizen stated that guest workers should be protected from discrimination on the same terms as U.S. workers. One non-profit legal aid firm stated that H–2A

employers have a reputation for mistreating U.S. farm workers and urged the Department to closely monitor hiring and employment practices and severely penalize employers who discriminate against U.S. workers.

One agricultural organization stated that the Department has not explained the legal basis for this authority or the proposed new procedures for handling discrimination claims. The agricultural organization also stated that Congressional intent is contrary to the Department's assertion of broad authority over undefined forms of discrimination with an uncapped make whole remedy.

The final regulation does not contain new procedures for the investigation of discrimination complaints. As part of the *Application for Temporary Employment Certification,* an employer attests that it will not discriminate against persons who exercise their rights under the H–2A statute and regulations. Authority for the current regulation is found in Section 218(g)(2) of the INA which authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure employer compliance with terms and conditions of employment.

The agricultural organization further stated that employment discrimination claims should be handled by the Equal Employment Opportunity Commission (EEOC). On the other hand, one farm worker advocacy organization argued that the Office of Special Counsel (OSC) has no statutory authority to enforce the rights of long-term, lawful permanent residents. This commenter proposed that § 501.3 should be modified to empower the WHD to investigate and prosecute complaints of discrimination on all unlawful grounds, including citizenship or immigrant status.

The Department has clarified the final regulation to make clear that the WHD will continue to investigate all alleged violations of the H–2A statute and regulations, and forward complaints of citizenship and immigration status, which it lacks authority to enforce, to the Department of Justice. Similarly, discrimination claims subject to EEOC jurisdiction will be forwarded to that agency. As noted above, where the same operative facts that support an allegation of citizenship discrimination or any other type of discrimination also support a claim of discrimination under the H–2A statute and regulations, which generally relate to retaliation for exercising rights under the program, the WHD will investigate the claim of discrimination under the H–2A statute and regulations and refer the claim of citizenship or other discrimination to the Department of Justice or to any other appropriate agency.

The language of this provision has been modified to conform to the changes made in § 501.20 of the Final Rule to WHD's debarment authority. The Final Rule provides that WHD ''may recommend to ETA debarment of any such violator from future labor certification,'' rather than stating that WHD ''may initiate action to debar any such violator from future labor certification.''

Section 501.3(a)(5) of the Final Rule provides, consistent with the proposed rule, that an employer may not retaliate or discriminate against an employee who has consulted with an attorney or an employee of a legal assistance program. This provision does not, however, provide employees license to aid or abet trespassing on an employer's property, including by persons offering advocacy or legal assistance. No matter how laudable the intent of those offering advocacy or legal services, an employee does not have the legal right to grant others access to the private property of an employer. A farm owner is entitled to discipline employees who actively aid and abet those who engage in illegal activity such as trespassing. Absent any evidence of a workers' actively aiding or abetting such activity, however, an employer's adverse action against an employee in response to that employee meeting with a representative of an advocacy or legal services organization, particularly on the worker's own time and not on the employer's property, would be viewed as retaliation.

Section 501.4 Waiver of Rights Prohibited

Proposed § 501.4 proposed a change to the existing regulation to conform to the modified definition of corresponding employment in § 501.0 and to remove language that was not necessary to the meaning or interpretation of the regulation. No other change was intended. The final regulation adds language that was included in the prior regulation to make clear that the prohibition on the waiver of rights does not prevent agreements to settle private litigation.

An agricultural organization expressed concern that this provision prohibits anyone from seeking a waiver of rights and recommended that the Department clarify that this does not preclude offering a settlement, proposing a waiver or general release, or informally resolving disputes in the workplace. As noted above, the Department has included language from the current regulation stating that agreements to settle private litigation are not prohibited. In other contexts employees may not waive statutory or regulatory rights.

Section 501.5 Investigation Authority of Secretary

This section reflects a change from the proposed rule to reflect that WHD will recommend debarment to ETA. *See* 29 CFR 501.20. In addition, the proposed rule provided that sanctions may be imposed on any employer that does not cooperate with an H–2A investigation. One commenter stated that the proposed rule changed the broader term *person* to *employer* and recommended the use of the prior language. The term *employer* is used to conform to the statutory language. To be consistent with language used elsewhere in the part and in 20 CFR 655 Subpart B, this section now includes the employer's attorney or agent.

Section 501.6 Cooperation With DOL Officials

The proposed changes to § 501.6 were intended to ensure that DOL officials receive cooperation from employers participating in the H–2A Program in conducting audits, investigations, and other enforcement procedures intended to ensure the efficiency and effectiveness of the Program and included language specifically addressing WHD's authority to debar under the H–2A Program. The regulation was changed to reflect the fact that WHD will make debarment recommendations to ETA and has been clarified to require all persons to cooperate with investigations so that a failure to cooperate, which encompasses interference with an investigation, would warrant appropriate action by WHD.

Section 501.8 Surety Bond

In order to assure compliance with the H–2A labor provisions and to ensure the safety and security of workers under the H–2A Program, proposed § 501.8 requires all H–2ALCs seeking H–2A labor certification to obtain a surety bond for $10,000, where the H–2ALC employs fewer than 50 employees, or for $20,000, where the H–2ALC's employees number 50 or more. The purpose of § 501.8 is to ensure that workers employed under the H–2A Program receive all wages and benefits owed to them by an H–2ALC who is found to have violated the provisions of the H–2A Program during the period for which it was certified. Rather than requiring H–2ALC applicants to remit

the bonds directly to the Department, however, proposed § 501.8 requires that the H–2ALC attest to having obtained the required bond and to provide the specific bond and bonding company information in conjunction with the H–2A certification application.

The proposed requirement for a surety bond from H–2ALCs was met with approval from two commenters. A worker advocacy organization suggested that the Department consider other associated worker costs in addition to the number of employees to compute the amount of the bond that the H–2ALC would have to obtain.

Other commenters disagreed with the surety bond requirement. An agricultural organization that disagreed with § 501.8, as it was proposed, argued that the surety bonds will not be financially feasible for any but the largest H–2A contractors. It contends that such bonds are not only financially constrictive but are also difficult to obtain in the bond underwriting market. The Department notes, however, that several states, including California, Illinois, Oregon, and Idaho, have adopted similar state regulations requiring comparable surety bond amounts from employers and labor contractors without causing any significant impediments to employers and agricultural labor contractors. The Final Rule has been modified in response to these comments, however, to create a smaller bonding requirement of $5,000 for small H–2ALCs with fewer than 25 employees.

Several commenters argued that the Department's ability to increase the bond amounts based only on its discretion is unreasonable and is outside the scope of the Department's authority. Instead, they suggest that the regulation provide more objective criteria for setting the bond levels instead of relying solely on the discretion of the Secretary of Labor.

The Department has determined that it has the authority, where warranted by the circumstances and supported by objective criteria, to require that an H–2ALC obtain an increase in a bond amount if it is deemed necessary to effectuate the purposes of ensuring that the H–2ALC comply with the requirements and obligations of the H–2A Program. A clarification that objective criteria are required to support an increase in the bond amount has been added to the Final Rule. The due process rights of H–2ALCs are further preserved through the H–2ALC's right to request a hearing pursuant to § 501.33 regarding the Department's determination that the amount of a bond is to be increased in order to be allowed to participate in the H–2A Program. By reviewing the historic bonding requirements in conjunction with worker claims, the Department preserves the discretionary authority needed to ensure that the obligations owed by the H–2ALCs to workers employed under the H–2A program are fulfilled, including wages paid, and to ensure that the protections offered to those workers by the H–2A Program are maintained.

Section 501.10 Definitions

Section 501.10 incorporates the definitions listed in 20 CFR part 655, Subpart B that pertain to 29 CFR part 501. The discussion of definitions that are common to both 20 CFR 655.100 and 29 CFR 501.10 can be found in the preamble for 20 CFR 655, Subpart B above. Several changes were made to the definitions in § 501.10 to conform to changes to the definitions in 20 CFR 655, Subpart B.

As noted in two comments, the definition of *employ* in proposed 29 CFR 501.10 was defined as *to suffer or permit to work,* whereas the terms *employer* and *employee* were defined in terms of the common law test. Since the two concepts are different and the use of *suffer or permit to work* is precluded by the Supreme Court opinion in *Nationwide Mutual Ins.* v. *Darden,* 503 U.S. 318, 322–323 (1992), the reference to suffer or permit to work has been removed.

The definition of work contract has been updated to reflect language used in the proposed changes to 20 CFR part 655, Subpart B.

The proposal, like the Final Rule, utilized the term *successor in interest* in § 501.20. A definition of the term has therefore been added to the Final Rule.

Section 501.15 Enforcement

This section updated references to Section 218 of the INA and changed language addressing corresponding employment. Minor, non-substantive changes have been made to the language of the provision in the Final Rule for purposes of clarity and to update cross-references.

Section 501.16 Sanctions and Remedies

The proposed rule modified the current language to conform to the proposed regulation at § 501.20, which provided authority to the WHD to debar violators under certain circumstances and to conform to the bonding requirements in 20 CFR part 655, Subpart B.

A farm worker advocacy organization comments that the proposed rule can be read to restrict payment of back wages to fixed-site employers in the event that a joint employment relationship exists between a fixed-site employer and an H–2ALC. Since it is the Department's intent to hold both employers in a joint employment relationship liable for back wages, the regulation has been clarified to make that point plain.

The farm worker advocacy organization also commented that the distinction between the WHD's jurisdiction to debar and the ETA's jurisdiction to debar is unclear, and expressed concern that some violations that may merit debarment would not be acted upon. The commenter suggested that debarment authority be concurrent to assure that all appropriate allegations would be addressed. After careful consideration of this alternative, the Department has determined that WHD will make debarment recommendations to ETA. See preamble to § 501.20. The Final Rule has been modified accordingly. Because debarment is addressed explicitly in § 655.118, and because recommendations of debarment are addressed explicitly in § 501.20, the language from § 501.16 of the NPRM has been deleted to avoid potential confusion.

The rule has also been clarified to make explicit that back wages may be assessed in the event a U.S. worker is adversely affected by a layoff or displacement. This clarification conforms the regulation to the provisions of the proposed civil money penalty and debarment regulations which provide for penalties in the event a U.S. worker is adversely affected by a layoff or displacement. Assessment of back wages in the event of a layoff or displacement that is prohibited by these regulations will help to ensure that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed. While the authority to assess back wages is already provided in the proposed regulation, the clarification is useful in light of the explicit penalty provisions in §§ 501.19 and 501.20.

Finally, the final rule modifies § 501.16 to make clear that injunctions may be sought to reinstate U.S. workers who are laid off or displaced in violation of the attestation provision found at § 655.105(j), where the Administrator/WHD has found a violation and the employer has refused reinstatement.

Section 501.19 Civil Money Penalty Assessment

Section 218(g)(2) of the INA authorizes the Secretary to set

appropriate penalties to assure compliance with the terms and conditions of employment under the H–2A statute. Proposed § 501.19 increased the maximum civil money penalties from the current maximum of $1,000 per violation. Section 501.19(c)(1) proposed an increase to a maximum penalty to $5,000 per worker for a willful failure to meet a condition of the work contract or for discrimination against a U.S. or H–2A worker who filed a complaint, has testified or is about to testify, or has exercised or asserted a protected right. Section 501.19(d) proposed a change to the maximum penalty for interference with a WHD investigation to $5,000 per investigation. Section 501.19(e) proposed an increase to $15,000 for the maximum penalty for a willful failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's application, or during the period of 75 days preceding such period of employment. Section 501.19(c)(2) proposed a new penalty of up to $50,000 per worker for a violation of an applicable housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker. The section also proposed a new penalty of up to $100,000 per worker where the violation of a safety and health provision involving death or serious injury is repeated or willful.

Three worker advocacy organizations and a U.S. Senator supported the Department's proposal to increase the amount of fines and penalties for noncompliance with H–2A rules. One commenter stated that enhanced enforcement activities are key to an effective attestation-based application program and encouraged the Department to utilize all fines levied for noncompliance to further enhance enforcement measures. Similarly, one worker advocacy organization stated that the increased money penalties are welcomed and may have some tangible deterrent effect; however, it did not think they were adequate to achieve meaningful assurance of employer compliance.

Fourteen commenters opposed the proposed increases in penalties and fines, arguing that the increases are excessive. Six commenters argued that the excessive increases in fines and penalties would discourage employers, especially new employers, from using the H–2A Program. Some agricultural organizations raised concerns that the increased penalties would deter employers from participating in the program out of fear that excessive penalties could end a business. Similarly, some agricultural organizations argued that the increased penalties are excessive given the complicated nature of the program and the likelihood of an inadvertent mistake on the part of the employer that could prove to be financially disastrous. One farm labor contractor argued that the fines are unnecessary since employers strive to treat all workers fairly and attempt to follow the rules.

Some commenters suggested that the Department not assess a $5,000 civil money penalty against employers new to the H–2A Program and the certification requirements. While one commenter endorsed and encouraged the Department's ability to utilize all fines and penalties for noncompliance with the H–2A rules, he raised some concern that the proposal does not provide any leeway to new users of the program. The commenter recommended a graduated system of fines to allow for a learning curve for new users. Similarly, one agricultural organization suggested that the civil money penalties be graduated for the first, second, and third offenses to allow for a learning curve due to the complexity of the program.

Initially, it should be noted that the current regulation at 29 CFR 501.19(c) provides penalties in the maximum amount of $1,000 for *each act* of discrimination or interference. While the Final Rule will result in increased penalties in some cases, it will also limit penalties for discrimination to $5,000 per worker and penalties for failure to cooperate to $5,000 *per investigation*, creating new caps for these penalties. The Department has revised 29 CFR 501.19(d) to cover a ''failure to cooperate with an investigation'' so that the language of the violation is consistent with §§ 501.6, 501.20, and 501.21.

The Department does not believe that higher penalties, where applicable, will prevent employers from participating in the H–2A Program. Rather, the Department agrees with this commenter that enhanced enforcement activities are key to an effective attestation-based application program and will assist the Department in enforcing worker protections. The higher penalties are an important and effective deterrent against violators who disregard their obligations under the attestation program and/or who discriminate against workers.

It is worth noting that some commenters believe that the penalties are excessive, while others claim they are inadequate. The Department believes that the general penalties of no more than $1,000 for each violation, and $5,000 for each willful failure to meet a covered condition of the work contract or for willful discrimination, are fully appropriate, and those penalties have been left unchanged in the Final Rule. To clear up ambiguities in the proposed rule, however, the Department has inserted clarifying language specifying how it is that the existence of separate violations subject to those penalties will be determined.

While the new sections increase the amount of the penalties that the Department may seek for some violations, they do not modify or change in any way the relevant factors that the Administrator/WHD will use in determining the amount of the penalty as listed in the prior rule. The Administrator/WHD will not seek the maximum amount for every violation. Rather, the Administrator/WHD will continue to evaluate the relevant factors listed in § 501.19(b), and the totality of the circumstances, when determining the amount of the penalty. The factors that will be considered include, but are not limited to, the previous history of violation(s) of the H–2A provisions of the Act and the regulations; the number of H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation(s); the gravity of the violation(s); efforts made in good faith to comply with the H–2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act; and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker. The phrase ''H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment'' has been substituted for the phrase ''workers'' in § 501.19(b)(2) of the current regulation to clarify the scope of potentially impacted workers that the Department will examine in determining an appropriate penalty, and to make clear that workers will not be considered unless they were sufficiently proximate to the violation in question that the Department can fairly consider the workers to have suffered a direct adverse effect. These criteria assure that excessive penalties will not be assessed and that penalties will be appropriately tailored when minor or inadvertent violations are committed.

As previously noted, the Department's proposal also allows the Administrator/WHD to seek higher civil money penalties for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department has corrected a typographical error in § 501.19(c)(3), which inadvertently stated that ''[f]or purposes of paragraph (c)(3) of this section, the term *serious injury* means.'' The proposed section should have referenced paragraph (c)(2).

One agricultural organization supported increased prosecution of repeat or flagrant violators of the H–2A Program instead of implementing excessive fines for inadvertent violations. Some commenters disagreed with the $50,000 penalty per worker for these violations, and one agricultural organization opposed additional penalties of $50,000, and $100,000 for violations that result in injury and death. These commenters expressed concerns that in some circumstances an employer could have no reasonable means of knowing about housing or transportation defects or an employee's misbehavior or carelessness that could lead to serious injury or death. One agricultural organization argued that these penalty increases would not reduce accidents but would rather deter employers from participating in the H–2A Program.

The Department is sensitive to the fact that the proposed penalties represent increases of up to 100 times the current maximum penalty amount. Nevertheless, the Department believes that the current penalties are grossly inadequate to address serious program violations that kill or seriously injure workers. In light of the concerns expressed, however, and to better tailor the proposed very substantial penalties to the employer's actual level of culpability, the Department has modified the penalties in the Final Rule. The Final Rule provides that ''[f]or a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed $25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed $100,000 per worker.''

The Department also notes in response to these commenters that the Administrator/WHD will not seek the full amount in every circumstance. The Department will continue to evaluate the relevant factors listed in § 501.19(b), and the totality of the circumstances, to determine the civil money penalty assessment for these violations. For instance, the gravity of the violation(s); efforts made in good faith to comply with the H–2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker will be considered by the Department in determining the civil money penalty assessment against an employer for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department believes that evaluating these relevant factors, along with the totality of the circumstances, should alleviate the commenter's concerns that excessive penalties will be assessed for inadvertent violations. Furthermore, one commenter expressed concern that serious injury is not further defined. It is the Department's view that § 501.19(c)(3), which defines serious injury as the permanent loss or substantial impairment of the senses, function of a bodily member, organ, or mental faculty, or the loss of movement of a body part, is sufficient to put employers on notice as to the types of injuries that the Department will consider when assessing a penalty.

One agricultural organization stated that penalties are not the proper deterrent to stop safety violations because they are imposed after an accident and recommended greater emphasis on preventing accidents. Similarly, two agricultural organizations requested a specified time period for employers to correct violations before penalties would be assessed. One agricultural organization stated that employers who make good faith efforts to comply with the revised H–2A Program should be allowed a 60 day compliance period to correct the error without the assessment of fines and penalties.

While the Department recognizes the need to prevent accidents before they happen, the Department believes that the burden to do so should rest with the employer who has attested that the housing and/or transportation provided to the workers meets all applicable requirements. Furthermore, the ability to assess a civil money penalty where violations have been found will serve as an important incentive for employers to ensure that the housing and transportation that they provide are safe to the H–2A and U.S. workers and meet all applicable safety and health requirements. The Department does not believe that a 60 day compliance period after a violation has been discovered would ensure that employers fulfill their obligations to provide safe housing and transportation. Rather, the 60 day compliance period would not be an effective deterrent for employers who might not cure safety violations until discovered by the Department.

One law firm argued that, to the extent that the Department contemplates issuing fines for violations of other laws, such as the Occupational Safety and Health Act or Fair Labor Standards Act, those fines would be duplicative and not authorized by law. The law firm also argued that there is no justifiable basis for treating H–2A employers more harshly than non-H–2A employers for violations of the same statute, but even if special treatment for violations of other laws by H–2A employers could be justified, any enhanced enforcement through heavier penalties or other punitive action for failure to comply fully with other laws as violations of the H–2A regulations should at least be deferred for at least 3 years after any new rules are implemented. The Department does not and will not assess penalties for the same housing violation under multiple laws at the same time. Where an employer violates an OSHA Temporary Labor Camp standard, which could also be a violation of the H–2A housing regulations, a violation will be charged under only one of those statutes. WHD follows this practice in enforcing OSHA temporary labor camp standards and MSPA housing standards that can apply to the same facility. However, an employer has an obligation to follow all applicable laws and regulations. To the extent that an employer is covered by the FLSA, the Division may enforce and seek remedies under both the H–2A program and the FLSA. Of course, payment of the AWER, or the prevailing hourly wage or piece rate under the H–2A Program, would also satisfy the obligation to pay the minimum wage under the FLSA. While all of the facts and circumstances of a given case will be considered in the assessment of any penalty, the Department has determined that a blanket 3 year deferral of penalty assessments is not warranted.

The proposed § 501.19(e) states that the civil money penalty shall not exceed $15,000 per worker for willful layoff or displacement of any similarly situated U.S. worker employed in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within

the period beginning 75 days before the date of need. A civil money penalty will not be assessed for layoffs where the employer has offered the opportunity to the laid-off U.S. worker, and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons. The Final Rule has changed the 75 day period to a period within 60 days of the date of need in conformity with the change to § 655.100(a)(1)(ii) which modified the requirement that the employer begin advertising within 75 days of the date of need to within 60 days of the date of need.

Some commenters argued that $15,000 for displacement of a domestic worker was excessive and could put a small farm out of business. The Department is sensitive to the fact that this penalty represents a fifteen-fold increase in the maximum penalty provided for any offense under the current regulations. Nevertheless, unlawfully displacing a domestic worker is a serious offense that has a substantial adverse effect on the displaced worker, and thus falls within the core of the Department's enforcement responsibilities. Balancing these competing concerns, the Department has decided to adopt a $10,000 maximum penalty for displacement of a U.S. worker in the Final Rule, a tenfold increase over the current maximum penalty for any violation. This penalty will provide the Department with an important enforcement tool under this attestation-based program. The Department believes that a significant penalty will serve as an important deterrent for employers who might turn away qualified U.S. workers from an occupation covered by an *Application for Temporary Employment Certification.* As discussed above, the Department will continue to evaluate the relevant factors listed in § 501.19(b), as well as the totality of the circumstances, to determine the civil money penalty assessment for these violations.

One commenter argued that the Department was purporting to legalize the displacement of U.S. farm workers based on nothing more than an employer's unscrutinized, self-serving statement that U.S. workers did not want, or were unqualified for, the job. The Department did not intend this consequence, and on further consideration has determined that such an expansive safe harbor provision for layoffs is not necessary. Layoffs that are for lawful, job-related reasons are already protected under the text of the Final Rule, and the Department does not believe that it is appropriate to allow an employer to legitimize an otherwise illegal layoff simply by later offering the laid-off employee a new position. The Department has therefore limited the application of the safe harbor provision to situations ''where all H–2A workers were laid off'' before any U.S. workers were. In such a situation, the employment of H–2A workers will not have factored into the layoff of the U.S. workers.

One agricultural organization argued that the safe harbor provision seems to require an actual offer and would not be satisfied by a good faith, but unsuccessful, attempt to locate the domestic worker. The agricultural organization noted that it may be difficult to locate domestic workers to make the offer and recommended that the attestation could be satisfied with reasonable, good-faith efforts to contact these workers through a written communication to the worker's last known address or any other reasonably specific attempt to make contact. In light of the modifications to the safe harbor provision, these comments have been rendered moot.

The agricultural organization also argued that this section should be revised because the maximum period of admission under the H–2A Program for one employer is 10 months, making it possible that the employer could discharge the domestic worker at the end of the employer's period of need and then begin a new employment period 2 months later. This employer would have discharged the domestic worker within the displacement provision timeline, notwithstanding the fact that the employer was in compliance with the H–2A Program. The agricultural organization argued that this could expose employers to large fines for no reason other than the timing of the seasons. The agricultural organization recommended that the section be revised to reflect the time frames inherent in the H–2A regulations to avoid this inequitable outcome. As noted above, the time frames have been modified to prohibit displacement and layoff within 60 days of the date of need. In any event, in light of the modifications to the safe harbor provision, these comments have been rendered moot.

One law firm requested that the Department remove what they considered improper, substantial new penalties against agents and attorneys of H–2A employers who are found or accused of making material misrepresentations in the certification application process. The law firm stated that such disciplinary measures are usually handled through the state bar association and that imposing substantial penalties, including debarment merely for accusations of material misrepresentations, is a violation of due process principles. There is no explicit reference in this provision to attorneys or agents. As is discussed at greater length in the preamble to Part 655, the Department will not hold attorneys and agents strictly liable under the Final Rule for the misconduct of their clients. Rather, the Department will require some degree of personal culpability on the part of attorneys and agents before applying any form of penalty to them.

Some commenters argued that the new regulations failed to provide an appeals process for violations or fines and requested that procedures be developed to allow employers to appeal violations and fines when good faith efforts were taken to comply with the rules. The Department already provides such a process in Subpart C—Administrative Proceedings. The current § 501.30 provides the administrative proceedings that will be applied with respect to a determination to impose an assessment of civil money penalties. Under current and proposed § 501.33(a), any person who desires review of a civil money penalty determination shall make written request for an administrative hearing no later than 30 days after issuance of the notice to the official who issued the determination at the Wage and Hour Division. Such timely filing of an administrative appeal stays the determination pending the outcome of the appeals process pursuant to proposed § 501.33(d).

Section 501.20—Debarment and Revocation

The current regulations provide ETA with the authority to deny certification (i.e., debarment) and revoke certificates while requiring the WHD to report findings and make recommendations to ETA to deny future certifications and revoke current certificates. The NPRM proposed providing debarment authority for issues arising from WHD investigations to the Administrator/WHD, while debarment authority for issues arising out of the attestation process would have remained with ETA. The Final Rule modifies the proposal by adhering to the current practice, providing ETA authority for debarment and revocation, and providing the Wage and Hour Division authority to make a debarment recommendation.

A number of commenters opposed extending debarment authority to the

WHD. These commenters requested that debarment authority remain with ETA to avoid inconsistencies in the interpretation of the H–2A regulations between WHD and ETA. One of these commenters stated that extending debarment authority to the WHD would enhance enforcement, while recommending regulatory language requiring coordination between the two agencies. One commenter stated that the WHD should have concurrent debarment authority with ETA to ensure that debarment is available for all appropriate violations.

After a careful review of the comments, the Department has concluded that providing debarment authority to two different agencies within the Department for different, though potentially overlapping types of violations could result in unnecessary confusion. Debarment authority will therefore remain with ETA, which will entertain recommendations from WHD.

However, under the current system the Board of Alien Labor Certification Appeals (BALCA) adjudicates appeals of ETA debarment determinations based upon WHD recommendations, while appeals of WHD back wage and civil money penalty assessments are adjudicated by the Administrative Review Board (ARB). WHD debarment recommendations generally arise from the same set of facts, involving the same evidence as WHD back wage and civil money penalty assessments. To conserve resources and avoid unnecessary duplication of litigation, the Final Rule specifies at § 501.20(e) that ''In considering a recommendation made by the Wage and Hour Division to debar an employer or to revoke a temporary agricultural labor certification, the Administrator/OFLC shall treat final agency determinations that the employer has committed a violation as *res judicata* and shall not reconsider those determinations.''

The standards for debarment recommendations used by WHD have been conformed to ensure that they are identical to the standards used by ETA for debarment actions under 20 CFR 655, Subpart B, thus ensuring consistency in application, though ETA has some additional standards that are not applicable to the WHD role and will not be utilized by WHD.

The proposed rule did not include a change to the current revocation procedures, under which WHD provides recommendations to ETA for certificate revocation. That procedure is adopted in the Final Rule, together with more specific revocation criteria, which have been modified to conform to the criteria set forth in 20 CFR 655, Subpart B.

Section 501.21 Failure To Cooperate With Investigations

Section 501.21 has been modified in the Final Rule to conform to the changes made in § 501.20 regarding WHD's authority to make debarment and revocation recommendations to ETA. The relevant language in the Final Rule now provides that ''a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked.''

Section 501.22 Payment and Collection of Civil Money Penalties

No changes to this section were proposed in the NPRM. The text of the current regulation has been included in the Final Rule with only one alteration, specifying that a ''penalty is due within 30 days.''

Section 501.30 Applicability of Procedures and Rules

The language in § 501.30 was revised in the proposed rule to illustrate the administrative process for assessing civil money penalties and seeking a debarment under the H–2A Program. With the exception of civil money penalty assessments and debarment disputes, the Department of Labor may file an action directly in Federal court seeking enforcement. Section 501.30 has been modified in the Final Rule to conform to the changes made in § 501.20 regarding WHD's authority to make debarment recommendations to ETA.

Section 501.31 Written Notice of Determination Required

The administrative process was revised in the proposed rule to reference WHD's authority to debar. Section 501.31 has been modified by deleting the phrase ''to debar'' to reflect the fact that WHD recommendations for debarment do not constitute ''determinations'' of the Administrator/WHD that are subject to hearing requests under § 501.33.

Section 501.32 Contents of Notice

This section was revised in the proposed rule to reference WHD's authority to debar. Section 501.32 has been modified by deleting the phrase ''whether to debar and the length of the debarment'' to reflect the fact that WHD recommendations for debarment do not constitute ''determinations'' of the Administrator/WHD that are subject to hearing requests under § 501.33.

Section 501.33 Requests for Hearing

The proposed rule added language to the regulation to make clear that exhaustion of the appeal of the Administrator/WHD's determination is required before a party may appeal an agency ruling to Federal court. No comments were received and the Final Rule is adopted as proposed.

Section 501.41 Decision and Order of Administrative Law Judge

Some minor, non-substantive changes were made to paragraph (c) of this provision, including the creation of a new paragraph (d), for purposes of clarity and consistency with § 501.42.

Section 501.42 Exhaustion of Administrative Remedies

Proposed § 501.42 clarified the current regulation to assure that the exhaustion of all administrative remedies is required before an appeal of the decision of the administrative law judge can be taken to the Federal courts pursuant to the Administrative Procedure Act.

One commenter noted that the additional language, stating that the decision of the administrative law judge shall be inoperative pending final review of the Administrative Review Board's (ARB) decision, was unnecessary to ensure exhaustion and harmful to workers. In *Darby* v. *Cisneros,* 509 U.S. 137, 152 (1993), the Supreme Court decided that agencies may not require exhaustion of administrative remedies before an appeal may be filed with a federal district court unless a rule is adopted that an agency appeal must be taken before judicial review is available, and it is provided that the initial decision is *inoperative* pending appeal. *Id.* Accordingly, the additional language is necessary to the exhaustion requirement. Further, it is unclear what harm may result from requiring that workers await a decision by the ARB before appealing to Federal court. There is a distinct public benefit from the uniform agency decision making process accorded by ARB review. Additional language has been added to this provision to clarify when an administrative law judge's decision becomes final agency action.

C. Revisions to 29 CFR Parts 780 and 788

In the notice of proposed rulemaking (NPRM) published February 13, 2008, the Department proposed a modification to Parts 780 and 788 of the FLSA

regulations to recognize that the production of ''Christmas'' trees through the application of agricultural and horticultural techniques to be harvested and sold for seasonal ornamental use constitutes agriculture as the term is defined under the FLSA. As explained in the preamble to the NPRM, the Department deemed this change necessary in light of the Fourth Circuit Court of Appeals' decision in *U.S. Department of Labor* v. *North Carolina Growers Association,* 377 F.3d 345 (4th Cir. 2004), and because it recognizes that modern production of such trees typically involves extensive care and management.

Many individual employers, trade associations, and associations of growers approved of the Department's proposed rule to classify Christmas tree farming as an agricultural activity under FLSA. Several commenters noted that the Christmas tree industry had undergone significant changes, such as no longer harvesting from natural stands, in the time since the FLSA was first passed in 1938. Commenters also listed a range of current common practices shared by Christmas tree producers and other row crop farmers, such as planting, pruning, weed control, pest control, transplanting, and harvesting under a deadline. The insight provided by these comments further confirms that the determination to classify Christmas tree farming as agriculture under the FLSA is appropriate.

Two commenters suggested that many of these activities were also covered by the 1938 FLSA primary definition of agriculture. Moreover, the commenters maintained that, since the FLSA classifies nursery activities as an agricultural activity, Christmas tree production and harvesting, which the commenters believed to be nearly identical to those in nursery production and harvesting, must also be classified as agricultural activity.

Several commenters expressed appreciation for the Department's attempt to establish a national standard for Christmas tree labor status. Several others maintained that the ambiguity surrounding the industry's status had hurt Christmas tree growers nationally because laws were not being applied in a uniform fashion across the states. In addition, many commenters pointed to the Fourth Circuit's 2004 decision in *North Carolina Growers Association,* in which the court held that Christmas tree farming fit the definition of agriculture as proof that Christmas tree production was an agricultural activity. *See* 377 F.3d at 352. This holding created confusion between the Department's classification and federal law. Two commenters noted that Christmas tree growers located in the Fourth Circuit may have achieved clarity with respect to their status as agricultural producers, but the status of all other Christmas tree growers not within the jurisdiction of the Fourth Circuit remained unclear until now.

Other commenters added that, under many other federal rules including property tax, sales tax, and agricultural worker's protection standards for pesticide use, Christmas tree growers were already considered to be agricultural. Several commenters acknowledged that certain Christmas tree growers may dig trees with a soil ball, which is considered a nursery activity and therefore an agricultural activity, but may also produce trees for harvesting by cutting, which has, historically, not been considered to be agricultural activity. The commenters noted that the decision to dig or cut a tree depends on market conditions at the time of harvest, and the same employees could hypothetically participate in both scenarios. Two commenters concluded, however, that this difference between nursery and Christmas tree harvesting was irrelevant because the production practices remained the same and should be construed as agriculture. Likewise, one commenter wrote that the same equipment was often used for both Christmas tree production and nursery projects.

Three commenters offered suggestions for minor changes to the rule stating that the proposed language offered overly specific timeframes for horticultural operations. The commenters argued that such timeframes may vary according to region and tree species and that future changes to horticultural procedures might affect some of the listed activities in the rule. One commenter further stated that removing the timeframes would not affect the Christmas tree industry's ability to operate within the FLSA's definition of agriculture, but would possibly eliminate an unnecessary rigidity that might otherwise disqualify Christmas tree production that appropriately qualifies for agricultural status. The Fourth Circuit's reasoning in the *North Carolina Growers Association* case clearly articulated that performance of certain actions on the plants is an important indicator that what is being produced is a seasonal ornamental horticultural commodity. *See* 377 F.3d at 345. The regulatory language addressing timeframes is sufficiently flexible to allow for variation in timeframes due to region, species, and procedural differences. Indeed, the Final Rule expressly qualifies the listed timeframes by saying that the agricultural techniques applied must be those ''such as the following.'' The Department will not apply the listed timeframes with undue rigidity.

One commenter, commenting on its own behalf and on behalf of numerous advocacy groups, opposed the rule, asserting that, while the H–2A program offered more comprehensive protections for workers than did the H–2B classification (under which many Christmas tree harvest workers had previously been allowed into the country to work), Christmas tree workers under the H–2A Program would lose their coverage under MSPA as well as their claims to overtime. The commenter added that the matter of overtime pay was critical because the Christmas tree harvest season can be extremely intense with extensive overtime work. Temporary, non-immigrant workers for Christmas tree production have been brought in under the H–2A Program and not the H–2B non-agricultural Program for many years now based on the IRC definition of agriculture, which the H–2A regulations use (as well as the FLSA definition of agriculture), and would not have been within the definition of a worker subject to MSPA. The proposed rule insures equity within the industry in that employers across the country will be bound by the same requirements under the FLSA in the wake of the Fourth Circuit's *North Carolina Growers Association decision. See id.* The Department is adopting the proposed changes for 29 CFR Part 780 without change.

No comments were received with respect to the proposed change to 29 CFR Part 788.10. Therefore, the Department is adopting the proposed rule without change in the Final Rule.

III. Administrative Information

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or

tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. The Department has determined that this Final Rule is not an ''economically significant regulatory action'' under Section 3(f)(1) of E.O.12866. The procedures for filing an *Application for Temporary Employment Certification* under the H–2A visa category on behalf of nonimmigrant temporary agricultural workers, under this regulation, will not have an economic impact of $100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this Final Rule is intended to provide relief to affected employers both directly, by modernizing the process by which they can apply for H–2A labor certification, and indirectly, by increasing the available legal workforce. The Department, however, has determined that this Final Rule is a ''significant regulatory action'' under Section 3(f)(4) of the E.O. Summary of Impacts. The changes in this Final Rule are expected to have little net direct cost impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented. The re-engineering of the program requirements, including attestation-based applications and pre-application recruitment, will have the effect of reducing employer application costs in time and resources and introduce processing efficiencies that will reduce costs for employers, particularly costs associated with loss of labor due to delayed certifications.

Employer costs for newspaper advertising will increase slightly, as the Final Rule will require that one of the two currently required advertisements be run on a Sunday. However, the Department believes that this cost increase will be offset by the certainty the Final Rule will provide regarding total recruitment costs. Most significantly, the Final Rule has eliminated the possibility that additional, unstated recruitment measures may be imposed on program users at the last minute, and further provides program users an annual list of traditional labor supply states that will inform them in advance of precisely where they will be required to engage in out-of-state newspaper advertising.

Civil money penalties have increased substantially under the Final Rule, but these represent avoidable costs, and the Department believes that they will have the deterrent effect of fostering greater program compliance under the Final Rule.

The biggest cost to employers under the Final Rule is likely to be an increased cost of foreign recruitment, since employers can no longer allow foreign recruiters with whom they are in privity of contract to charge foreign workers fees for recruitment. The Department believes that this cost can be substantially offset by collaborative recruitment, however, and that it will not be so large as to overcome employers' cost savings resulting from streamlining of the application process and program efficiencies. The Department requested comment on what costs these policies introduce and what efficiencies may be gained from adopting these new procedures, to foster a thorough consideration and discussion of the rule's costs and benefits before its finalization. Several commenters believed that the proposed changes could increase costs for employers and doubted that they would achieve the proposed objectives. Many of these concerns have been addressed by changes in the Final Rule, including reductions in the newspaper advertising and record retention requirements.

The additional record retention costs for employers are minimal and the Final Rule includes a three-year requirement as compared to the originally proposed five-year requirement. The new record retention requirements will require a burden of approximately ten minutes per year per application to retain the application and supporting documents above and beyond the one year of retention required by regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR 1602.14, promulgated pursuant to Title VII of the Civil Rights Act and the Americans With Disabilities Act, and 29 CFR 1627.3(b)(3), promulgated pursuant to the Age Discrimination in Employment Act. In FY 2007, 7,725 employers filed requests for 80,294 workers. Using standard administrative wage rates, including benefits, of $60.42 [15] per hour, this additional burden for each of the two years following the mandated year above is approximately $77,791 total per year (or approximately $10 per applicant per year) if the current number of requests remains constant. Any increase in the use of the program would result in the same ultimate burden to each individual applicant.

Employers will experience efficiencies as a result of the reengineering of the process. These savings are expected to result primarily from the simplified attestation-based application. While the Department cannot precisely estimate the cost savings as a result of this time saved, it believes that employers will experience economic benefits as a result of this reengineering of the application process to an attestation-based submission, including lower advertising costs and fewer unanticipated labor costs due to post-date-of-need hiring requirements. Savings to employers will be universal to new users as well as current participants. Savings from efficiency gains may be impacted, however, by increased usage of the program by agricultural employers, which could delay processing times within the Department.

B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared and made available for public comment. The RFA must describe the impact of the rule on small entities. *See* 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. The rule does not substantively change existing obligations for employers who choose to participate in the H–2A temporary agricultural worker program.

The factual basis for such a certification is that even though this rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor is there a significant economic impact upon those small entities that are affected. Of the total 2,089,790 farms in the United States, 98 percent have sales of less than $750,000 per year and fall within SBA's definition of small entities. In FY 2007, however, only

[15] Derived by utilizing the Bureau of Labor Statistics 2006 median wage for Human Resources Manager wage of $42.55 and a 1.42 factor for the cost of benefits and taxes.

7,725 employers filed requests for only 80,294 workers. That represents fewer than 1 percent of all farms in the United States. Even if all of the 7,725 employers who filed applications under H–2A in FY2007 were small entities, that is still a relatively small number of employers affected. The Department does anticipate a substantial increase in program usage as a result of the Final Rule, but even a doubling in program usage would mean the participation of only about 15,500 employers, not all of whom would be small entities.

Even more important than the number of small entities affected, however, the Department believes that the costs incurred by employers under this Final Rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H–2A program must continue to establish to the Secretary of Labor's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers and that their hiring of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Similar to the current process, employers under this newly reengineered H–2A process will file a standardized application for temporary labor certification and will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed.

To estimate the cost of this reformed H–2A process on employers, the Department calculated the current costs each employer likely pays in the range of $124.00–$170.00 to meet the advertising and recruitment requirements for a job opportunity, and spends approximately 3 hours of staff time preparing the standardized applications for the required offered wage rate and for temporary labor certification, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, job orders, business necessity) in a file for audit purposes that is not otherwise required to be retained in the normal course of business. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager ($42.55), as published by the U.S. Department of Labor's Occupational Employment Statistics survey, O*Net OnLine,[16] and increased it by a factor of 1.42 to account for employee benefits and other compensation for a total staff time cost of $181.26 per applicant.

The Department acknowledges that there might be some extremely small businesses that may incur additional costs to file their application on-line if and when the Department moves to an electronic processing model. The total costs for the small entities affected by this program will most likely be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2A labor certification applications are considered to be small businesses, the net economic effect is not significant.

The Department invited comments from members of the public who believed there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this Final Rule will not have a significant impact on a substantial number of small entities. Several small farmers and ranchers offered that the proposal could have substantial impact on sheepherding operations and other small farmers. However, the comments offered addressed costs arising from requirements that were either already in place or were required by statute and therefore were unchanged by this rulemaking. Several other commenters from farming enterprises voiced concern that the Department's determination that the rulemaking was not economically significant was a judgment as to the economic significance of the industry. This was clearly a misconstruction of the Department's intent. The Department recognizes the economic importance of the agricultural and farming sector of the economy and has embarked on this rulemaking to ensure that there are sufficient workers available to ensure the economic success of both individual farms and the agricultural sector as a whole.

Several other commenters, including individual farmers and a law firm representing farming concerns, objected to what they saw as high costs of compliance with the new changes when taken together with the increased costs of filing applications with DHS. The Department appreciates and recognizes the strong cost pressures on American agricultural firms and has taken steps to reduce the costs of compliance wherever possible to ensure that farms of all sizes have the ability to participate in the program and have access to a reliable and legal workforce. We believe the improvements to this Final Rule address many of these concerns, while ensuring program integrity and worker protections.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 et seq.) directs agencies to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector to determine whether the regulatory action imposes a Federal mandate. A Federal mandate is defined in the Act at 2 U.S.C. 658(5)–(7) to include any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. Further, each agency is required to provide a process where State, local, and tribal governments may comment on the regulation as it develops, which further promotes coordination between the Federal and the State, local, and tribal governments.

The Department of Labor provided several opportunities for State, local, and tribal government input. Representatives from the Department in OFLC hosted webinars with the States on December 2 and 5, 2007, and then again on March 12 and 25, 2008, to discuss the issues outlined in Training and Employment Guidance Letter (TEGL) 11–07, Change 1 (November 14, 2007) that are now codified in the regulation. In addition, the Department hosted and continues to host regular conference calls to discuss these issues. Further, the Department fielded questions about the verification process from the States and posted the responses to them as Frequently Asked Questions on the program office Web site. Finally, the Department invited comments from all individuals, which includes State representatives, through the comment process for this regulation. As a result of these efforts, the Department received only six (6) comments from State agencies on unfunded mandates.

Each of the commenters stated that the regulation imposes an unfunded mandate because there are insufficient funds to support the H–2A activities at the State level. One commenter stated that the State would have difficulty maintaining the same level of quality in the program. Another commenter stated that the rule represents an unfunded mandate because there is no funding for litigation defense.

The Department disagrees that this final rule imposes an unfunded

[16] *Source:* Bureau of Labor Statistics 2006 wage data.

mandate. As noted in the proposed rule, the SWAs are required to perform certain activities for the Federal government under this program, and are compensated for the resources used in performing these activities. Further, under this final rule, the SWAs responsibilities are streamlined and generally reduced because they no longer are responsible for the substantive review of H–2A applications, which will allow the States to use grant funds for other program purposes. The Department recognizes that certain States may see an increase in the use of the program, as two commenters discussed, and as a result, may experience an increase in activities over another State with less H–2A activity. The Department addressed this issue in the proposed rule when it stated that it would analyze the amount of grants to each State to fund H–2A activities. The Department believes it would be premature to make a blanket statement regarding any increases the States may experience until after the new requirements are implemented. Therefore, the Department intends to make funding determinations based on that analysis and after an analysis of any increased usage trends among particular States as part of its normal program management operations. The Department believes it is also premature to presume that the States will have to bear a significant cost to defend against any potential litigation associated with the implementation of this final rule, and which is typically considered part of a grantee's programmatic responsibility, should it occur. A more substantive discussion on the Department's position on defending any potential litigation is located in other sections of the preamble.

Several commenters expressed a concern about using already limited Wagner-Peyser Act funds to compensate for H–2A activities. Although the Department understands the commenters' concern that Wagner-Peyser Act funds may be discontinued, such arguments are not relevant at this time given that the Department currently funds Wagner-Peyser Act activities and intends to continue doing so in the future.

Another commenter stated that TEGL 11–07, Change 1 imposes an unfunded mandate because compliance with the TEGL, which is now codified in the final rule, is a condition for the continued receipt of Wagner-Peyser Act funds. That same commenter also noted that the rule is more restrictive than H.R. 4088 (introduced in the 110th Congress), which is similar to the TEGL.

With regard to this comment, the Department included references to this TEGL in the proposed rule merely to inform the public that the provisions of the TEGL were clarified and codified in this rule. Because the Department already requires States under current program guidance to verify the employment authorization of workers before making H–2A referrals, the Final Rule's codification of these verification requirements will not impose significant new costs on States. The fact that a State may lose its funding for failing to comply with the program requirements, including those in the TEGL and now codified in this final rule, does not rise to the level of an unfunded mandate. The Department notes that this program is voluntary and like all voluntary Federal programs, it comes with responsibilities for managing the program and penalties for failing to adhere to those program requirements. There were no comments from the private sector on this issue. Therefore, for the reasons stated above, the Department has determined that this final rule does not impose any unfunded mandates.

D. Executive Order 13132—Federalism

Executive Order 13132 addresses the Federalism impact of an agency's regulations on the States' authority. Under E.O. 13132, Federal agencies are required to consult with States prior to and during the implementation of national policies that have a direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Further, an agency is permitted to limit a State's discretion when it has statutory authority and the regulation is a national activity that addresses a problem of national significance. The Department received one comment on this section. This commenter stated that the Department's reversal of a long-standing position on U.S. worker self-attestation creates a Federalism impact. According to this commenter, TEGL 11–07, Change 1, mandates that SWAs perform pre-employment eligibility verifications on every U.S. worker that requests a referral to an H–2A job order. This commenter requests that the Department prepare a summary impact statement and acknowledge that many States currently have attestation-based systems for U.S. worker access to public labor exchange services.

The Department disagrees with this commenter's assessment of a Federalism impact and therefore, the need for a summary impact statement. In this case there is no direct effect on the States. The H–2A program is a Federal program that regulates work visas for temporary agriculture workers, protects employment opportunities for U.S. workers, and prevents an adverse effect on the wages and working conditions of U.S. workers. As noted elsewhere in this preamble, the Department has not reviewed the H–2A program comprehensively since its inception in 1986. These changes are consistent with the Department's review, program experience, and years of stakeholder feedback on longstanding concerns about the integrity of the prior program. Therefore, as a program of national scope, the Department is implementing requirements that apply uniformly to all States.

Even if there were an argument that the Department should defer to the States on the eligibility verification requirements, the Department is authorized by the INA to implement Federal regulations to ensure consistency across States on immigration matters. In addition, given that the H–2A program is an immigration program, it also is a program related to national security with national significance requiring Federal oversight and uniformity. Further, the relationship the States have with this program and the Federal government is by grants from the Department to the States for the sole purpose of maintaining consistency across States. As a voluntary Federal program, the Department may change the direction from time to time as dictated by the changes to immigration concerns, but at the same time are consistent with the underlying legislation.

Furthermore, the Department consulted with the States on the eligibility verification requirements by several means. Representatives from the Department in OFLC hosted webinars with the States on December 2 and 5, 2007, and then again on March 12 and 25, 2008, to discuss the issues outlined in the TEGL that are now codified in the regulation. In addition, the Department hosted and continues to host regular conference calls to discuss these issues. Further, the Department fielded questions about the verification process from the States and posted the responses to them as Frequently Asked Questions on the program office Web site. Finally, the Department invited comments from all individuals, which includes State representatives, through the comment process for this regulation.

Therefore, for the reasons stated, the Department has determined that this rule does not have sufficient Federalism

implications to warrant the preparation of a summary impact statement.

E. Executive Order 13175—Indian Tribal Governments

Executive Order 13175 requires Federal agencies to develop policies in consultation with tribal officials when those policies have tribal implications. This final rule regulates the H–2A visa program and does not have tribal implications. Therefore, the Department has determined that this E.O. does not apply to this rulemaking. The Department did not receive any comments related to this section.

F. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Federal regulations and policies on families. The assessment must address whether the regulation strengthens or erodes the stability, integrity, autonomy, or safety of the family.

The final rule does not have an impact on the autonomy or integrity of the family as an institution, as it is described under this provision. The Department has determined that although there may be some costs associated with the final rule, they are not of a magnitude to adversely affect family well-being. The Department did not receive any comments related to this section.

G. Executive Order 12630—Protected Property Rights

Executive Order 12630, Governmental Actions and the Interference with Constitutionality Protected Property Rights, prevents the Federal government from taking private property for public use without compensation. It further institutes an affirmative obligation that agencies evaluate all policies and regulations to ensure there is no impact on constitutionally protected property rights. Such policies include rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

The Department received one comment on this section. This commenter stated that this rule would have a ''takings'' implication if farmers are forced out of business under this rule. The Department disagrees with this assessment. Although the cost associated with this regulatory action has an impact on commerce, it is not the type of impact addressed by the E.O. This final rule does not propose or implement licensing, permitting or other condition requirements on the use of private property nor does it require dedications or exactions from owners of private property. Accordingly, the Department has determined this rule does not have takings implications.

H. Executive Order 12988—Civil Justice Reform

Section 3 of E.O. 12988, Civil Justice Reform, requires Federal agencies to draft regulations in a manner that will reduce needless litigation and will not unduly burden the Federal court system. Therefore, agencies are required to review regulations for drafting errors and ambiguity; to minimize litigation; ensure that it provides a clear legal standard for affected conduct rather than a general standard; and promote simplification and burden reduction.

The rule has been drafted in clear language and with detailed provisions that aim to minimize litigation. The purpose of this final rule is to streamline the H–2A program and simplify the application process. Therefore, the Department has determined that the regulation meets the applicable standards set forth in Section 3 of E.O. 12988. The Department received no comments regarding this section.

I. Plain Language

Every Federal agency is required to draft regulations that are written in plain language to better inform the public about policies. The Department has assessed this final rule under the plain language requirements and determined that it follows the Government's standards requiring documents to be accessible and understandable to the public. The Department did not receive any comments related to this section.

J. Executive Order 13211—Energy Supply

This final rule is not subject to E.O. 13211, which assesses whether a regulation is likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, the Department has determined that this rule does not represent a significant energy action and does not warrant a Statement of Energy Effects. The Department did not receive any comments related to this section.

K. Paperwork Reduction Act

1. Summary

The Paperwork Reduction Act (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, were submitted to OMB on February 14, 2008, in conjunction with the NPRM. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l). The public was given 60 days to comment on this information collection under the NPRM even though originally the Department gave the public only 45 days to comment on the rest of the NPRM. On March 27, 2008, the Department published a notice in the **Federal Register** extending the comment period to April 14, 2008, for the rest of the NPRM, which then coincided with the comment period for the information collection. This same information collection was again submitted for public comment under another NPRM for a different program. The comments received pertaining to this rule were taken into consideration and a final package with the forms needed to implement this rule was submitted to OMB and received final approval on November 21, 2008, under OMB control number 1205–0466. The approval will expire on November 30, 2011. The information required under this collection is mandated in this final rule at §§ 655.100(a), 655.101, 655.102(c), 655.104(d), 655.105, 655.106, 655.107, 655.108, and 655.109.

The collection of information for the current H–2A program under the regulations in effect prior to the effective date of this rule were approved under OMB control number 1205–0015 (Form ETA 750) and OMB Control Number 1205–0134 (Form ETA 790). The Form ETA 750 will be gradually phased out and will no longer be used for the H–2A program for applications filed with a beginning date of need of July 1, 2009 or later. The Form ETA 790 will continue to be used in the H–2A program as it is required under 20 CFR 653.501 for all agricultural job orders.

As noted above, this final rule implements the use of the new information collection that OMB approved on November 21, 2008, under OMB control number 1205–0466. The approval will expire on November 30, 2011. The new Form ETA 9142, with instructions and appendices, has a public reporting burden estimated to average 2.17 hours for Form ETA 9142 per response or application filed. The Department has made changes to this final rule after receiving comments to the proposed rule and has made changes to the forms for clarity and program functionality. However, these changes do not impact the overall annual burden hours for the H–2A program information collection. The total costs associated

with the form, as defined by the Paperwork Reduction Act, is a maximum of $1,100 per employer for the Form ETA 9142. For an additional explanation of how the Department calculated the burden hours and related costs, the Paperwork Reduction Act package for this information collection may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting the Department at: Office of Policy and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov*.

2. Comments

The Department received only a few comments on this section of the NPRM. In each case, the commenters noted that there appeared to be an increase in the number of hours required under the new regulations, especially for the second recruitment report. One commenter estimated that it would take approximately 6.5 hours for an employer to complete two (2) recruitment reports, but did not provide data or a supporting rationale for this estimate. Most of the commenters did not specifically address the issue of our methodology or assumptions.

The combined paperwork burden estimate for the forms used for the H–2A program under the regulations in effect prior to the effective date of this final rule, Forms ETA 750 and ETA 790, was approximately 2.5 hours. Under this new collection of information, the Department estimates that the burden will be approximately 2.17 hours for Form ETA 9142, which includes one hour on average per employer to prepare the recruitment reports. There will be some employers who only require a few minutes to complete the recruitment report if only a few (or no) workers apply for the job opportunity, while other employers may spend two or more hours compiling the recruitment report if many workers apply for the job opportunity. As for other information requirements, the Department estimates that the affidavits of publication or tear sheets, which should be requested at the time of publication, require only one extra minute of time. Further, the Department estimates that requesting notice from the SWA confirming distribution of the job order will also only take an extra minute of time. Therefore, without more persuasive analysis rebutting the analysis used by the Department, we assume our calculations are representative of the actual hourly burden for the new collection.

Another commenter stated that the form itself lacked sufficient space and the ''description for complying * * * [is] inadequate and materially misleading of the terms and conditions employers need to provide * * *.'' The Department notes, however, that this comment is related to the Form ETA 750, which will be discontinued, rather than the new collection form, ETA 9142. In addition, the Department added a notation to the new form that permits employers to submit additional pages of information if there is not sufficient space on the form for a response. In such cases, the information must clearly correspond to the appropriate section and question number noted on the form.

A couple of commenters on this section asked if any of the paperwork could be shifted to the Department, such as making copies of job orders, placing advertisements, and obtaining the tear sheets. Although the Department appreciates these comments, we find no reasonable justification for assuming this type of expense or responsibility. The responsibility for the applicable reporting requirements lies with program participant, which in this case is the applicant. The Department will continue to seek ways to improve program management efficiency and as noted elsewhere in this preamble, will be looking to implement an online application process in the future.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 501

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

29 CFR Part 780

Agricultural commodities, Agriculture, Employment, Forests and forest products, Labor, Minimum wages, Nursery stock, Overtime pay, Wages.

29 CFR Part 788

Employment, Forests and forest products, Labor, Overtime pay, Wages.

■ For the reasons stated in the preamble, the Department of Labor amends 20 CFR part 655 and 29 CFR parts 501, 780, and 788 as follows:

TITLE 20—EMPLOYEES' BENEFITS

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Revise the heading to part 655 to read as set forth above.

■ 3. Revise § 655.1 to read as follows:

§ 655.1 Purpose and scope of subpart A.

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the United States (U.S.) in occupations other than agriculture or registered nursing.

■ 4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

655.90 Purpose and scope of subpart B.
655.92 Authority of ETA–OFLC.
655.93 Special procedures.

655.100 Overview of subpart B and definition of terms.
655.101 Applications for temporary employment certification in agriculture.
655.102 Required pre-filing recruitment.
655.103 Advertising requirements.
655.104 Contents of job offers.
655.105 Assurances and obligations of H–2A employers.
655.106 Assurances and obligations of H–2A Labor Contractors.
655.107 Processing of applications.
655.108 Offered wage rate.
655.109 Labor certification determinations.
655.110 Validity and scope of temporary labor certifications.
655.111 Required departure.
655.112 Audits.
655.113 H–2A applications involving fraud or willful misrepresentation.
655.114 Petition for higher meal charges.
655.115 Administrative review and de novo hearing before an administrative law judge.
655.116 Job Service Complaint System; enforcement of work contracts.
655.117 Revocation of approved labor certifications.
655.118 Debarment.
655.119 Document retention requirements.

§ 655.90 Purpose and scope of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and

(b) Whether the employment of H–2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.92 Authority of ETA–OFLC.

Temporary agricultural labor certification determinations are made by the Administrator, Office of Foreign Labor Certification (OFLC) in the Department of Labor's (the Department or DOL) Employment & Training Administration (ETA), who, in turn, may delegate this responsibility to a designated staff member; e.g., a Certifying Officer (CO).

§ 655.93 Special procedures.

(a) *Systematic process.* This subpart provides procedures for the processing of applications from agricultural employers and associations of employers for the certification of employment of nonimmigrant workers in agricultural employment.

(b) *Establishment of special procedures.* To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the Administrator, OFLC has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to the Administrator, OFLC that special procedures are necessary. These include special procedures in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine crews. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Administrator, OFLC has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates (AEWR) for those occupations for a statewide or other geographical area. Prior to making determinations under this section, the Administrator, OFLC will consult with employer and worker representatives.

§ 655.100 Overview of subpart B and definition of terms.

(a) *Overview.* (1) *Application filing process.* (i) This subpart provides guidance to employers desiring to apply for a labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employers must file with the Administrator, OFLC an H–2A application on forms prescribed by the ETA that describe the material terms and conditions of employment to be offered and afforded to U.S. and H–2A workers. The application must be filed with the Administrator, OFLC at least 45 calendar days before the first date the employer requires the services of the H–2A workers. The application must contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, the payment of an appropriate wage, and terms and conditions of employment.

(ii) No more than 75 and no fewer than 60 calendar days before the first date the employer requires the services of the H–2A workers, and as a precursor to the filing of an *Application for Temporary Employment Certification,* the employer must initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA National Processing Center (NPC). The employer must then place a job order with the SWA; place print advertisements meeting the requirements of this regulation; contact former U.S. employees; and, when so designated by the Secretary, recruit in other States of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post the job order locally, as well as in all States listed in the application as anticipated work sites, and in any additional States designated by the Secretary as States of traditional or expected labor supply. The SWA will keep the job order open until the end of the designated recruitment period. No more than 50 days prior to the first date the employer requires the services of the H–2A workers, the employer will prepare and sign an initial written recruitment report that it must submit with its *Application for Temporary Employment Certification (www.foreignlaborcert.doleta.gov).* The recruitment report must contain information regarding the original number of openings for which the employer recruited. The employer's obligation to engage in positive recruitment will end on the actual date on which the H–2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H–2A workers, whichever occurs first.

(iii) The *Application for Temporary Employment Certification* must be filed by mail unless the Department publishes a Notice in the **Federal Register** requiring that applications be filed electronically. Applications that meet threshold requirements for completeness and accuracy will be processed by NPC staff, who will review each application for compliance with the criteria for certification. Each application must meet requirements for timeliness and temporary need and must provide assurances and other safeguards against adverse impact on the wages and working conditions of U.S. workers. Employers receiving a labor certification must continue to cooperate with the SWA by accepting referrals—and have the obligation to hire qualified and eligible U.S. workers

who apply—until the end of the designated recruitment period.

(2) *Deficient applications.* The CO will promptly review the application and notify the applicant in writing if there are deficiencies that render the application not acceptable for certification, and afford the applicant a 5 calendar day period (from date of the employer's receipt) to resubmit a modified application or to file an appeal of the CO's decision not to approve the application as acceptable for consideration. Modified applications that fail to cure deficiencies will be denied.

(3) *Amendment of applications.* This subpart provides for the amendment of applications. Where the recruitment is not materially affected by such amendments, additional positive recruitment will not be required.

(4) *Determinations.* (i) *Determinations.* If the employer has complied with the criteria for certification, including recruitment of eligible U.S. workers, the CO must make a determination on the application by 30 days before the first date the employer requires the services of the H–2A workers. An employer's failure to comply with any of the certification criteria or to cure deficiencies identified by the CO may lengthen the time required for processing, resulting in a final determination less than 30 days prior to the stated date of need.

(ii) *Certified applications.* This subpart provides that an application for temporary agricultural labor certification will be certified if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages, better working conditions, or fewer restrictions than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified, and eligible will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees.* (A) *Amount.* This subpart provides that each employer (except joint employer associations) of H–2A workers will pay the appropriate fees to the Department for each temporary agricultural labor certification received.

(B) *Timeliness of payment.* The fee must be received by the CO no later than 30 calendar days after the granting of each temporary agricultural labor certification. Fees received any later are untimely. A persistent or prolonged failure to pay fees in a timely manner is a substantial program violation which may result in the denial of future temporary agricultural labor certifications and/or program debarment.

(iv) *Denied applications.* This subpart provides that if the application for temporary agricultural labor certification is denied, in whole or in part, the employer may seek expedited review of the denial, or a de novo hearing, by an administrative law judge as provided in this subpart.

(b) *Transition of filing procedures from current regulations.* (1) *Compliance with these regulations.* Employers with a date of need for H–2A workers for temporary or seasonal agricultural services on or after July 1, 2009 must comply with all of the obligations and assurances required in this subpart.

(2) *Transition from former regulations.* Employers with a date of need for H–2A workers for temporary or seasonal agricultural services prior to July 1, 2009 will file applications in the following manner:

(i) *Obtaining required wage rate.* An employer will not obtain an offered wage rate through the NPC prior to filing an application, but will complete and submit Form ETA–9142, *Application for Temporary Employment Certification* no less than 45 days prior to their date of need. The employer will simultaneously submit Form ETA–790 *Agricultural and Food Processing Clearance Order,* along with the *Application for Temporary Employment Certification,* directly to the NPC having jurisdiction over H–2A applications.

(ii) *Pre-filing activities.* Activities required to be conducted prior to filing under the final rule will be conducted post-filing during this transition period. The employer will be expected to make attestations in its application applicable to its future activities concerning recruitment, payment of the offered wage rate, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission to the NPC prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period.

(iii) *Acceptance of application.* Upon receipt, the NPC will provide the employer with the wage rate to be offered, at a minimum, by the employer, and will process the application in a manner consistent with new § 655.107, issuing a notification of deficiencies for any curable deficiencies within 7 calendar days.

(iv) *Processing of application.* Once the application and job order have been accepted, the NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request that the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment in a manner consistent with § 655.102(d)(2) through (4). The NPC will designate labor supply States during this period on a case-by-case basis. Such designations must be based on information provided by State agencies or by other sources, and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State.

(c) *Definitions of terms used in this subpart.* For the purposes of this subpart:

Administrative Law Judge (ALJ) means a person within the DOL's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth in § 655.115.

Administrator, OFLC means the primary official of the Office of Foreign Labor Certification (*OFLC*), or the Administrator, OFLC 's designee.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator, OFLC has determined must be offered and paid to every H–2A worker employed under the DOL-approved *Application for Temporary Employment Certification* in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H–2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this paragraph (c) of this section with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or the Department of Homeland Security (DHS) under 8 CFR 292.3 or 1003.101.

Agricultural association means any nonprofit or cooperative association of

farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an *Application for Temporary Employment Certification*, and may also act as the sole or joint employer of H–2A workers.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes both the form and the employer's initial recruitment report.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR. 292.3 or 1003.101. Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart.

Certifying Officer (CO) means the person designated by the Administrator, OFLC to make determinations on applications filed under the H–2A program.

Chief Administrative Law Judge means the chief official of the DOL Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Date of need means the first date the employer requires the services of H–2A worker as indicated in the employer's *Application for Temporary Employment Certification*.

Department of Homeland Security (DHS) means the Federal agency having control over certain immigration functions that, through its sub-agency, *United States Citizenship and Immigration Services* (USCIS), makes the determination under the INA on whether to grant visa petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the United States Department of Labor.

Eligible worker means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer means a person, firm, corporation or other association or organization that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship with respect to H–2A employees or related U.S. workers under this subpart; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employment Standards Administration (ESA) means the agency within DOL that includes the Wage and Hour Division (WHD), and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

Employment Service (ES) refers to the system of Federal and State entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and the OFLC, including the NPCs.

Employment and Training Administration (ETA) means the agency within the DOL that includes OFLC.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this subpart who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this subpart, *person* includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H–2A Labor Contractor (H–2ALC) means any person who meets the definition of employer under this paragraph (c) of this section and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to sec. 218 of the INA or these regulations.

H–2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Job offer means the offer made by an employer or potential employer of H–2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

Joint employment means that where two or more employers each have sufficient definitional indicia of

employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a joint employer of that employee.

Occupational Safety and Health Administration (OSHA) means the organizational component of the Department that assures the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health under the Occupational Safety and Health Act, as amended.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; but only if

(2) This 50 percent or more of employers also employs in aggregate 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H–2A employers only for determinations concerning the provision of advance transportation).

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1½ bushels), a bushel of potatoes, and Eastern apple box (1½ metric bushels), a flat of strawberries (twelve quarts), etc.

Prevailing hourly wage means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the *Application for Temporary Employment Certification.*

Secretary means the Secretary of the United States Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the United States Department of Homeland Security (DHS) or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the United States Department of State (DOS) or the Secretary of State's designee.

State Workforce Agency (SWA) means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's One-Stop delivery system in accordance with the Wagner-Peyser Act at 29 U.S.C. 49 *et seq.* Separately, SWAs receive ETA grants, administered by OFLC, to assist them in performing certain activities related to foreign labor certification, including conducting housing inspections.

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation. Whether a job opportunity is vacant by reason of a strike or lock out will be determined by evaluating for each position identified as vacant in the *Application for Temporary Employment Certification* whether the specific vacancy has been caused by the strike or lock out.

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of § 655.118, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H–2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188).

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII, the Commonwealth of the Northern Mariana Islands.

United States Citizenship and Immigration Services (USCIS) means the Federal agency making the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the U.S.

United States worker (U.S. worker) means a worker who is

(1) A citizen or national of the U.S., or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

Within [number and type] days means, for purposes of determining an employer's compliance with the timing requirements for appeals and requests for review, a period that begins to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

Work contract means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in Subpart B of 20 CFR part 655, *Labor Certification for Temporary Agricultural Employment of H–2A Aliens in the U.S. (H–2A Workers),* or these regulations, including those terms and conditions attested to by the H–2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, Subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

(d) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart means the following:

(1) *Agricultural labor or services,* pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA at 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as:

(i) Agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1954 at 26 U.S.C. 3121(g);

(ii) Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f). Work performed by H–2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) 29 U.S.C. 207(a);

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H–2B workers are employed to perform the same work at the same establishment; or

(vi) Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (d)(1)(i) and (ii) of this section is *agricultural labor or services,* notwithstanding the exclusion of that occupation from the other statutory definition.

(i) *Agricultural labor.* For purposes of paragraph (d)(1)(i) of this section means all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended at 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)(*1*) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(*2*) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (d)(2)(i)(D)(*1*) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(*3*) The provisions of paragraphs (d)(2)(i)(D)(*1*) and (*2*) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(*4*) On a farm operated for profit if such service is not in the course of the employer's trade or business and is not domestic service in a private home of the employer.

(E) For purposes of (d)(2)(i) of this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. See sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g).

(ii) *Agriculture.* For purposes of paragraph (d)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for

transportation to market. See 29 U.S.C. 203(f), as amended.

(iii) *Agricultural commodity.* For purposes of paragraph (d)(2)(ii) of this section agricultural commodity includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. See 12 U.S.C. 1141j(g), sec. 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.

(3) *Of a temporary or seasonal nature.* (i) *On a seasonal or other temporary basis.* For the purposes of this subpart, of a temporary or seasonal nature means on a seasonal or other temporary basis, as defined in the WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of *on a seasonal or other temporary basis* found in MSPA is summarized as follows:

(A) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though the worker may continue to be employed during a major portion of the year.

(B) A worker is employed on other temporary basis where he or she is employed for a limited time only or the worker's performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) On a seasonal or other temporary basis does not include (i) the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or (ii) the employment of any worker who is living at his or her permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) *Temporary.* For the purposes of this subpart, the definition of ''temporary'' in paragraph (d)(3) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, including, but not limited to, a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.

§ 655.101 Applications for temporary employment certification in agriculture.

(a) *Application Filing Requirements.* (1) An employer that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed DOL *Application for Temporary Employment Certification* form and, unless a specific exemption applies, the initial recruitment report. If an association of agricultural producers files the application, the association must identify whether it is the sole employer, a joint employer with its employer-member employers, or the agent of its employer-members. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation to the CO in the event of an audit.

(2) If an H–2ALC intends to file an application, the H–2ALC must meet all of the requirements of the definition of employer in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The H–2ALC must have a place of business (physical location) in the U.S. and a means by which it may be contacted for employment. H–2A workers employed by an H–2ALC may not perform services for a fixed-site employer unless the H–2ALC is itself providing the housing and transportation required by § 655.104(d) and (h), or has filed a statement confirming that the fixed-site employer will provide compliant housing and/or transportation, as required by § 655.106, with the OFLC, for each fixed-site employer listed on the application. The H–2ALC must retain a copy of the statement of compliance required by § 655.106(b)(6).

(3) An association of agricultural producers may submit a master application covering a variety of job opportunities available with a number of employers in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the application and the combination of job opportunities is supported by an explanation demonstrating a business reason for the combination. The association must identify on the *Application for Temporary Employment Certification,* by name and address, each employer that will employ H–2A workers. If the association is acting solely as an agent, each employer will receive a separate labor certification.

(b) *Filing.* The employer may send the *Application for Temporary Employment Certification* and all supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which applications must be mailed, and will also post these addresses on the DOL Internet Web site at *http://www.foreignlaborcert.doleta.gov/.* The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). An association filing a master application as a joint employer may sign on behalf of its employer members. The Department may also require applications to be filed electronically in addition to or instead of by mail.

(c) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before date of need.

(d) *Emergency situations.* (1) *Waiver of time period and required pre-filing activity.* The CO may waive the time period for filing and pre-filing wage and recruitment requirements set forth in § 655.102, along with their associated attestations, for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO can timely make the determinations required by § 655.109(b).

(2) *Employer requirements.* The employer requesting a waiver of the required time period and pre-filing wage and recruitment requirements must submit to the NPC a completed *Application for Temporary Employment Certification,* a completed job offer on the ETA Form 790 *Agricultural and Food Processing Clearance Order,* and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H–2A workers during the prior agricultural season or

whether the request is for other good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, such things as the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(3) *Processing of Applications.* The CO shall promptly transmit the job order, on behalf of the employer, to the SWA serving the area of intended employment and request an expedited review of the job order in accordance with § 655.102(e) and an inspection of housing in accordance with § 655.104(d)(6)(iii). The CO shall process the application and job order in accordance with § 655.107, issue a wage determination in accordance with § 655.108 and, upon acceptance, require the employer to engage in positive recruitment consistent with § 655.102(d)(2), (3), and (4). The CO shall require the SWA to transmit the job order for interstate clearance consistent with § 655.102(f). The CO shall specify a date on which the employer will be required to submit a recruitment report in accordance with § 655.102(k). The CO will make a determination on the application in accordance with § 655.109.

§ 655.102 Required pre-filing activity.

(a) *Time of filing of application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations. Modifications to these requirements for H–2ALCs are set forth in § 655.106.

(b) *General Attestation Obligation.* An employer must attest on the *Application for Temporary Employment Certification* that it will comply with all of the assurances and obligations of this subpart and to performing all necessary steps of the recruitment process as specified in this section.

(c) *Retention of documentation.* An employer filing an *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a Notice of Deficiency from the CO prior to the CO rendering a Final Determination, or in the event of an audit. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for any application (and supporting documentation) after the Secretary has made a final decision to deny the application.

(d) *Positive recruitment steps.* An employer filing an application must:

(1) Submit a job order to the SWA serving the area of intended employment;

(2) Run two print advertisements (one of which must be on a Sunday, except as provided in paragraph (g) of this section);

(3) Contact former U.S. employees who were employed within the last year as described in paragraph (h) of this section; and

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in all States currently designated as a State of traditional or expected labor supply with respect to each area of intended employment in which the employer's work is to be performed as required in paragraph (i)(2) of this section.

(e) *Job order.* (1) The employer must submit a job order to the SWA serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance, identifying it as a job order to be placed in connection with a future application for H–2A workers. If the job opportunity is located in more than one State, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites. Where a future master application will be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the association on behalf of all employers that will be duly named on the *Application for Temporary Employment Certification.* Documentation of this step by the applicant is satisfied by maintaining proof of posting from the SWA identifying the job order number(s) with the start and end dates of the posting of the job order.

(2) The job order submitted to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.103 and comply with the requirements for agricultural clearance orders in 20 CFR part 653 Subpart F and the requirements set forth in § 655.104.

(3) The SWA will review the contents of the job order as provided in 20 CFR part 653 Subpart F and will work with the employer to address any deficiencies, except that the order may be placed prior to completion of the housing inspection required by 20 CFR 653.501(d)(6) where necessary to meet the timeframes required by statute and regulation. However, the SWA must ensure that housing within its jurisdiction is inspected as expeditiously as possible thereafter. Any issue with regard to whether a job order may properly be placed in the job service system that cannot be resolved with the applicable SWA may be brought to the attention of the NPC, which may direct that the job order be placed in the system where the NPC determines that the applicable program requirements have been met. If the NPC concludes that the job order is not acceptable, it shall so inform the employer using the procedures applicable to a denial of certification set forth in § 655.109(e).

(f) *Intrastate/Interstate recruitment.* (1) Upon receipt and acceptance of the job order, the SWA must promptly place the job order in intrastate clearance on its active file and begin recruitment of eligible U.S. workers. The SWA receiving the job order under paragraph (e) of this section will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the job order as anticipated worksites. The SWA must also transmit a copy of all active job orders to no fewer than three States, which must include those States, if any, designated by the Secretary as traditional or expected labor supply States (''out-of-State recruitment States'') for the area of intended employment in which the employer's work is to be performed as defined in paragraph (i) of this section.

(2) Unless otherwise directed by the CO, the SWA must keep the job order open for interstate clearance until the end of the recruitment period, as set forth in § 655.102(f)(3). Each of the SWAs to which the job order was referred must keep the job order open for that same period of time and must refer each eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(3) (i) For the first 5 years after the effective date of this rule, the recruitment period shall end 30 days after the first date the employer requires the services of the H–2A workers, or on the last day the employer requires the services of H–2A workers in the applicable area of intended employment, whichever is sooner (the 30-day rule). During that 5-year period, the Department will endeavor to study

the costs and benefits of providing for continuing recruitment of U.S. workers after the H–2A workers have already entered the country. Unless prior to the expiration of the 5-year period the Department conducts a study and publishes a notice determining that the economic benefits of such extended recruitment period outweigh its costs, the recruitment period will, after the expiration of the 5-year period, end on the first date the employer requires the services of the H–2A worker.

(ii) Withholding of U.S. workers prohibited. The provisions of this paragraph shall apply so as long as the 30-day rule is in place.

(A) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers during the 30-day rule under paragraph (f)(3)(i) of this section may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(B) *Investigations.* The CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(C) *Written findings.* Where the CO determines, after conducting the interviews required by this paragraph, that the employer's complaint is valid and justified, the CO shall immediately suspend the application of the 30-day rule under paragraph (f)(3)(i) of this section to the employer. The CO's determination shall be the final decision of the Secretary.

(g) *Newspaper advertisements.* (1) During the period of time that the job order is being circulated by the SWA(s) for interstate clearance under paragraph (f) of this section, the employer must place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is accepted by the SWA for intrastate/interstate clearance.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements of §§ 655.103 and 655.104. The employer must maintain copies of newspaper pages (with date of publication and full copy of ad), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute required by paragraph (g)(2) of this section).

(h) *Contact with former U.S. employees.* The employer must contact by mail or other effective means its former U.S. employees (except those who were dismissed for cause, abandoned the worksite, or were provided documentation at the end of their previous period of employment explaining the lawful, job-related reasons they would not be re-contacted) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. The employer must maintain copies of correspondence signed and dated by the employer or, if other means are used, maintain dated logs demonstrating that each worker was contacted, including the phone number, e-mail address, or other means that was used to make contact. The employer must list in the recruitment report any workers who did not return to the employ of the employer because they were either unable or unwilling to return to the job or did not respond to the employer's request, and must retain documentation, if provided by the worker, showing evidence of their inability, unwillingness, or non-responsiveness.

(i) *Additional positive recruitment.* (1) Each year, the Secretary will make a determination with respect to each State whether there are other States (''traditional or expected labor supply States'') in which there are a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State, as well as which newspapers in each traditional or expected labor supply State that the employer may use to fulfill its obligation to run a newspaper advertisement in that State. Such determination must be based on information provided by State agencies or by other sources within the 120 days preceding the determination (which will be solicited by notice in the **Federal Register**), and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State. The Secretary will not designate a State as a traditional or expected labor supply State if the State has a significant number of employers that are recruiting for U.S. workers for the same types of occupations and comparable work. The Secretary's annual determination as to traditional or expected labor supply States, if any, from which applicants from each State must recruit will be published in the **Federal Register** and made available through the ETA Web site.

(2) Each employer must engage in positive recruitment in those States designated in accordance with paragraph (i)(1) with respect to the State in which the employer's work is to be performed. Such recruitment will consist of one newspaper advertisement in each State in one of the newspapers designated by the Secretary, published within the same period of time as the newspaper advertisements required under paragraph (g) of this section. An employer will not be required to conduct positive recruitment in more than three States designated in accordance with paragraph (i)(1) for each area of intended employment listed on the employer's application. The advertisement must refer applicants to the SWA nearest the area in which the advertisement was placed.

(j) *Referrals of U.S. workers.* SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(k) *Recruitment report.* (1) No more than 50 days before the date of need the employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted with the *Application for Temporary Employment Certification.* The recruitment report must:

(i) List the original number of openings for which the employer recruited;

(ii) Identify each recruitment source by name;

(iii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(iv) Confirm that former employees were contacted and by what means; and

(v) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied for the position.

(2) The employer must update the recruitment report within 48 hours of the date that is the end of the recruitment period as specified in § 655.102(f)(3). This supplement to the recruitment report must meet the requirements of paragraph (k)(1) of this section. The employer must sign and date this supplement to the recruitment report and retain it for a period of no less than 3 years. The supplement to the recruitment report must be provided in the event of an audit.

(3) The employer must retain resumes (if provided) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report and the supplemental recruitment report for a period of no less than 3 years, and must be provided in response to a Notice of Deficiency or in the event of an audit.

§ 655.103 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.102 before filing the *Application for Temporary Employment Certification* must meet the requirements set forth in this section and at § 655.104 and must contain terms and conditions of employment which are not less favorable than those that will be offered to the H–2A workers. All advertising must contain the following information:

(a) The employer's name and location(s) of work, or in the event that a master application will be filed by an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA of the State in which the advertisement is run;

(b) The geographic area(s) of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated period of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (such as where a master application will be filed by an association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an association, a statement indicating that the rate(s) applicable to each employer can be obtained from the SWA;

(e) The three-fourths guarantee specified in § 655.104(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers, who cannot reasonably return to their permanent residence at the end of each working day;

(h) If applicable, a statement that transportation and subsistence expenses to the worksite will be provided by the employer;

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) A statement directing applicants to report or send resumes to the SWA of the State in which the advertisement is run for referral to the employer;

(k) Contact information for the applicable SWA and the job order number.

§ 655.104 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers.

(b) *Job qualifications.* Each job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops.

(c) *Minimum benefits, wages, and working conditions.* Every job offer accompanying an H–2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing.* (1) *Obligation to provide housing.* The employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to their permanent residence at the end of the work day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing that meets the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation that meets applicable local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document that the housing complies with the local, State, or Federal housing standards. Such documentation may include but is not limited to a certificate from a State Department of Health or other State or local agency or a statement from the manager or owner of the housing.

(2) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued by ETA.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing, bedding, or other property by the individual workers found to have been responsible for

damage which is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units (but need not pay for optional, extra services) directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing must be provided to workers with families who request it.

(6) *Housing inspection.* In order to ensure that the housing provided by an employer under this section meets the relevant standard:

(i) An employer must make the required attestation, which may include an attestation that the employer is complying with the procedures set forth in § 654.403, at the time of filing the *Application for Temporary Employment Certification* pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no less than 60 days before the date of need, except where otherwise provided under this part.

(iii) The SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under INA sec. 218(c)(3)(A), which is 30 days before the employer's date of need. SWAs must not adopt rules or restrictions on housing inspections that unreasonably prevent inspections from being completed in the required time frame, such as rules that no inspections will be conducted where the housing is already occupied or is not yet leased. If the employer has attested to and met all other criteria for certification, and the employer has made a timely request for a housing inspection under this paragraph, and the SWA has failed to complete a housing inspection by the statutory deadline of 30 days prior to date of need, the certification will not be withheld on account of the SWA's failure to meet the statutory deadline. The SWA must in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer and the CO. The CO will take appropriate action, including notice to the employer to cure deficiencies. An employer's failure to cure substantial violations can result in revocation of the temporary labor certification.

(7) *Certified housing that becomes unavailable.* If after a request to certify housing (but before certification), or after certification of housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of paragraph (d)(1)(ii) of this section. The SWA must notify the CO of all housing changes and of any noncompliance with the standards set forth in paragraph (d)(1)(ii) of this section. Substantial noncompliance can result in revocation of the temporary labor certification under § 655.117.

(e) *Workers' compensation.* The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment. The employer must retain for 3 years from the date of certification of the application, the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* Except as provided in this paragraph, the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted, provided that the requirements of sec. 3(m) of the FLSA at 29 U.S.C. 203(m) are met. Section 3(m) does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.114.

(h) *Transportation; daily subsistence.* (1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer's place of employment. For an H–2A worker coming from outside of the U.S., the place from which the worker has departed is the place of recruitment, which the Department interprets to mean the appropriate U.S. consulate or port of entry. When it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H–2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to U.S. workers. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount

permitted under paragraph (g) of this section.

(2) *Transportation from last place of employment to home country.* If the worker completes the work contract period, and the worker has no immediately subsequent H–2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. For an H–2A worker coming from outside of the U.S., the place from which the worker has departed will be considered to be the appropriate U.S. consulate or port of entry.

(3) *Transportation between living quarters and worksite.* The employer must provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer pursuant to paragraph (d) of this section) and the employer's worksite at no cost to the worker, and such transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation.

(i) *Three-fourths guarantee.* (1) *Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and has been approved by the CO. The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks × 48 hours/week = 480-hours × 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total guaranteed. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

(2) *Guarantee for piece rate paid worker.* If the worker will be paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with paragraph (j)(2) of this section.

(4) *Displaced H–2A worker.* The employer is not liable for payment under paragraph (i)(1) of this section to an H–2A worker whom the CO certifies is displaced because of the employer's compliance with § 655.105(d) with respect to referrals made after the employer's date of need. The employer is, however, liable for return transportation for any such displaced worker in accordance with paragraph (h)(2) of this section.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and subsistence for each day of the contract period up until the day the workers depart for other H–2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G–28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated

representative, and by the worker and designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the completion of the work contract.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages; and

(6) If piece rates are used, the units produced daily.

(l) *Rates of pay.* (1) If the worker is paid by the hour, the employer must pay the worker at least the AEWR in effect at the time recruitment for the position was begun, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2)(i) If the worker is paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and must be normal, meaning that they may not be unusual for workers performing the same activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly.

(n) *Abandonment of employment or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, fails to report for employment at the beginning of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the **Federal Register** not later than 2 working days after such abandonment or abscondment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause, however, for shorter unexcused periods of time that shall not be considered abandonment or abscondment.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination as described in paragraph (i)(1) of this section. The employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2A employer (but only if the worker can provide documentation supporting such employment), whichever the worker prefers. For an H–2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence will be computed as set forth in paragraph (h) of this section. The amount of the transportation payment will be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* The employer must make all deductions from the worker's paycheck that are required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(q) *Copy of work contract.* The employer must provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract must contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the job order, as provided in 20 CFR part 653, Subpart F, will be the work contract.

§ 655.105 Assurances and obligations of H–2A employers.

An employer seeking to employ H–2A workers must attest as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions of this subpart:

(a) The job opportunity is and will continue through the recruitment period to be open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer attests that it

will retain records of all rejections as required by § 655.119.

(b) The employer is offering terms and working conditions which are not less favorable than those offered to the H–2A worker(s) and are not less than the minimum terms and conditions required by this subpart.

(c) The specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(d) The employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the recruitment period as specified in § 655.102(f)(3).

(e) During the period of employment that is the subject of the labor certification application, the employer will:

(1) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(2) Provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker, that complies with the applicable standards as set forth in § 655.104(d);

(3) Where required, has timely requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;

(4) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of § 655.104(e); and

(5) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under § 655.104(d)) and the employer's worksite without cost to the worker.

(f) Upon the separation from employment of H–2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS) of the separation from employment not later than 2 work days after such separation is discovered by the employer. The procedures for reporting abandonments and abscondments are outlined in § 655.104(n) of this subpart.

(g) The offered wage rate is the highest of the AEWR in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.

(h) The offered wage is not based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the AEWR, prevailing hourly wage or piece rate, or the legal Federal or State minimum wage, whichever is highest.

(i) The job opportunity is a full-time temporary position, calculated to be at least 30 hours per work week, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations or crops.

(j) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment except for lawful, job related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

(k) The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to sec. 218 of the INA at 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated under sec. 218 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to sec. 218 of the INA, or this subpart or any other Department regulation promulgated under sec. 218 of the INA;

(3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or this subpart or any other Department regulation promulgated under sec. 218 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA or this subpart or any other Department regulation promulgated under sec. 218 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by sec. 218 of the INA, or this subpart or any other Department regulation promulgated under sec. 218 of the INA.

(l) The employer shall not discharge any person because of that person's taking any action listed in paragraphs (k)(1) through (k)(5) of this section.

(m) All fees associated with processing the temporary labor certification will be paid in a timely manner.

(n) The employer will inform H–2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.111, unless the H–2A worker is being sponsored by another subsequent employer.

(o) The employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees.

(p) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A).

(q) The applicant is either a fixed-site employer, an agent or recruiter, an H–2ALC (as defined in these regulations), or an association.

§ 655.106 Assurances and obligations of H–2A Labor Contractors.

(a) The pre-filing activity requirements set forth in § 655.102 are modified as follows for H–2ALCs:

(1) The job order for an H–2ALC may contain work locations in multiple areas of intended employment, and may be submitted to any one of the SWAs

having jurisdiction over the anticipated work areas. The SWA receiving the job order shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites, as well as those States, if any, designated by the Secretary as traditional or expected labor supply States for each area in which the employer's work is to be performed. Each SWA shall keep the H–2ALC's job order posted until the end of the recruitment period, as set forth in § 655.102(f)(3), for the area of intended employment that is covered by the SWA. SWAs in States that have been designated as traditional or expected labor supply States for more than one area of intended of employment that are listed on an application shall keep the H–2ALC's job order posted until the end of the applicable recruitment period that is last in time, and may make referrals for job opportunities in any area of intended employment that is still in an active recruitment period, as defined by § 655.102(f)(3).

(2) The H–2ALC must conduct separate positive recruitment under § 655.102(g) through (i) for each area of intended employment in which the H–2ALC intends to perform work, but need not conduct separate recruitment for each work location within a single area of intended employment. The positive recruitment for each area of intended employment must list the name and location of each fixed-site agricultural business to which the H–2ALC expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site. Such positive recruitment must be conducted pre-filing for the first area of intended employment, but must be started no more than 75 and no fewer than 60 days before the listed arrival date (or the amended date, if applicable) for each subsequent area of intended employment. For each area of intended employment, the advertising that must be placed in any applicable States designated as traditional or expected labor supply States must be placed at the same time as the placement of other positive recruitment for the area of intended employment in accordance with § 655.102(i)(2).

(3) The job order and the positive recruitment in each area of intended employment may require that workers complete the remainder of the H–2ALC's itinerary.

(4) An H–2ALC who hires U.S. workers during the course of its itinerary, and accordingly releases one or more of its H–2A workers, is eligible for the release from the three-quarters guarantee with respect to the released H–2A workers that is provided for in § 655.104(i)(4).

(5) An H–2ALC may amend its application subsequent to submission in accordance with § 655.107(d)(3) to account for new or changed worksites or areas of intended employment during the course of the itinerary in the following manner:

(i) If the additional worksite(s) are in the same area(s) of intended employment as represented on the *Application for Temporary Employment Certification,* the H–2ALC is not required to re-recruit in those areas of intended employment if that recruitment has been completed and if the job duties at the new work sites are similar to those already covered by the application.

(ii) If the additional worksite(s) are outside the area(s) of intended employment represented on the *Application for Temporary Employment Certification,* the H–2ALC must submit in writing the new area(s) of intended employment and explain the reasons for the amendment of the labor certification itinerary. The CO will order additional recruitment in accordance with § 655.102(d).

(iii) For any additional worksite not included on the original application that necessitates a change in housing of H–2A workers, the H–2ALC must secure the statement of housing as described in paragraph (b)(6) of this section and obtain an inspection of such housing from the SWA in the area of intended employment.

(iv) Where additional recruitment is required under paragraphs (a)(5)(i) or (a)(5)(ii) of this section, the CO shall allow it to take place on an expedited basis, where possible, so as to allow the amended dates of need to be met.

(6) Consistent with paragraph (a)(5) of this section, no later than 30 days prior to the commencement of employment in each area of intended employment in the itinerary of an H–2ALC, the SWA having jurisdiction over that area of intended employment must complete the housing inspections for any employer-provided housing to be used by the employees of the H–2ALC.

(7) To satisfy the requirements of § 655.102(h), the H–2ALC must contact all U.S employees that worked for the H–2ALC during the previous season, except those excluded by that section, before filing its application, and must advise those workers that a separate job opportunity exists for each area of intended employment that is covered by the application. The employer may advise contacted employees that for any given job opportunity, workers may be required to complete the remainder of the H–2ALC's itinerary.

(b) In addition to the assurances and obligations listed in § 655.105, H–2ALC applicants are also required to:

(1) Provide the MSPA Farm Labor Contractor (FLC) certificate of registration number and expiration date if required under MSPA at 29 U.S.C. 1801 *et seq.*, to have such a certificate;

(2) Identify the farm labor contracting activities the H–2ALC is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, to have such a certificate of registration;

(3) List the name and location of each fixed-site agricultural business to which the H–2A Labor Contractor expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;

(4) Provide proof of its ability to discharge financial obligations under the H–2A program by attesting that it has obtained a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated pursuant to 29 CFR 501.8) and any identifying designation utilized by the surety for the bond;

(5) Attest that it has engaged in, or will engage in within the timeframes required by § 655.102 as modified by § 655.106(a), recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business; and

(6) Attest that it will be providing housing and transportation that complies with the applicable housing standards in § 655.104(d) or that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards in § 655.104(d); and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D,

except where workers' compensation is used to cover such transportation as described in § 655.104(h)(3).

§ 655.107 Processing of applications.

(a) *Processing.* (1) Upon receipt of the application, the CO will promptly review the application for completeness and an absence of errors that would prevent certification, and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. Applications requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number of U.S. workers must comply with other requirements for H–2A applications and must be supported by a recruitment report, in which case the application will be accepted but will then be denied. Criteria for certification, as used in this subpart, include, but are not limited to, whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H–2ALC, by § 655.106; complied with the timeliness requirements in § 655.102; and complied with the recruitment obligations required by §§ 655.102 and 655.103.

(2) Unless otherwise noted, any notice or request sent by the CO or OFLC to an applicant requiring a response shall be sent by means normally assuring next-day delivery, to afford the applicant sufficient time to respond. The employer's response shall be considered filed with the Department when sent (by mail, certified mail, or any other means indicated to be acceptable by the CO) to the Department, which may be demonstrated, for example, by a postmark.

(b) *Notice of deficiencies.* (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (a) of this section, the CO will promptly notify the employer within 7 calendar days of the CO's receipt of the application.

(2) The notice will:

(i) State the reason(s) why the application fails to meet the criteria for temporary labor certification, citing the relevant regulatory standard(s);

(ii) Offer the employer an opportunity to submit a modified application within 5 business days from date of receipt, stating the modification that is needed for the CO to accept the application for consideration;

(iii) Except as provided for under paragraph (b)(2)(iv) of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 business days and in a manner specified by the CO;

(iv) Where the CO determines the employer failed to comply with the recruitment obligations required by §§ 655.102 and 655.103, offer the employer an opportunity to correct its recruitment and conduct it on an expedited schedule. The CO shall specify the positive recruitment requirements, request the employer submit proof of corrected advertisement and an initial recruitment report meeting the requirements of § 655.102(k) no earlier than 48 hours after the last corrected advertisement is printed, and state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made within 5 business days of receiving the required documentation, which may be a date later than 30 days before the date of need:

(v) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ, of the *Notice of Deficiency.* The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(vi) State that if the employer does not comply with the requirements under paragraphs (b)(2)(ii) and (iv) of this section or request an expedited administrative judicial review or a de novo hearing before an ALJ within the 5 business days the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(c) *Submission of modified applications.* (1) If the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth in paragraph (b)(1) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 business-day period allowed under paragraph (b)(2)(ii) of this section to submit a modified application.

(2) Where the employer submits a modified application as required by the CO, and the CO approves the modified application, the CO will not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(3) If the modified application is not approved, the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(d) *Amendments to applications.* (1) Applications may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the total period of employment, but only if a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the total period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such workers will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be approved by the CO if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the

labor certification determination required under § 655.109. Requested amendments will be reviewed as quickly as possible, taking into account revised dates of need for work locations associated with the amendment.

(e) *Appeal procedures.* With respect to either a Notice of Deficiency issued under paragraph (b) of this section, the denial of a requested amendment under paragraph (d) of this section, or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ, the procedures set forth in § 655.115 will be followed.

§ 655.108 Offered wage rate.

(a) *Highest wage.* To comply with its obligation under § 655.105(g), an employer must offer a wage rate that is the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.

(b) *Wage rate request.* The employer must request and obtain a wage rate determination from the NPC, on a form prescribed by ETA, before commencing any recruitment under this subpart, except where specifically exempted from this requirement by these regulations.

(c) *Validity of wage rate.* The recruitment must begin within the validity period of the wage determination obtained from the NPC. Recruitment for this purpose begins when the job order is accepted by the SWA for posting.

(d) *Wage offer.* The employer must offer and advertise in its recruitment a wage at least equal to the wage rate required by paragraph (a) of this section.

(e) *Adverse effect wage rate.* The AEWR will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web site (*http://www.flcdatacenter.com/*). This wage shall not be less than the July 24, 2009 Federal minimum wage of $7.25.

(f) *Wage determination.* The NPC must enter the wage rate determination on a form it uses, indicate the source, and return the form with its endorsement to the employer.

(g) *Skill level.* (1) Level I wage rates are assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

(2) Level II wage rates are assigned to job offers for employees who have attained, through education or experience, a good understanding of the occupation. These employees perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. These employees perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as lead, senior, crew chief, or journeyman would be indicators that a Level III wage should be considered.

(4) Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees receive only minimal guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

(h) *Retention of documentation.* An employer filing an *Application for Temporary Employment Certification* must maintain documentation of its wage determination from the NPC as required in this subpart and be prepared to submit this documentation with the filing of its application. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for applications (and supporting documentation) that are denied.

§ 655.109 Labor certification determinations.

(a) *COs.* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC, and the CO(s) in the NPC(s) (by virtue of delegation from the Administrator, OFLC), have the authority to certify or deny applications for temporary employment certification under the H–2A nonimmigrant classification. If the Administrator, OFLC has directed that certain types of temporary labor certification applications or specific applications under the H–2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the NPC(s) will refer such applications to the Administrator, OFLC.

(b) *Determination.* No later than 30 calendar days before the date of need, as identified in the *Application for Temporary Employment Certification*, except as provided for under § 655.107(c) for modified applications, or applications not otherwise meeting certification criteria by that date, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification.* The CO will grant the application if and only if: the employer has met the requirements of this subpart, including the criteria for certification set forth in § 655.107(a), and thus the employment of the H–2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(c) *Notification.* The CO will notify the employer in writing (either electronically or by mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the recruitment period as set forth in § 655.102(f)(3). However, the employer will not be required to accept referrals of eligible U.S. workers once it has hired

or extended employment offers to eligible U.S. workers equal to the number of H–2A workers sought.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery. The Final Determination Letter will:

(1) State the reasons certification is denied, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions of similarly employed U.S. workers in the occupation and/or any applicable special procedures;

(3) Offer the applicant an opportunity to request an expedited administrative review, or a *de novo* administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification.

(f) *Partial certification.* The CO may, to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H–2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise. The number of workers certified shall be reduced by one for each referred U.S. worker who is qualified, able, available and willing. If a partial labor certification is issued, the Final Determination letter will:

(1) State the reasons for which either the period of need and/or the number of H–2A workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation;

(3) Offer the applicant an opportunity to request an expedited administrative review, or a *de novo* administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification.

(g) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ under paragraph (e)(3) or (f)(3) of this section, the procedures at § 655.115 will be followed.

(h) *Payment of processing fees.* A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part under paragraph (d) or (f) of this section will include a bill for the required fees. Each employer of H–2A workers under the *Application for Temporary Employment Certification* (except joint employer associations, which shall not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the application (in whole or in part), as follows:

(1) *Amount.* The application fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H–2A worker certified under the *Application for Temporary Employment Certification*, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the application. The fees must be paid by check or money order made payable to ''United States Department of Labor.'' In the case of H–2A employers that are members of an agricultural association acting as a joint employer applying on their behalf, the aggregate fees for all employers of H–2A workers under the application must be paid by one check or money order.

(2) *Timeliness.* Fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely. Non-payment of fees by the date that is 30 days after the issuance of the certification will be considered a substantial program violation and subject to the procedures in § 655.115.

§ 655.110 Validity and scope of temporary labor certifications.

(a) *Validity period.* A temporary labor certification is valid for the duration of the job opportunity for which certification is granted to the employer. Except as provided in paragraph and (d) of this section, the validity period is that time between the beginning and ending dates of certified employment, as listed on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of validity.* Except as provided in paragraphs (c) and (d) of this section, a temporary labor certification is valid only for the number of H–2A workers, the area of intended employment, the specific occupation and duties, and the employer(s) specified on the certified *Application for Temporary Employment Certification* (as originally filed or as amended) and may not be transferred from one employer to another.

(c) *Scope of validity—associations.* (1) *Certified applications.* If an association is requesting temporary labor certification as a joint employer, the certified *Application for Temporary Employment Certification* will be granted jointly to the association and to each of the association's employer members named on the application. Workers authorized by the temporary labor certification may be transferred among its certified employer members to perform work for which the temporary labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary agricultural labor certifications to associations may be used for the certified job opportunities of any of its employer members named on the application. If an association is requesting temporary labor certification as a sole employer, the certified *Application for Temporary Employment Certification* is granted to the association only.

(2) *Ineligible employer-members.* Workers may not be transferred or referred to an association's employer member if that employer member has

been debarred from participation in the H–2A program.

(d) *Extensions on period of employment.* (1) *Short-term extension.* An employer who seeks an extension of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply for such extension to DHS. If DHS grants the extension, the corresponding *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(2) *Long-term extension.* For extensions beyond 2 weeks, an employer may apply to the CO at any time for an extension of the period of employment on the certified *Application for Temporary Employment Certification* for reasons related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will grant or deny the request for extension of the period of employment on the *Application for Temporary Employment Certification* based on the available information, and will notify the employer of the decision in writing. The employer may appeal a denial for a request of an extension in accordance with the procedures contained in § 655.115. The CO will not grant an extension where the total work contract period under that application and extensions would be 12 months or more, except in extraordinary circumstances.

(e) *Requests for determinations based on nonavailability of able, willing, available, eligible, and qualified U.S. workers.* (1) *Standards for requests.* If a temporary labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (e)(2) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.115.

(2) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(3) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient specific able, willing, eligible, and qualified U.S. workers who are or who are likely to be available, the CO will grant the employer's request for a new determination. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.111 Required departure.

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification limits the authorized period of stay for an H–2A worker. *See* 8 CFR 214.2(h). A foreign worker may not remain beyond his or her authorized period of stay, as established by DHS, which is based upon the validity period of the labor certification under which the H–2A worker is employed, nor beyond separation from employment prior to completion of the H–2A contract, absent an extension or change of such worker's status under DHS regulations.

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H–2A worker that when the worker departs the U.S. by land at the conclusion of employment as provided in paragraph (a) of this section, the worker must register such departure at the place and in the manner prescribed by DHS.

§ 655.112 Audits.

(a) *Discretion.* The Department will conduct audits of temporary labor certification applications for which certification has been granted. The applications selected for audit will be chosen within the sole discretion of the Department.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer/applicant. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, no fewer than 14 days and no more than 30 days from the date of the audit letter, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process may result in a finding by the CO to:

(i) Revoke the labor certification as provided in § 655.117 and/or

(ii) Debar the employer from future filings of H–2A temporary labor certification applications as provided in § 655.118.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit.

(d) *Audit violations.* If, as a result of the audit, the CO determines the employer failed to produce required documentation, or determines that the employer violated the standards set forth in § 655.117(a) with respect to the application, the employer's labor certification may be revoked under § 655.117 and/or the employer may be referred for debarment under § 655.118. The CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO shall refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.113 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Terminated processing.* If a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification,* the application will be deemed invalid. The determination is not appealable. If a certification has been granted, a finding under this paragraph will be cause to revoke the certification.

§ 655.114 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* Until a new amount is set under this paragraph an employer may charge workers up to $9.90 for providing them with three meals per day. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the Administrator, OFLC, as a Notice in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206 (FLSA), the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Filing petitions for higher meal charges.* The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.

(1) *Required documentation.* Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection by the CO for a period of 1 year.

(2) *Effective date for higher charge.* The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) *Appeal.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief Administrative Law Judge. ALJ's will hear such appeals according to the procedures in 29 CFR part 18, except that the appeal will not be considered as a complaint to which an answer is required. The decision of the ALJ is the final decision of the Secretary.

§ 655.115 Administrative review and de novo hearing before an administrative law judge.

(a) *Administrative review.* (1) *Consideration.* Whenever an employer has requested an administrative review before an ALJ of a decision by the CO: Not to accept for consideration an *Application for Temporary Employment Certification;* to deny an *Application for Temporary Employment Certification;* to deny an amendment of an *Application for Temporary Employment Certification;* or to deny an extension of an *Application for Temporary Employment Certification,* the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ (which may be a panel of such persons designated by the Chief Administrative Law Judge from BALCA established by 20 CFR part 656, which will hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The ALJ may not remand the case and may not receive evidence in addition to what the CO used to make the determination.

(2) *Decision.* Within 5 business days after receipt of the ETA case file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the Administrator, OFLC, and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(b) *De novo hearing.* (1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a de novo hearing before an ALJ of a decision by the CO: Not to accept for consideration an *Application for Temporary Employment Certification;* to deny an *Application for Temporary Employment Certification;* to deny an amendment of an *Application for Temporary Employment Certification;* or to deny an extension of an *Application for Temporary Employment Certification,* the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ (which may be a panel of such persons designated by the Chief Administrative Law Judge from BALCA established by 20 CFR part 656 of this chapter, but which will hear and decide the appeal as provided in this section) to conduct the *de novo* hearing. The procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 5 calendar days after the ALJ's receipt of the ETA case file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

(2) *Decision.* After a *de novo* hearing, the ALJ must affirm, reverse, or modify the CO's determination, and the ALJ's decision must be provided immediately to the employer, CO, Administrator, OFLC, and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

§ 655.116 Job Service Complaint System; enforcement of work contracts.

(a) Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, Subpart E. Complaints which involve worker contracts must be referred by the SWA to ESA for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, ESA may report the results of its investigation to the Administrator, OFLC for consideration of employer penalties or such other action as may be appropriate.

(b) Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, may be referred to the U.S. Department of Justice, Civil Rights

Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or an SWA. Likewise, if OSC becomes aware of a violation of these regulations, it may provide such information to the appropriate SWA and the CO.

§ 655.117 Revocation of approved labor certifications.

(a) *Basis for DOL revocation.* The CO, in consultation with the Administrator, OFLC, may revoke a temporary agricultural labor certification approved under this subpart, if, after notice and opportunity for a hearing (or failure to file rebuttal evidence), it is found that any of the following violations were committed with respect to that temporary agricultural labor certification:

(1) The CO finds that issuance of the temporary agricultural labor certification was not justified due to a willful misrepresentation on the application;

(2) The CO finds that the employer:

(i) Willfully violated a material term or condition of the approved temporary agricultural labor certification or the H–2A regulations, unless otherwise provided under paragraphs (a)(2)(ii) through (iv) of this section; or

(ii) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d); or

(iii) Significantly failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(iv) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).

(3) The CO determines after a recommendation is made by the WHD ESA in accordance with 29 CFR 501.20, which governs when a recommendation of revocation may be made to ETA, that the conduct complained of upon examination meets the standards of paragraph (a)(1) or (2) of this section; or

(4) If a court or the DHS, or, as a result of an audit, the CO, determines that there was fraud or willful misrepresentation involving the *Application for Temporary Employment Certification.*

(b) *DOL procedures for revocation.* (1) The CO will send to the employer (and his attorney or agent) a *Notice of Intent to Revoke* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The CO must consider all relevant evidence presented in deciding whether to revoke the temporary agricultural labor certification.

(2) If rebuttal evidence is not timely filed by the employer, the *Notice of Intent to Revoke* will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the CO finds that the employer more likely than not meets one or more of the bases for revocation under § 655.117(a), the CO will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination that the temporary agricultural labor certification should be revoked. The CO's notice will contain a detailed statement of the bases for the decision, and must offer the employer an opportunity to request a hearing. The notice must state that, to obtain such a hearing, the employer must, within 10 calendar days of the date of the notice file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the Administrator, OFLC. The timely filing of a request for a hearing will stay the revocation pending the outcome of the hearing.

(c) *Hearing.* (1) Within 5 business days of receipt of the request for a hearing, the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The request for a hearing will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 15 calendar days after the ALJ's receipt of the ETA case file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 20 calendar days after the hearing.

(2) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the CO's determination. The ALJ's decision must be provided immediately to the employer, CO, Administrator, OFLC, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(d) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked under this section, and the workers have departed the place of recruitment, the employer will be responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.104(h)(1);

(2) The worker's outbound transportation expenses, as if the worker meets the requirements for payment under § 655.104(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.104(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under these regulations.

§ 655.118 Debarment.

(a) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer and any successor in interest to the debarred employer, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The Administrator, OFLC finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and

(2) The Administrator, OFLC issues a *Notice of Intent to Debar* no later than 2 years after the occurrence of the violation.

(b) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer represented by an agent or attorney, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The Administrator, OFLC finds that the agent or attorney participated in, had knowledge of, or had reason to know of, an employer's substantial violation; and

(2) The Administrator, OFLC issues the agent or attorney a *Notice of Intent to Debar* no later than 2 years after the occurrence of the violation.

(c) No employer, attorney, or agent may be debarred under this subpart for more than 3 years.

(d) For the purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages or benefits required to be offered under the H–2A program, or working conditions of a significant number of the employer's U.S. or H–2A workers; or

(ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons; or

(iii) Reflect a willful failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart; or

(iv) Reflect a significant failure to comply with the audit process in violation of § 655.112; or

(v) Reflect the employment of an H–2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;

(2) The employer's persistent or prolonged failure to pay the necessary fee in a timely manner, following the issuance of a deficiency notice to the applicant and allowing for a reasonable period for response;

(3) Fraud involving the *Application for Temporary Employment Certification* or a response to an audit;

(4) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(5) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(6) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(e) DOL procedures for debarment under this section will be as follows:

(1) The Administrator, OFLC will send to the employer, attorney, or agent a *Notice of Intent to Debar* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

(2) If rebuttal evidence is not timely filed by the employer, attorney, or agent, the *Notice of Intent to Debar* will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator, OFLC determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.118(d), the Administrator, OFLC will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

(4) The *Notice of Debarment* must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must offer the employer, attorney, or agent an opportunity to request a hearing. The notice must state that, to obtain such a hearing, the debarred party must, within 30 calendar days of the date of the notice, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the Administrator, OFLC. The debarment will take effect 30 days from the date the *Notice of Debarment* is issued unless a request for a hearing is properly filed within 30 days from the date the *Notice of Debarment* is issued. The timely filing of the request for a hearing stays the debarment pending the outcome of the hearing.

(5)(i) *Hearing.* Within 10 days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required;

(ii) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC 's determination. The ALJ's decision must be provided immediately to the employer, Administrator, OFLC, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(iii) Review by the ARB.

(A) Any party wishing review of the decision of an ALJ must, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB must decide whether to accept the petition within 30 days of receipt. If the ARB declines to accept the petition or if the ARB does not issue a notice accepting a petition within 30 days after the receipt of a timely filing of the petition, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding in person or by certified mail.

(B) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges shall promptly forward a copy of the complete hearing record to the ARB.

(C) Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(*1*) The issue or issues raised;

(*2*) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and

(*3*) The time within which such presentation shall be submitted.

(D) The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary.

(f) *Debarment involving members of associations.* If the Administrator, OFLC determines a substantial violation has occurred, and if an individual employer-member of an agricultural

association acting as a joint employer is determined to have committed the violation, the debarment determination will apply only to that member of the association unless the Administrator, OFLC determines that the association or other association members participated in the violation, in which case the debarment will be invoked against the complicit association or other association members.

(g) *Debarment involving agricultural associations acting as joint employers.* If the Administrator, OFLC determines a substantial violation has occurred, and if an agricultural association acting as a joint employer with its members is found to have committed the violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association unless the Administrator, OFLC determines that the member participated in the violation, in which case the debarment will be invoked against any complicit association members as well. An association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(h) *Debarment involving agricultural associations acting as sole employers.* If the Administrator, OFLC determines a substantial violation has occurred, and if an agricultural association acting as a sole employer is determined to have committed the violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

§ 655.119 Document retention requirements.

(a) *Entities required to retain documents.* All employers receiving a certification of the *Application for Temporary Employment Certification* for agricultural workers under this subpart are required to retain the documents and records as provided in the regulations cited in paragraph (c) of this section.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification.*

(c) *Documents and records to be retained.* (1) All applicants must retain the following documentation:

(i) Proof of recruitment efforts including:

(A) Job order placement as specified in § 655.102(e)(1);

(B) Advertising as specified in § 655.102(g)(3), or, if used, professional, trade, or ethnic publications;

(C) Contact with former U.S. workers as specified in § 655.102(h);

(D) Multi-state recruitment efforts (if required under § 655.102(i)) as specified in § 655.102(g)(3);

(ii) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.102(k)(2), such as evidence of non-applicability of contact of former employees as specified in § 655.102(h);

(iii) The supplemental recruitment report as specified in § 655.102(k) and any supporting resumes and contact information as specified in § 655.102(k)(3);

(iv) Proof of workers' compensation insurance or State law coverage as specified in § 655.104(e);

(v) Records of each worker's earnings as specified in § 655.104(j);

(vi) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.104(q);

(vii) The wage determination provided by the NPC as specified in § 655.108;

(viii) Copy of the request for housing inspection submitted to the SWA as specified in § 655.104(d); and

(2) In addition to the documentation specified in paragraph (c)(1) of this section, H–2ALCs must also retain:

(i) Statements of compliance with the housing and transportation obligations for each fixed-site employer which provided housing or transportation and to which the H–2ALC provided workers during the validity period of the certification, unless such housing and transportation obligations were met by the H–2ALC itself, in which case proof of compliance by the H–2ALC must be retained, as specified in § 655.101(a)(5);

(ii) Proof of surety bond coverage which includes the name, address, and phone number of the surety, the bond number of other identifying designation, the amount of coverage, and the payee, as specified in 29 CFR 501.8; and

(3) Associations filing must retain documentation substantiating their status as an employer or agent, as specified in § 655.101(a)(1).

Subpart C—[Removed and Reserved]

■ 5. Subpart C is removed and reserved.

TITLE 29—LABOR

■ 6. Revise part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

Subpart A—General Provisions

§ 501.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H–2A workers under sec. 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H–2A workers in the same occupations as the H–2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such U.S. workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

§ 501.1 Purpose and scope.

(a) *Statutory standard.* Section 218(a) of the INA provides that:

(1) A petition to import an alien as an H–2A worker (as defined in the INA) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the Secretary of the United States Department of Labor (Secretary) for a certification that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) [Reserved]

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under sec. 218 of the INA has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing AEWR, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by sec. 218 of the INA and regulations at 20 CFR part 655, Subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, Subpart B.

(c) *Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD).* (1) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of sec. 218 of the INA have been delegated by the Secretary to the ESA, WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and U.S. workers hired in corresponding employment by H–2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under sec. 218 of the INA or 20 CFR part 655, Subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s) or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H–2A Labor Contractors (H–2ALC), from the H–2ALC directly and/or from the insurer who issued the surety bond to the H–2ALC as required by 20 CFR part 655, Subpart B and 29 CFR 501.8).

(d) *Effect of regulations.* The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations apply to the employment of any H–2A worker and any other U.S. workers hired by H–2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

§ 501.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

§ 501.3 Discrimination prohibited.

(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to sec. 218 of the INA or these regulations;

(2) Instituted or caused to be instituted any proceedings related to sec. 218 of the INA or these regulations;

(3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or these regulations;

(4) Exercised or asserted on behalf of himself or others any right or protection afforded by sec. 218 of the INA or these regulations; or

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to sec. 218 of the INA.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA debarment of any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other U.S. worker hired in corresponding employment by an H–2A employer, waive any rights conferred under sec. 218 of the INA, the

regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

§ 501.5 Investigation authority of Secretary.

(a) *General.* The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places (including housing) and such vehicles, and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under sec. 218 of the INA or these regulations.

(b) *Failure to cooperate with an investigation.* Where any employer (or employer's agent or attorney) using the services of an H–2A worker does not cooperate with an investigation concerning the employment of H–2A workers or U.S. workers hired in corresponding employment, the WHD shall report such occurrence to ETA and may recommend that ETA revoke the existing certification that is the basis for the employment of the H–2A workers giving rise to the investigation, and the WHD may recommend to ETA the debarment of the employer from future certification for up to 3 years. In addition, the WHD may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the WHD to make an investigation.

(c) *Confidential investigation.* The Secretary shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the work contract obligations of sec. 218 of the INA or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.6 Cooperation with DOL officials.

All persons must cooperate with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefore. In addition, the WHD will report the matter to ETA, and the WHD may recommend to ETA the debarment of the employer from future certification and/or recommend that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

§ 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.8 Surety bond.

(a) H–2ALCs shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655, Subpart B for each labor certification being sought. The H–2ALC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, United States Department of Labor. It shall obligate the surety to pay any sums to the Administrator, WHD, for wages and benefits owed to H–2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655, Subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the H–2ALC, and shall be amended to cover any extensions of the labor certification requested by the H–2ALC. Surety bonds may not be canceled or terminated unless 30 days' notice is provided by the surety to the Administrator, WHD.

(c) The bond shall be in the amount of $5,000 for a labor certification for which a H–2ALC will employ fewer than 25 employees, $10,000 for a labor certification for which a H–2ALC will employ 25 to 49 employees, and $20,000 for a labor certification for which a H–2ALC will employ 50 or more employees. The amount of the bond may be increased by the Administrator, WHD after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

§ 501.10 Definitions.

(a) Definitions of terms used in this part. For the purpose of this part:

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth at 20 CFR 655.115.

Administrator, WHD means the Administrator of the Wage and Hour Division (WHD), ESA and such authorized representatives as may be designated to perform any of the functions of the Administrator, WHD under this part.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator of the Office of Foreign Labor Certification (OFLC) has determined must be offered and paid to every H–2A worker employed under the DOL-approved *Application for Temporary Employment Certification* in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H–2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that—

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section, with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101.

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an H–2A *Application for Temporary Employment Certification*, and may also act as the sole or joint employer of H–2A workers.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form and the initial recruitment report.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Department of Homeland Security (DHS) means the Federal agency having control over certain immigration functions that, through its sub-agency, *United States Citizenship and Immigration Services (USCIS)*, makes the determination under the INA on whether to grant visa petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the United States Department of Labor.

Eligible worker means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer means a person, firm, corporation or other association or organization that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship with respect to H–2A employees or related U.S. workers under this part; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

Employment Service (ES) refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and OFLC, including the National Processing Centers (NPCs).

Employment Standards Administration (ESA) means the agency within DOL that includes the WHD, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the DOL that includes OFLC.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this part who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, *person* includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H–2A Labor Contractor (H–2ALC) means any person who meets the definition of employer in this section and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to sec. 218 of the INA or these regulations.

H–2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

INA/Act means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Job offer means the offer made by an employer or potential employer of H–2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a ''joint employer'' of that employee.

Office of Foreign Labor Certification (OFLC) means the organizational

component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing means with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; but only if

(2) This 50 percent or more of employers also employs in aggregate 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of H–2ALCs).

Prevailing hourly wage means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.) to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1½ bushels), a bushel of potatoes, and Eastern apple box (1½ metric bushels), a flat of strawberries (twelve quarts), etc.

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the *Application for Temporary Employment Certification*.

Secretary means the Secretary of the United States Department of Labor or the Secretary's designee.

State Workforce Agency (SWA) means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's One-Stop delivery system in accordance with the Wagner-Peyser Act, 29 U.S.C. 49, *et seq.* Separately, SWAs receive ETA grants, administered by OFLC, to assist them in performing certain activities related to foreign labor certification, including conducting housing inspections.

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of this part, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H–2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed as stated at 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII, the Commonwealth of the Northern Mariana Islands.

U.S. worker means a worker who is:

(1) A citizen or national of the U.S., or;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

Work contract means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in subpart B of 20 CFR part 655, *Labor Certification for Temporary Agricultural Employment of H–2A Aliens in the U.S. (H–2A Workers)*, or these regulations, including those terms and conditions attested to by the H–2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, Subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

(b) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this part, *agricultural labor or services of a temporary or seasonal nature* means the following:

(1) *Agricultural labor or services,* pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), is defined as:

(i) *Agricultural labor* as defined and applied in sec. 3121(g) of the Internal

Revenue Code of 1954 at 26 U.S.C. 3121(g);

(ii) *Agriculture* as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) (Work performed by H–2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) at 29 U.S.C. 207(a));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H–2B workers are employed to perform the same work at the same establishment; or

(vi) Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (b)(1)(i) and (ii) of this section is *agricultural labor or services,* notwithstanding the exclusion of that occupation from the other statutory definition.

(i) *Agricultural labor* for purposes of paragraph (b)(1)(i) of this section means all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended at 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)(*1*) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(*2*) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(*3*) The provisions of paragraphs (b)(2)(i)(D)(*1*) and (*2*) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(*4*) On a farm operated for profit if such service is not in the course of the employer's trade or business and is not domestic service in a private home of the employer.

(E) For the purposes of this section, the term *farm* includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. See sec. 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g)).

(ii) *Agriculture.* For purposes of paragraph (b)(1)(ii) of this section *agriculture* means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See sec.* 29 U.S.C. 203(f), as amended.

(iii) *Agricultural commodity.* For purposes of paragraph (b)(1)(ii) of this section, *agricultural commodity* includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. *See* 12 U.S.C. 1141j(g) (sec. 15(g) of the Agricultural Marketing Act, as amended), and 7 U.S.C. 92.

(3) *Of a temporary or seasonal nature.*

(i) *On a seasonal or other temporary basis.* For the purposes of this part, *of a temporary or seasonal nature* means *on a seasonal or other temporary basis,* as defined in the WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of *on a seasonal or other temporary basis* found in MSPA is summarized as follows:

(A) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though the worker may continue to be employed during a major portion of the year.

(B) A worker is employed on *other temporary basis* where the worker is employed for a limited time only or the worker's performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) *On a seasonal or other temporary basis* does not include

(*1*) The employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or

(*2*) The employment of any worker who is living at his or her permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) *Temporary.* For the purposes of this part, the definition of *temporary* in paragraph (b)(3) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, including, but not limited, to a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to 20 CFR 655.110.

Subpart B—Enforcement of Work Contracts

§ 501.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of sec. 218 of the INA, as provided in these regulations for enforcement by the WHD, pertain to the employment of any H–2A worker and any other U.S. worker hired in corresponding employment by an H–2A employer. Such enforcement includes work contract provisions as defined in § 501.10(a). The work contract also includes those employment benefits which are required to be stated in the job offer, as prescribed in 20 CFR 655.104.

§ 501.16 Sanctions and remedies—General.

Whenever the Secretary believes that the H–2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute appropriate administrative proceedings, including: The recovery of unpaid wages, including wages owed to U.S. workers as a result of a layoff or displacement prohibited by these rules (either directly from the employer, a successor in interest, or in the case of an H–2ALC also by claim against any surety who issued a bond to the H–2ALC); the enforcement of covered provisions of the work contract as set forth in 29 CFR 501.10(a); the assessment of a civil money penalty; reinstatement; or the recommendation of debarment for up to 3 years.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including the withholding of unpaid wages and/or reinstatement, to restrain violation of the H–2A provisions of the INA, 20 CFR part 655, Subpart B, or these regulations by any person.

(c) Petition any appropriate District Court of the U.S. for specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H–2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

§ 501.18 Representation of the Secretary.

(a) Except as provided in 28 U.S.C. 518(a) relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator, WHD and the Secretary in all administrative hearings under the H–2A provisions of the Act and these regulations.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation of the work contract as set forth in § 501.10(a) of these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H–2A provisions of the Act or these regulations the Administrator, WHD shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation or violations of the H–2A provisions of the Act and these regulations;

(2) The number of H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H–2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment that is required by sec. 218 of the INA, 20 CFR 655, Subpart B, or these regulations constituting a separate violation), with the following exceptions:

(1) For a willful failure to meet a covered condition of the work contract, or for willful discrimination, the civil money penalty shall not exceed $5,000 for each such violation committed (with each willful failure to honor the terms or conditions of a worker's employment that are required by sec. 218 of the INA, 20 CFR 655, Subpart B, or these regulations constituting a separate violation);

(2) For a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed $25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed $100,000 per worker.

(3) For purposes of paragraph (c)(2) of this section, the term *serious injury* means:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,000 per investigation;

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within 60 days of the date of need other than for a lawful, job-related reason, except that such layoff shall be permitted where all H–2A workers were laid off

first, the civil penalty shall not exceed $10,000 per violation per worker.

§ 501.20 Debarment and revocation.

(a) The WHD shall recommend to the Administrator, OFLC the debarment of any employer and any successor in interest to that employer (or the employer's attorney or agent if they are a responsible party) if the WHD finds that the employer substantially violated a material term or condition of its temporary labor certification for the employment of domestic or nonimmigrant workers.

(b) For purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages, benefits required to be offered under the H–2A program, or working conditions of a significant number of the employer's U.S. or H–2A workers;

(ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a willful failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart; or

(iv) Reflect the employment of an H–2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;

(2) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(3) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(c) Procedures for Debarment Recommendation. The WHD will send to the employer a *Notice of Recommended Debarment.* The *Notice of Recommended Debarment* must be in writing, must state the reason for the debarment recommendation, including a detailed explanation of the grounds for and the duration of the recommended debarment. The debarment recommendation will be forwarded to the Administrator, OFLC. The *Notice of Recommended Debarment* shall be issued no later than 2 years after the occurrence of the violation.

(d) The WHD may recommend to the Administrator, OFLC the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Willfully violated a material term or condition of the approved temporary agricultural labor certification, work contract, or this part, unless otherwise provided under paragraphs (d)(2) through (4) of this section.

(2) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d);

(3) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order Secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).

(e) In considering a recommendation made by the WHD to debar an employer or to revoke a temporary agricultural labor certification, the Administrator, OFLC shall treat final agency determinations that the employer has committed a violation as res judicata and shall not reconsider those determinations.

§ 501.21 Failure to cooperate with investigations.

No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator, WHD by certified check or by money order, made payable to the order of *Wage and Hour Division, United States Department of Labor.* The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties, and which may be applied to the enforcement of covered provisions of the work contract as set forth in § 501.10(a), including the collection of unpaid wages due as a result of any violation of the H–2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the Administrator, WHD decides to assess a civil money penalty or to proceed administratively to enforce covered contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator, WHD including the amount of any unpaid wages due or actions necessary to fulfill a covered contractual obligation, the amount of

any civil money penalty assessment and the reason or reasons therefore.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator, WHD shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

Rules of Practice

§ 501.34 General.

Except as specifically provided in these regulations, the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of __, Respondent.

(b) For the purposes of such administrative proceedings the Administrator, WHD shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the Administrator, WHD, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by *Order of Reference,* promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the *Order of Reference,* together with a copy of these regulations, shall be served by counsel for the Administrator, WHD upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an *Order of Reference,* the Chief Administrative Law Judge shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the *Order of Reference* was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings

and an order is submitted within the time allowed therefor, the ALJ, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

(b) The decision of the ALJ shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Administrative Review Board (ARB) in person or by certified mail.

(d) The decision concerning civil money penalties and/or back wages when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision concerning civil money penalties and/or back wages within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action. If the ARB does not issue a notice accepting a petition for review of the decision concerning the debarment recommendation within 30 days after the receipt of a timely filing of the petition, or if no petition has been received by the ARB within 30 days of the date of the decision, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be inoperative unless and until the ARB issues an order affirming the decision.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding in person or by certified mail.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's Notice pursuant to § 501.42 of these regulations, the Office of ALJ shall promptly forward a copy of the complete hearing record to the ARB.

§ 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and

(c) The time within which such presentation shall be submitted.

§ 501.45 Final decision of the Administrative Review Board.

The ARB's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge, or, where the case has been the subject of administrative review, the ARB.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge or, where the case has been the subject of administrative review, the ARB shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 9. The authority citation for part 780 is revised to read as follows:

Authority: Sections 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 10. Revise § 780.115 to read as follows:

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not agricultural or horticultural commodities, for the purpose of the FLSA. (*See* § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within sec. 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.200 through 780.209 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute agriculture. For a discussion of the exemption in sec. 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

■ 11. Revise § 780.201 to read as follows:

§ 780.201 Meaning of forestry or lumbering operations.

The term forestry or lumbering operations refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild Christmas trees is included. (*See* the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the sec. 13(b)(28) exemption for forestry or logging operations in which not more than eight employees are employed.) Wood working as such is not included in forestry or lumbering operations. The manufacture of charcoal under modern methods is neither a forestry nor lumbering operation and cannot be regarded as agriculture.

■ 12. Revise § 780.205 to read as follows:

§ 780.205 Nursery activities generally and Christmas tree production.

(a) The employees of a nursery who are engaged in the following activities are employed in agriculture:

(1) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees, and shrubs, vines, and flowers;

(2) Handling such plants from propagating frames to the field;

(3) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

(b) Trees produced through the application of extensive agricultural or horticulture techniques to be harvested and sold for seasonal ornamental use as Christmas trees are considered to be agricultural or horticultural commodities. Employees engaged in the application of agricultural and horticultural techniques to produce Christmas trees as ornamental horticultural commodities such as the following are employed in agriculture:

(1) Planting seedlings in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary;

(2) After approximately three years, re-planting in lineout beds;

(3) After two more seasons, lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary;

(4) Pruning or shearing yearly;

(5) Harvesting of the tree for seasonal ornamental use, typically within 7 to 10 years of planting.

(c) Trees to be used as Christmas trees which are gathered in the wild, such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are not agricultural or horticultural commodities for purposes of sec. 3(f).

■ 13. Revise § 780.208 to read as follows:

§ 780.208 Forestry activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. For such operations to fall within sec. 3(f), they must qualify under the second part of the definition dealing with incidental practices. *See* § 780.201.

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

■ 14. Revise § 788.10 to read as follows:

§ 788.10 Preparing other forestry products.

As used in the exemption, other forestry products means plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques. *See* 29 CFR 780.205 for further discussion. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

Signed in Washington this 5th day of December 2008.

Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division.

Note: The following appendix will not appear in the Code of Federal Regulations.

BILLING CODE 4510–FP–P

OMB Approval: 1205-0466
Expiration Date: XX/XX/XXXX

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

Please read and review the filing instructions carefully before completing the ETA Form 9142. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If submitting this form non-electronically, ALL required fields/items containing an asterisk (*) must be completed as well as any fields/items where a response is conditional as indicated by the section (§) symbol.

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	

B. Temporary Need Information

1. Job Title *		
2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *	
4. Is this a full-time position? * ☐ Yes ☐ No	**Period of Intended Employment**	
	5. Begin Date * *(mm/dd/yyyy)*	6. End Date * *(mm/dd/yyyy)*

7. Worker positions needed/basis for the visa classification supported by this application

☐ **Total Worker Positions Being Requested for Certification ***

Basis for the visa classification supported by this application
(*indicate the total workers in each applicable category based on the total workers identified above*)

☐ a. New employment *

☐ b. Continuation of previously approved employment * without change with the same employer

☐ c. Change in previously approved employment *

☐ d. New concurrent employment *

☐ e. Change in employer *

☐ f. Amended petition *

8. Nature of Temporary Need: (Choose only one of the standards) *

☐ Seasonal ☐ Peakload ☐ One-Time Occurrence ☐ Intermittent

9. Statement of Temporary Need *

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C. Employer Information

Important Note: Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For master applications filed on behalf of more than one employer under the H-2A program, submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
14. Type of employer application (choose only one box below) *		

☐ Individual Employer
☐ H-2A Labor Contractor or Job Contractor
☐ Association – Sole Employer (H-2A only)
☐ Association – Joint Employer (H-2A only)
☐ Association – Filing as Agent (H-2A only)

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. E-Mail address

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E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *		❑ Yes ❑ No
2. Attorney or Agent's last (family) name §	3. First (given) name §	4. Middle name(s) §
5. Address 1 §		
6. Address 2		
7. City §	8. State §	9. Postal code §
10. Country §	11. Province	
12. Telephone number §	13. Extension	14. E-Mail address
15. Law firm/Business name §	16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §	18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest court where attorney is in good standing (only if attorney) §		

F. Job Offer Information

a. Job Description

1. Job Title *	
2. Number of hours of work per week Basic *: _____ Overtime: _____	3. Hourly Work Schedule * A.M. *(h:mm)*: ___ : ____ P.M. *(h:mm)*: ___ : ____
4. Does this position supervise the work of other employees? * ❑ Yes ❑ No	4a. If yes, number of employees worker will supervise (if applicable) § _____
5. Job duties – A description of the duties to be performed **MUST** begin in this space. If necessary, add attachment to continue and complete description. *	

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F. Job Offer Information ***(continued)***

b. Minimum Job Requirements

1. Education: minimum U.S. diploma/degree required * ☐ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/ degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
2. Does the employer require a second U.S. diploma/degree? *	☐ Yes ☐ No
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §	
3. Is training for the job opportunity required? *	☐ Yes ☐ No
3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
4. Is employment experience required? *	☐ Yes ☐ No
4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *	

c. Place of Employment Information

1. Worksite address 1 *	
2. Address 2	
3. City *	4. County *
5. State/District/Territory *	6. Postal code *
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	☐ Yes ☐ No
7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible, such as the Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. If filing as a farm labor or job contractor, please see the General Instructions for further details. §	

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G. Rate of Pay

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay *(if applicable)* §
From: $ _____ . _____ To (Optional): $ _____ . _____	From: $ _____ . _____ To (Optional): $ _____ . _____
2. Per: (Choose only one) * ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: §	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures) §	
4. For H-2A applications where the rate of pay is based upon **multiple crop or agricultural activities**, please confirm that **Appendix A.1** is complete and being submitted with the filing of this application. §	☐ Yes ☐ No ☐ N/A

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment *		
2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order *
3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? *		☐ Yes ☐ No

Name of Newspaper/Publication *(in area of intended employment)* *	Dates of Print Advertisement *	
4.	From:	To:
5.	From:	To:

6. Additional Recruitment Activities. A description of efforts to recruit U.S. workers **MUST** begin in this space. For each recruitment activity, identify the type or source of recruitment (e.g., additional SWA job orders, newspaper/journal name, contact with former employees) and the date(s) on which recruitment was conducted. *

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I. Declaration of Employer and Attorney/Agent

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A.2 or Appendix B.1 will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix A.2.** §	❑ Yes ❑ No ❑ N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix B.1.** §	❑ Yes ❑ No ❑ N/A

J. Preparer

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial §
4. Job Title §		
5. Firm/Business name §		
6. E-Mail address §		

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from _____ to _____.

_____

Department of Labor, Office of Foreign Labor Certification — Determination Date (date signed)

_____

Case number — Case Status

L. OMB Paperwork Reduction Act *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 minutes per response for H-2A and 2 hours 45 minutes for H-2B, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

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Application for Temporary Employment Certification
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IMPORTANT: Please read these instructions carefully before completing the ETA Form 9142 –Application for Temporary Employment Certification. These instructions contain full explanations of the questions and attestations that make up the ETA Form 9142. ***In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If the employer received approval by the Department of Labor to submit this form non-electronically, ALL required fields/items must be completed as well as any fields/items where is a response is conditioned on the response to another required field/item.***

Anyone, who knowingly and willingly furnishes any false information in the preparation of ETA Form 9142 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. §§ 2, 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. §§ 1546, 1621).

OMB Notice: These reporting instructions have been approved under the Paperwork Reduction Act of 1995. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours and 10 mintues for H-2A and 2 hours and 45 minutes for H-2B per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Section A
Employment - Based Nonimmigrant Visa Information

1. Enter the following classification symbol to indicate the type of visa supported by this application: **"H-2A"** or **"H-2B"**

Section B
Temporary Need Information

1. Enter the title of the job opportunity for which the application for temporary employment certification is being sought by the employer.

2. Enter the six or eight-digit Standard Occupational Classification (SOC)/Occupational Network (O*NET) code for the occupation, which most clearly describes the work to be performed.. For example, the six-digit SOC code for a fruit or vegetable harvester or orchard worker is 45-2092.02 (Farmworkers and Laborers, Crop).

3. Enter the occupational title associated with the SOC/O*NET (OES) code. For example, the occupational title associated with SOC/O*NET code 45-2092.02 is "Farmworkers and Laborers, Crop".

4. Enter whether this position is full-time by indicating "Yes" or "No". Although there is no regulatory definition for full-time employment, the Department generally considers 35 hours per week as the distinction point between full-time and part-time.

5. Enter the beginning date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.

6. Enter the end date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.

7. The collection of this item contains two parts. First, enter the number of workers being requested for certification. Second, use collection items (a) through (f) to enter the number of workers in each applicable category based on the answer to the first part of this item. Every box MUST be filled. If the employer has no workers in a particular category, please indicate "0 (zero)."

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8. Mark the appropriate box to indicate the nature of the employer's temporary need for the services or labor to be performed. Only one standard of temporary need may be selected. The following definitions generally apply to temporary agricultural and non-agricultural work:

   Seasonal Need: The employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees.

   Peakload Need: The employer must establish that (1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the employer's regular operation.

   One-Time Occurrence: The employer must establish that either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s).

   Intermittent Need: The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

9. Provide a statement clearly describing the employer's temporary need for the services or labor to be performed. The employer's statement must explain (a) the nature of the employer's business or operations, (b) why the job opportunity and number of workers being requested for certification reflect a temporary need, and (b) how the employer's request for the services or labor to be performed meets the chosen standard under Question 8 of a seasonal, peakload, one-time occurrence, or an intermittent basis.

Section C
Employer Information

1. Enter the full legal name of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application. The employer's full legal name is the exact name of the individual, corporation, LLC, partnership, or other organization that is reported to the Internal Revenue Service. For master applications filed on behalf of more than one employer under the H-2A program, submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application

2. Enter the full trade name or "Doing Business As" (DBA) name, if applicable, of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application.

3. Enter the street address of the employer's principal place of business.

4. If additional space is needed for the street address, use this line to complete the employer's street address.

5. Enter the city of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.

6. Enter the state of the employer's principal place of business.

7. Enter the postal (zip) code of the employer's principal place of business.

8. Enter the country of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.

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9. Enter the province of the employer's principal place of business, if applicable.

10. Enter the area code and telephone number for the employer's principal place of business. Include country code, if applicable.

11. Enter the extension of the telephone number for the employer's principal place of business, if applicable.

12. Enter the nine-digit Federal Employer identification Number (FEIN) as assigned by the IRS. Do not enter a social security number.

    Note: All employers, including private households, MUST obtain an FEIN from the IRS before completing this application. Information on obtaining an FEIN can be found at www.IRS.gov.

13. Enter the four to six-digit North American Industry Classification System (NAICS) code that best describes the employer's business, not the alien's job. A listing of NAICS codes can be found at http://www.census.gov/epcd/www/naics.html

14. Mark the appropriate to indicate the type of application being filed for temporary employment certification. Only one application type can be selected.

Section D
Employer Point of Contact Information

An employer point of contact is an employee of the employer whose position authorizes the employee to provide information and supporting documentation concerning this Application for Temporary Employment Certification and to communicate with the Department of Labor on behalf of the employer. The employer point of contact should be the individual most familiar with the content of this application and circumstances of the foreign worker's employment.

Note: The employer point of contact information in this Section, specifically the name, telephone number, and email address, must be different from the attorney/agent information listed in Section E, unless the attorney is an employee of the employer.

1. Enter the last (family) name of the employer's point of contact.

2. Enter the first (given) name of the employer's point of contact.

3. Enter the middle initial of the employer's point of contact.

4. Enter the job title of the employer's point of contact.

5. Enter the business street address for the employer's point of contact.

6. If additional space is needed for the street address, use this line to complete the street address.

7. Enter the city of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.

8. Enter the state of the employer's point of contact.

9. Enter the postal (zip) code of the employer's point of contact.

10. Enter the country of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.

11. Enter the province of the employer's point of contact, if applicable.

12. Enter the area code and business telephone number of the employer's point of contact. Include country code, if applicable.

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13. Enter the extension of the telephone number of the employer's point of contact, if applicable.

14. Enter the business e-mail address of the employer's point of contact in the format name@emailaddress.top-level domain.

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Section E
Attorney or Agent Information (if applicable)

Note: The attorney/agent information in this Section, specifically the name, telephone number, and email address, must be different from the employer's point of contact information in Section D, unless the attorney is an employee of the employer.

1. Identify whether the employer is represented by an attorney or agent in the process of filing this application. Only mark one box. If "Yes" complete the remainder of Section E. If "No" in question 1, skip questions 2 to 19 and continue to Section F. Associations filing H-2A applications as an agent on behalf of one or more of its grower members must mark "Yes" to this question.

2. Enter the last (family) name of the attorney/agent.

3. Enter the first (given) name of the attorney/agent.

4. Enter the middle initial of the attorney/agent.

5. Enter the street address of the attorney/agent.

6. If additional space is needed for the street address, use this line to complete the attorney/agent's street address.

7. Enter the city of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.

8. Enter the state of the attorney/agent.

9. Enter the postal (zip) code of the attorney/agent.

10. Enter the country of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.

11. Enter the province of the attorney/agent, if applicable.

12. Enter the area code and telephone number of the attorney/agent. Include country code, if applicable.

13. Enter the extension of the telephone number of the attorney/agent, if applicable.

14. Enter the e-mail address of the attorney/agent in the format name@emailaddress.top-level domain .

15. Enter the attorney/agent's law firm or business name.

16. Enter the attorney/agent's law firm or business nine-digit FEIN as assigned by the IRS.

17. Enter the attorney's state Bar number. If the attorney is licensed in more than one state, enter only one state Bar number. If submitting this form electronically and the attorney is licensed in a state which does not issue state Bar numbers, leave the field blank and once confirmed it will be automatically prepopulated with "N/A."

Note: The answers to questions 18 and 19 below should correspond to the same state for which a Bar number was provided in question 17, if any.

18. Enter the state of the highest court where the attorney is in good standing.

19. Enter the name of the highest court in the state where the attorney is in good standing.

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Section F
Job Offer Information

a. Job Description

1. Enter the same job title as the one entered under Section B question 1.

2. Enter the basic hours of work required per week and, if applicable, overtime hours per week in accordance with State and Federal law for the work and area of employment.

3. Enter the daily work schedule for the job opportunity (e.g., 9 a.m. to 5 p.m., 7 a.m. to 11 a.m. and 4 p.m. to 8 p. m.).

4. Mark "Yes" or "No" as to whether the job opportunity supervises the work of other employees.

5. If "Yes" is marked in question 4, enter the total number of employees the job opportunity will supervise.

6. Describe the job duties, in detail, to be performed by any worker filling the job opportunity. Specify any equipment to be used and pertinent working conditions.

b. Minimum Requirements

1. Identify whether the minimum U.S. diploma or degree required by the employer for the job opportunity is none, high school/GED, Associates, Bachelor's, Master's, Doctorate, or Other. Only mark one box.

1-A. If "Other" in question 1, enter the specific U.S. diploma or degree required. (Example: JD, MD, DDS, etc.). If the answer to question 1 is not "Other," enter "N/A."

1-B. Enter the major(s) and/or field(s) of study required by the employer for the job opportunity. You may list more than one field and/or more than one related major. If the answer to question 1 is "None" or "High School", enter "N/A."

2. If the employer requires a second U.S. diploma or degree for the job opportunity, mark "Yes." Otherwise, mark "No."

2-A. If "Yes" in question 2, enter the specific second U.S. diploma or degree required. If the answer to question 2 is "No", enter "N/A."

3. If the employer requires training for the job opportunity, mark "Yes." Otherwise, mark "No." Training may include, but is not limited to: programs, coursework, or training experience (other than employment). When answering this question, do not duplicate requirements – the training required should not be counted as education or experience required.

3-A. If "Yes" in question 3, enter the number of months of training required by the employer for the job opportunity. If the answer to question 3 is "No", enter "0" (zero). When answering this question, do not duplicate time requirements – the training time required should not be counted as (added to) education or experience time required.

3-B. If "Yes" in question 3, enter the field(s) and/or name(s) of the training required by the employer for the job opportunity. You may list more than one field and/or more than one name. If the answer to question 3 is "No", enter "N/A."

4. If the employer requires employment experience, mark "Yes." Otherwise, mark "No."

4-A. If "Yes" in question 4, enter the number of months of experience required by the employer. If the answer to question 4 is "No", enter "0" (zero).

4-B. If "Yes" in question 4, enter the occupation in which experience is required by the employer for the job opportunity. If the answer to question 4 is "No", enter "N/A."

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5. Enter the job related special requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, test results. Document business necessity for a foreign language requirement.

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Section F
Job Offer Information *(continued)*

c. Place of Employment

It is important for the employer to define the area of intended employment with as much geographic specificity as possible. This information is used for purposes of reviewing and verifying regulatory compliance with advertising, positive recruitment requirements, and prevailing wage determinations.

Important Note: For farm labor or job contractors filing under the H-2A or H-2B visa programs where multiple worksites are involved or where special procedures apply, submit a separate attachment identifying, by business name and address, all physical locations where the services or labor is expected to be performed. Enter the address of the first worksite location on the form using questions 1 through 7, and then use question 7-A to identify the business name for the first worksite location and write the words "See attached worksites".

1. Enter the street address of the worksite location identified in question1, where work will be performed. The worksite address must be a physical location and cannot be a P.O. Box.

2. If additional space is needed for the street address, use this line. If no additional space is needed, enter "N/A."

3. Enter the city of the worksite location.

4. Enter the county of the worksite location.

5. Enter the state/district/territory of the worksite location.

6. Enter the postal (zip) code of the worksite location.

7. If work will be performed in location(s) other than the address listed in questions 1-6 above, mark "Yes" and complete question 7-A. If work will not be performed in location(s) other than the address listed in questions 1-6 above, mark "No."

7-A. If "Yes" in question 7, identify the geographic place(s) of employment with as much specificity as possible, such as the
Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. The employer must provide enough geographic detail to cover all the worksite locations of intended employment.

Section G
Rate of Pay

1. Enter the rate of pay to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

   Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

1-A. Enter the rate of overtime pay, if applicable, to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

   Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

2. Enter whether the rate of pay is in terms of per year, month, two weeks, week or hour in the section indicating "Rate is Per." Mark only one box.

2-A. If the answer to question 2 is "Piece Rate", enter the wage offer requirements. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

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3. Enter any additional wage information covered by the job opportunity and the anticipated area(s) of intended employment (e.g., itinerant work, multi-state worksite locations). In order to expedite the application review process, employers are **strongly encouraged** to list all valid prevailing wage determinations received by the OFLC National Processing Center (NPC) in support of the application as well as all corresponding wage offers.

4. If the Application for Temporary Employment Certification is being filed under the H-2A program and the job offer and rate of pay will be based on multiple crop or agricultural activities, indicate whether Appendix A.1 is complete and being submitted with the filing of this application by answering "Yes" or "No". If the job opportunity is offering a single rate of pay, then mark "N/A".

Section H
Recruitment Information

1. Enter the name of the State Workforce Agency which received the job offer from the employer and placed a job order on its active file for recruitment of U.S. workers.

2. Enter the unique job order number provided by the State Workforce Agency.

2-A Enter the start date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

2-B Enter the end date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

3. Mark "Yes" or "No" whether there is a Sunday edition of a newspaper (of general circulation) in the area of intended employment.

   Note: Only if the job opportunity is located in a rural area of intended employment that does not have a newspaper that publishes a Sunday edition, is the employer permitted to use the newspaper edition with the widest circulation in the area of intended employment, and not a Sunday edition.

4. Enter the name of the newspaper of general circulation or other publication in which the employer placed an advertisement for the job opportunity.

   For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

5. Enter the name of the newspaper of general circulation or other publication in which the employer placed a second newspaper advertisement for the job opportunity.

   For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

6. Describe other efforts to positively recruit U.S. workers for the job opportunity. For each positive recruitment activity, identify the type or source of recruitment (e.g., additional SWA job orders, out-of-state newspaper, contact with former employees) and the date(s) on which the recruitment was conducted.

Section I
Declaration of Employer and Attorney/Agent

1. Employer must read and agree to all the applicable terms, assurances, and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Mark "Yes" or "No" to confirm that Appendix A.2 is complete and being submitted with the filing of this application.

Section J
Preparer

This section must be completed if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

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1. Enter the last (family) name of the person preparing this application by or on behalf of the employer.

2. Enter the first (given) name of the person preparing this application by or on behalf of the employer.

3. Enter the middle initial of the person with preparing this application by or on behalf of the employer.

4. Enter the Firm/Business name of the person with preparing this application by or on behalf of the employer.

5. Enter the email address of the person with preparing this application by or on behalf of the employer. Format must be in the format name@emailaddress.top-level domain.

Section K
U.S. Government Agency User ONLY

Read this section. No entries required.

Section L
OMB *Paperwork Reduction Act/Information Control Number 1205-0310*

Read this section. No entries required.

APPENDIX A.1
Rate of Pay Information for Multiple Crop or Agricultural Activities

This appendix must only be completed for applications for temporary labor certification filed under the H-2A program. The rate of pay for each crop or agricultural activity covered by the application must be disclosed in this appendix. For each crop or agricultural activity, the following information must be disclosed (where applicable):

1. Enter the name of the crop or agricultural activity.

2. If applicable, enter the hourly rate of pay. In no event may rate be less than the applicable FLSA or State minimum, or the applicable prevailing hourly wage rate, whichever is higher.

3. If applicable, enter the piece rate of pay.

4. If a piece rate of pay is entered, describe the unit used when piece rates are being paid. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

5. Describe 1) Any bonus or incentives aside from the flat rate or piece rate, e.g., garden space, milk, eggs, meat, health insurance; 2) Special conditions on guaranteed weeks of work, under what conditions bonuses or incentives are to be paid, if any; 3) If the activity is covered by a "schedule of rates", indicate conditions under which each of the rates on the schedule applies; 4) Describe frequency of pay arrangements, e.g., daily, weekly, biweekly; 5) Indicate deductions to be made from workers' wages, such as Social Security, workers' compensation, health insurance, Federal or state tax. If applicable, note whether employer of record or farm labor contractor will be responsible for deductions.

APPENDIX A.2
Employer and Attorney/Agent Declarations (H-2A Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.

2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.

3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.

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4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.

5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format name@emailaddress.top-level domain.

6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.

7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.

B. Employer Declaration

1. Enter the last (family) name of the person with authority to sign on behalf of the employer.

2. Enter the first (given) name of the person with authority to sign on behalf of the employer.

3. Enter the middle initial of the person with authority to sign on behalf of the employer.

4. Enter the job title of the person with authority to sign on behalf of the employer.

5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.

6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.

APPENDIX B.1
Employer and Attorney/Agent Declarations (H-2B Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.

2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.

3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.

4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.

5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format name@emailaddress.top-level domain.

6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.

7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.

B. Employer Declaration

1. Enter the last (family) name of the person with authority to sign on behalf of the employer.

2. Enter the first (given) name of the person with authority to sign on behalf of the employer.

3. Enter the middle initial of the person with authority to sign on behalf of the employer.

4. Enter the job title of the person with authority to sign on behalf of the employer.

5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.

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6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.

OMB Approval:
Expiration Date

Application for Temporary Employment Certification

ETA Form 9089T – APPENDIX A
U.S. Department of Labor

For Use in Filing Applications Under the H-2A Agricultural Program ONLY

A. Rate of Pay Information for Multiple Crop or Agricultural Activities

Important Note: The rate of pay for each crop or agricultural activity **MUST** begin in the spaces below. If necessary, add attachment to continue and complete the rate of pay for all crop activities covered by the application.

Agricultural Crop Activity	Hourly Wage	Piece Rate Wage	Piece Rate Unit(s)	Special Pay *(bonus, etc.)*
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
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	$ ___ . ___	$ ___ . ___		

OMB Paperwork Reduction Act

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Tracking Number: _____ Status: _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
U.S. Department of Labor

For Use in Filing Applications Under the H-2A Agricultural Program ONLY

A. Attorney or Agent Declaration

I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application. I also certify that to the best of my knowledge the information contained herein is true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).*

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

B. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The job opportunity is a full-time temporary position, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.
2. The specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.
3. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections as required by 20 CFR 655.119.
4. The job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B.
5. The offered wage rate is the highest of the adverse effect wage rate in effect at the time the application is certified, the prevailing hourly or piece rate, or the Federal or State minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.
6. The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the adverse effect wage rate, prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, whichever is greatest.
7. There are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity, and the employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date that is 30 days after the first date the employer requires the services of the H-2A worker.
8. All fees associated with processing the temporary labor certification will be paid in a timely manner.

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
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9. During the period of employment that is the subject of the labor certification application, the employer will:
   (i) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
   (ii) Provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker;
   (iii) Where required, has timely requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;
   (iv) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of 20 CFR 655.104(e).
   (v) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under 20 CFR 655.104(d)) and the employer's worksite without cost to the worker.

10. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment except for lawful, job related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

11. The employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

12. The employer has and will contractually forbid any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations.

13. The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:
   (i) Filed a complaint under or related to Sec. 218 of the INA (8 U.S.C. 1188), or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (ii) Instituted or caused to be instituted any proceeding under or related to Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (iii) Testified or is about to testify in any proceeding under or related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (iv) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA; or
   (v) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA.

14. The employer has not and will not discharge any person because of that person's taking any action listed in paragraph 14(i) through (v) listed above.

15. The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under 20 CFR 655.111, unless the H-2A worker is being sponsored by another subsequent employer.

16. Upon the separation from employment of any H-2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than two work days after such separation is effective under 20 CFR 655.104(n).

17. If the application is being filed as an H-2A Labor Contractor the following additional attestations and obligations apply under 20 CFR 655.106:
   (i) The H-2A Labor Contractor will provide upon request the MSPA Farm Labor Contractor (FLC) certificate of registration number and expiration date if required under MSPA, 1801 U.S.C. et seq., to have such a certificate;
   (ii) The H-2A Labor Contractor will identify upon request the farm labor contracting activities it is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration, if required under MSPA, 1801 U.S.C. et seq., to have such a certificate of registration;

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
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(iii) The H-2A Labor Contractor will provide with this application a list of the names and locations of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2A Labor Contractor will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;

(iv) The H-2A Labor Contractor is able to provide proof of its ability to discharge financial obligations under the H-2A program by agreeing to secure and to present, upon request, a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated pursuant to 29 CFR 501.8) and any identifying designation utilized by the surety for the bond;

(v) The H-2A Labor Contractor has engaged in, or will engage in within the timeframes required by 20 CFR 655.102 as modified by 20 CFR 655.106(a), recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business; and

(vi) The H-2A Labor Contractor has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

a. All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards in 20 CFR 655.104(d); and

b. All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, except where workers' compensation is used to cover such transportation as described in 20 CFR 655.104(h)(3).

I hereby designate the agent or attorney identified in section E (if any) of the ETA Form 9142 and section A above to represent me for the purpose of labor certification and, by virtue of my signature in Block 5 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name	2. First (given) name	3. Middle initial
4. Title		
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Federal Register

Thursday,
December 18, 2008

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions To List Penguin Species as Threatened or Endangered Under the Endangered Species Act; Proposed Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–IA–2008–0069; 96000–1671–0000–B6]

RIN 1018–AV73

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Four Penguin Species as Threatened or Endangered Under the Endangered Species Act and Proposed Rule To List the Southern Rockhopper Penguin in the Campbell Plateau Portion of Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list four species of penguins as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). After a thorough review of all available scientific and commercial information, we find that the petitioned action for the Campbell Plateau portion of the range of the New Zealand/Australia Distinct Population Segment (DPS) of the southern rockhopper penguin (*Eudyptes chrysocome*) is warranted, and we propose to list this species as threatened under the Act in the Campbell Plateau portion of its range. This proposal, if made final, would extend the Act's protection to this species in that portion of its range. In addition, we find that listing under the Act is not warranted for the remainder of the range of the southern rockhopper penguin and throughout all or any portion of the range for the northern rockhopper penguin (*Eudyptes moseleyi*), macaroni penguin (*Eudyptes chrysolophus*), and emperor penguin (*Aptenodytes forsteri*).

DATES: We made the finding announced in this document on December 18, 2008. We will accept comments and information on the proposed rule received or postmarked on or before February 17, 2009. We must receive requests for public hearings on the proposed rule, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 2, 2009.

ADDRESSES: *Comments on Proposed Rule*: If you wish to comment on the proposed rule to list the southern rockhopper penguin in the Campbell Plateau portion of its range, you may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS–R9–IA–2008–0069]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments Solicited section below for more information).

Supporting Documents for 12-Month Finding: Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Pamela Hall, Branch Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires the Service to make a finding known as a ''90-day finding,'' on whether a petition to add, remove, or reclassify a species from the list of endangered or threatened species has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If the Service finds that the petition has presented substantial information indicating that the requested action may be warranted (referred to as a positive finding), section 4(b)(3)(A) of the Act requires the Service to commence a status review of the species if one has not already been initiated under the Service's internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires the Service to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher-priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

In this notice, we announce a 12-month finding on the petition to list four penguins: southern rockhopper penguin, northern rockhopper penguin, macaroni penguin, and emperor penguin. We will announce the 12-month findings for the African penguin (*Spheniscus demersus*), yellow-eyed penguin (*Megadyptes antipodes*), white-flippered penguin (*Eudyptula minor albosignata*), Fiordland crested penguin (Eudyptes pachyrhynchus), Humboldt penguin (*Spheniscus humboldti*), and erect-crested penguin (*Eudyptes sclateri*) in one or more separate **Federal Register** notice(s).

Previous Federal Actions

On November 29, 2006, the Service received a petition from the Center for Biological Diversity to list 12 penguin species under the Act: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, snares crested penguin (*Eudyptes robustus*), erect-crested penguin, macaroni penguin, royal penguin (*Eudyptes schlegeli*), white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Among them, the ranges of the 12 penguin species include Antarctica, Argentina, Australian Territory Islands, Chile, French Territory Islands, Namibia, New Zealand, Peru, South Africa, and United Kingdom Territory Islands. The petition is clearly identified as such, and contains detailed information on the natural history, biology, status, and distribution of each of the 12 species. It also contains information on what the petitioner reported as potential threats to the species from climate change and changes to the marine environment, commercial fishing activities, contaminants and pollution, guano extraction, habitat loss, hunting,

nonnative predator species, and other factors. The petition also discusses existing regulatory mechanisms and the perceived inadequacies to protect these species.

In the **Federal Register** of July 11, 2007 (72 FR 37695), we published a 90-day finding in which we determined that the petition presented substantial scientific or commercial information to indicate that listing 10 species of penguins as endangered or threatened may be warranted: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, erect-crested penguin, macaroni penguin, white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Furthermore, we determined that the petition did not provide substantial scientific or commercial information indicating that listing the snares crested penguin and the royal penguin as threatened or endangered species may be warranted.

Following the publication of our 90-day finding on this petition, we initiated a status review to determine if listing each of the 10 species is warranted, and opened a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the 10 species of penguins. The public comment period closed on September 10, 2007. In addition, we attended the International Penguin Conference in Hobart, Tasmania, Australia, a quadrennial meeting of penguin scientists from September 3–7, 2007 (during the open public comment period), to gather information and to ensure that experts were aware of the status review and the open comment period. We also consulted with other agencies and range countries in an effort to gather the best available scientific and commercial information on these species.

During the public comment period, we received over 4,450 submissions from the public, concerned governmental agencies, the scientific community, industry, and other interested parties. Approximately 4,324 e-mails and 31 letters received by U.S. mail or facsimile were part of one letter-writing campaign and were substantively identical. Each letter supported listing under the Act, included a statement identifying ''the threat to penguins from global warming, industrial fishing, oil spills and other factors,'' and listed the 10 species included in the Service's 90-day finding. A further group of 73 letters included the same information plus information concerning the impact of ''abnormally warm ocean temperatures and diminished sea ice'' on penguin food availability and stated that this has led to population declines in southern rockhopper, Humboldt, African, and emperor penguins. These letters stated that the emperor penguin colony at Point Geologie has declined more than 50 percent due to global warming and provided information on krill declines in large areas of the Southern Ocean. They stated that continued warming over the coming decades will dramatically affect Antarctica, the sub-Antarctic islands, the Southern Ocean and the penguins dependent on these ecosystems for survival. A small number of general letters and e-mails drew particular attention to the conservation status of the southern rockhopper penguin in the Falkland Islands.

Twenty submissions provided detailed, substantive information on one or more of the 10 species. These included information from the governments, or government-affiliated scientists, of Argentina, Australia, Namibia, New Zealand, Peru, South Africa, and the United Kingdom, from scientists, from 18 members of the U.S. Congress, and from one non-governmental organization (the original petitioner).

On December 3, 2007, the Service received a 60-day Notice of Intent To Sue from the Center for Biological Diversity (CBD). CBD filed a complaint against the Department of the Interior on February 27, 2008, for failure to make a 12-month finding on the petition. On September 8, 2008, the Service entered into a Settlement Agreement with CBD, in which we agreed to submit to the **Federal Register** 12-month findings for the 10 species of penguins, including the five penguin taxa that are the subject of this proposed rule, on or before December 19, 2008.

We base our findings on a review of the best scientific and commercial information available, including all information received during the public comment period. Under section 4(b)(3)(B) of the Act, we are required to make a finding as to whether listing each of the 10 species of penguins is warranted, not warranted, or warranted but precluded by higher priority listing actions.

Introduction

In this notice, for each of the four species addressed, we first provide background information on the biology of the species. Next, we address each of the categories of factors listed in section 4(a)(1) of the Act. For each factor, we first determine whether any stressors appear to be causing declines in numbers of the species at issue anywhere within the species' range. If we determine they are, then we evaluate whether these stressors are causing population-level declines that are significant to the determination of the conservation status of the species. If so, we describe it as a ''threat.'' In the subsequent finding section, we then consider each of the stressors and threats, individually and cumulatively, and make a determination with respect to whether the species is endangered or threatened according to the statutory standard.

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this notice, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

Species Information and Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Southern Rockhopper Penguin and Northern Rockhopper Penguins

Taxonomy

Rockhopper penguins are among the smallest of the world's penguins, averaging 20 inches (in) (52 centimeters (cm)) in length and 6.6 pounds (lbs) (3 kilograms (kg)) in weight. They are the most widespread of the crested penguins (genus *Eudyptes*), and are so named because of the way they hop from boulder to boulder when moving

around their rocky colonies. Rockhopper penguins are found on islands from near the Antarctic Polar Front to near the Subtropical Convergence in the South Atlantic and Indian Oceans (Marchant and Higgins 1990, p. 183).

The taxonomy of the rockhopper complex is contentious. Formerly treated as three subspecies (Marchant and Higgins 1990, p. 182), recent papers suggested that these should be treated as two species (Jouventin *et al.* 2006, pp. 3,413–3,423) or three species (Banks *et al.* 2006, pp. 61–67).

Jouventin *et al.* (2006, pp. 3,413–3,423), following up on recorded differences in breeding phenology, song characteristics, and head ornaments used as mating signals, conducted genetic analysis between northern subtropical rockhopper penguins and southern sub-Antarctic penguins using the Subtropical Convergence, a major ecological boundary for marine organisms, as the dividing line between them. Their results supported the separation of *E. chrysocome* into two species, the southern rockhopper (*E. chrysocome*) and the northern rockhopper (*E. moseleyi*).

Another recently published paper in the journal *Polar Biology* confirmed that there is more than one species of rockhopper penguins. Banks *et al.* (2006, pp. 61–67) compared the genetic distances between the three rockhopper subspecies and compared them with such sister species as macaroni penguins. Banks *et al.* (2006, pp. 61–67) suggested that three rockhopper subspecies—southern rockhopper (currently *E. chrysocome chrysocome*), eastern rockhopper (currently *E. chrysocome filholi*), and northern rockhopper (currently *E. chrysocome moseleyi*)—should be split into three species.

BirdLife International (2007, p. 1) has reviewed these two papers and made the decision to adopt, for the purposes of their continued compilation of information on the status of birds, the conclusion of Jouventin *et al.* (2006, p. 3,419) that there are two species of rockhopper penguin. In doing so, they noted that the proposed splitting of an eastern rockhopper species from *E. chrysocome* has been rejected on account of weak morphological differentiations between the circumpolar populations south of the Subtropical Convergence (Banks *et al.* 2006, p. 67). Furthermore those two groups are more closely related to each other in terms of genetic distance than either is to the northern rockhopper penguin (Banks *et al.* 2006, p. 65).

We conclude that, while both analyses have merit, the split into a northern and southern species on the basis of both genetic and morphological differences represents the best available science. On the basis of our review, we accept the BirdLife International treatment of the rockhopper penguins as two species: The northern rockhopper penguin (*E. moseleyi*) and the southern rockhopper penguin (*E. chrysocome*).

Life History

The life histories of northern and southern rockhopper penguins are similar. Breeding begins in early October (the austral spring) when males arrive at the breeding site a few days before females. Breeding takes place as soon as the females arrive, and two eggs are laid 4–5 days apart in early November. The first egg laid is typically smaller than the second, 2.8 versus 3.9 ounces (oz) (80 versus 110 grams (g)), and is the first to hatch. Incubation lasts about 33 days and is divided into three roughly equal shifts. During the first 10-day shift, both parents are in attendance. Then, the male leaves to feed while the female incubates during the second shift. The male returns to take on the third shift. He generally remains for the duration of incubation and afterward to brood the chicks while the female leaves to forage and returns to feed the chicks. Such a system of extended shift duration requires lengthy fasts for both parents, but allows them to forage farther afield than would be the case if they had a daily change-over. The newly hatched chicks may have to wait up to a week before the female returns with their first feed. During this period, chicks are able to survive on existing yolk reserves, after which they begin receiving regular feedings of around 5 oz (150 g) in weight. By the end of the 25 days of brooding, chicks are receiving regular feedings averaging around 1 lb 5 oz (600 g). By this stage they are able to leave the nest and crèche with other chicks, allowing both adults to forage to meet the chicks' increasing demands for food (Marchant and Higgins 1990, p. 190).

Northern rockhopper penguins and birds in the eastern colonies of southern rockhopper penguins typically rear only one of the two chicks. However, southern rockhopper penguins near the Falkland Islands are capable of rearing both chicks to fledging when conditions are favorable (Guinard *et al.* 1998, p. 226). In spite of this difference, southern rockhopper penguins average successful breeding of one chick per pair annually for the colony as a whole. Chicks fledge at around 10 weeks of age, and adults then spend 20–25 days at sea building up body fat reserves in preparation for their annual molt. The molt lasts for around 25 days, and the birds then abandon the breeding site. They spend the winter feeding at sea, prior to returning the following spring (Marchant and Higgins 1990, p. 185).

The range of southern and northern rockhopper penguins includes breeding habitat on temperate and sub-Antarctic islands around the Southern Hemisphere and marine foraging areas. In the breeding season, these marine foraging areas may lie within as little as 6 miles (mi) (10 kilometers (km)) of the colony (as at the Crozet Archipelago in the Indian Ocean), as distant as 97 mi (157 km) (as at the Prince Edward Islands in the Indian Ocean), or for male rockhoppers foraging during the incubation stage at the Falkland Islands in the Southwest Atlantic, as much as 289 mi (466 km) away (Sagar *et al.* 2005, p. 79; Putz *et al.* 2003b, p. 141). Foraging ranges vary according to the geographic, geologic, and oceanographic location of the breeding sites and their proximity to sea floor features (such as the continental slope and its margins or the sub-Antarctic slope) and oceanographic features (such as the polar frontal zone or the Falkland current) (Sagar *et al.* 2005, pp. 79–80). Winter at-sea foraging areas are less well-documented, but penguins from the Staten Island breeding colony at the tip of South America dispersed over a range of 501,800 square miles (mi^2) (1.3 million square kilometers (km^2)) covering polar, sub-polar, and temperate waters in oceanic regions of the Atlantic and Pacific as well as shelf waters (Putz *et al.* 2006, p. 735) and traveled up to 1,242 mi (2,000 km) from the colony.

Southern Rockhopper Penguin

Distribution

The southern rockhopper penguin (*Eudyptes chrysocome*) is widely distributed around the Southern Ocean, breeding on many sub-Antarctic islands in the Indian and Atlantic Oceans (Shirihai 2002, p. 71). The species breeds on the Falkland Islands (United Kingdom, Argentina), Penguin and Staten Islands (Argentina) at the southern tip of South America, and islands of southern Chile. Farther to the east, the southern rockhopper penguin breeds on Prince Edward Islands (South Africa); Crozet and Kerguelen Islands (French Southern Territories); Heard, McDonald, and Macquarie Islands (Australia); and Campbell, Auckland, and Antipodes Islands (New Zealand) (BirdLife International 2007, pp. 2–3; Woehler 1993, pp. 58–61).

Population

Falkland Islands

At the Falkland Islands, between the census in 1932–33 and the census in 1995–96, there was a decline of more than 80 percent, with an overall rate of decline of 2.75 percent per year (Putz *et al.* 2003a, p. 174). Reports of even greater declines (Bingham 1998, p. 223) have been revised after re-analysis of the original 1930's census data, which recorded an estimated 1.5 million southern rockhopper breeding pairs (Putz *et al.* 2003a, p. 174). The census in 2000–01 of 272,000 breeding pairs indicated stable numbers since the mid-1990s (297,000 breeding pairs) in the Falkland Islands (Clausen and Huin 2003, p. 389), although further declines since then (Putz *et al.* 2006, p. 742), and a lower figure of 210,000 breeding pairs in 2005–06, have been cited (Kirkwood *et al.* 2007, p. 266).

The declines of southern rockhoppers in the Falkland Islands appear not to have been gradual. Clausen and Huin (2003, p. 394) state that ''circumstantial evidence'' suggests that in the early 1980s, there were no more than 500,000 pairs, a decline of 66 percent since the 1930s. By the mid-1990s, the total decline had reached 80 percent. A mass mortality event in the 1985–86 breeding season killed thousands of penguins and was linked to starvation before molt (Putz *et al.* 2003a, p. 174; Keyme *et al.* 2001, p. 168). In summary, although there has been a long-term decline in numbers at the Falkland Islands, numbers have not declined at a consistent rate, but rather, there have been periodic declines over a long period of time. As mentioned below, Schiavini (2000, p. 290) suggested that Falkland Island birds may be dispersing to Staten Island, potentially contributing to the stable or increasing numbers there.

Southern Tip of South America

In the region of the southern tip of South America, large numbers of southern rockhopper penguins are reported with approximately 180,000 breeding pairs in southern Argentina at Staten Island (Schiavini 2000, p. 286; Kirkwood *et al.* 2007, p. 266), 134,000 breeding pairs at Isla Noir (Oehler 2005, p. 7), 86,400 breeding pairs at Ildefonso Archipelago, and 132,721 breeding pairs at Diego Ramirez Archipelago (Kirkwood *et al.* 2007, p. 265). Kirkwood *et al.* (2007, p. 266) concluded that numbers for the southern tip of South America are approximately 555,000 breeding pairs. These relatively recent estimates are substantially larger than previous estimates of 175,000 breeding pairs reported in Woehler (1993, p. 61), but it is unclear whether this reflects population increases or more comprehensive surveys. In the Chilean archipelago, Kirkwood *et al.* (2007, p. 266) found no substantive evidence for overall changes in the number of penguins between the early 1980s and 2002, although one colony in the region (the Isla Recalada colony, a historical breeding site) declined from 10,000 pairs in 1989 to none in 2005 (Oehler *et al.* 2007, p. 505). On the Argentine side, Schiavini (2000, p. 290) stated that the numbers at Staten Island are stable or increasing, perhaps as a result of a flux of birds from the Falkland Islands. In summary, the overall number of southern rockhopper penguins at the Falklands and the southern tip of South America is estimated at 765,000 breeding pairs distributed as follows: Falkland Islands, 27 percent; Argentina, 24 percent; and Chile, 48 percent. Based on the available information, there does not appear to be a declining trend in southern rockhopper penguin numbers on the southern tip of South America. Although there may have been population increases in the region based on the reported population numbers, it is unclear if these higher numbers reflect true increases in numbers, more comprehensive surveys, or movement of other penguins from the Falkland Islands.

Prince Edward Islands

Two species of *Eudyptes* penguins breed at Marion Island (46.9 degrees (°) South (S) latitude, 37.9° East (E) longitude), one of two islands in the sub-Antarctic Prince Edward Islands group in the southwest Indian Ocean. They are the southern rockhopper penguin (*E. chrysocome*) and the macaroni penguin (*E. chrysolophus*). For southern rockhopper penguins, the numbers of birds estimated to breed at Marion Island decreased by 61 percent from 173,000 pairs in 1994–95 to 67,000 pairs in 2001–02 (Crawford *et al.* 2003, p. 490). The number of southern rockhopper penguins at nearby Prince Edward Island appears to have been stable since the 1980s with 35,000–45,000 pairs present (Crawford *et al.* 2003, p. 496). The decreases at Marion Island are thought to result from poor breeding success, with fledging rates lower than required for the colonies to remain in equilibrium; a decrease in the mass of males and females on arrival at the colony for breeding; and low mass of chicks at fledging (Crawford *et al.* 2003, p. 496). These changes are attributed to an inadequate supply of food for southern rockhopper penguins at Marion Island (Crawford *et al.* 2003, p. 487), presumably from a decrease in the availability of crustaceans or competition with other predators for food (Crawford *et al.* 2003, p. 496). Winter grounds of southern rockhopper penguins are not known. However, over-wintering conditions, which are reflected in the condition of birds arriving to breed, influence the proportion of adults that breed in the following summer and the outcome of breeding (Crawford *et al.* 2006, p. 185).

Crozet and Kerguelen Islands

Jouventin *et al.* (2006, p. 3,417) referenced 1984 data from French Indian Ocean territories that showed 264,000 breeding pairs at Crozet Islands and 200,000 breeding pairs at Kerguelen Island. These figures did not agree with those presented by Woehler (1993, pp. 59–60) and, if accurate, represent an increase of about 25 percent for the Crozet Islands and over 100 percent for Kerguelen. We are not aware of reported declines at the Crozet and Kerguelen Islands.

Heard, McDonald, and Macquarie Islands

Numbers at Heard and McDonald Islands (Australia) are reported as small, with an ''order of magnitude estimate'' of greater than 10,000 pairs for Heard Island and greater than 10 pairs for McDonald (Woehler 1993, p. 60). No information has been reported on trends in numbers in these areas. Order of magnitude estimates at Macquarie Island (Australia) reported 100,000–300,000 pairs in the early 1980s (Woehler 1993, p. 60; Taylor 2000, p. 54). The 2006 Management Plan for the Macquarie Island Nature Reserve and World Heritage Area reported that the total number of southern rockhopper penguins in this area may be as high as 100,000 breeding pairs, but estimates from 2006–07 indicate 32,000–43,000 breeding pairs at Macquarie Island (BirdLife International 2008b, p. 2). Given the large range in the earlier categorical estimate, we cannot evaluate whether the more recent estimate represents a decline in numbers or a more precise estimate.

Campbell, Auckland, and Antipodes Islands

In New Zealand territory, southern rockhopper numbers at Campbell Island declined by 94 percent between the early 1940s and 1985 from approximately 800,000 breeding pairs to 51,500 (Cunningham and Moors 1994, p. 34). The majority of the decline appears to have coincided with a period of warmed sea surface temperatures

between 1946 and 1956. It is widely inferred that warmer waters most likely affected southern rockhopper penguins through changes in the abundance, availability, and distribution of their food supply (Cunningham and Moors 1994, p. 34); recent research suggests they may have had to work harder to find the same food (Thompson and Sagar 2002, p. 11). According to standard photographic monitoring, numbers in most colonies at Campbell Island continued to decline from 1985 to the mid-1990s (Taylor 2000, p. 54), although the extent of such declines has not been quantified in the literature. The New Zealand Department of Conservation (DOC) provided preliminary information from a 2007 Campbell Island survey team that ''the population is still in decline'' (D. Houston 2008, p. 1), but quantitative analysis of these data have not yet been completed. At the Auckland Islands, a survey in 1990 found 10 colonies produced an estimate of 2,700–3,600 breeding pairs of southern rockhopper penguins (Cooper 1992, p. 66). This was a decrease from 1983, when 5,000–10,000 pairs were counted (Taylor 2000, p. 54). There has been a large decline at Antipodes Islands from 50,000 breeding pairs in 1978 to 3,400 pairs in 1995 (Taylor 2000, p. 54). There is no more recent data for Auckland or Antipodes Islands (D. Houston 2008, p. 1).

Other Status Classifications

The IUCN (International Union for Conservation of Nature) Red List classifies the southern rockhopper penguin as 'Vulnerable' due to rapid population declines, which ''appear to have worsened in recent years.''

Summary of Factors Affecting the Species

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

Terrestrial Habitat

There are few reports of destruction, modification, or curtailment of the terrestrial habitat of the southern rockhopper penguin. Analyses of large-scale declines of southern rockhopper penguins have uniformly ruled out that impacts to the terrestrial habitat have been a limiting factor to the species (Cunningham and Moors 1994, p. 34; Keyme *et al.* 2001, pp. 159–169; Clausen and Huin 2003, p. 394), and we have no reason to believe threats to the terrestrial habitat will emerge in the foreseeable future.

Climate-Related Changes in the Marine Environment

Reports of major decreases in southern rockhopper penguin numbers have been linked to sea surface temperature changes and other apparent or assumed oceanographic or prey shifts in the vicinity of southern rockhopper penguin breeding colonies or their wintering grounds. Actual empirical evidence of changes has been difficult to compile, and conclusions of causality for observations at one site are often inferred from data from other studies at other sites, which may or may not be pertinent. In the most cited study, Cunningham and Moors (1994, pp. 27–36) concluded that drastic southern rockhopper penguin declines were related to increased sea surface temperature changes at Campbell Island in New Zealand. In another study, Crawford *et al.* (2003, p. 496) hypothesized altered distribution or decreased abundance of marine prey at Marion Island, where mean sea surface temperature increased by 2.5 degrees Fahrenheit (°F) (1.4 degrees Celsius (°C)) between 1949 and 2002, as a factor in a decline of southern rockhopper penguin numbers by 61 percent during that period (Crawford and Cooper 2003, p. 415). Clausen and Huin (2003, p. 394), in discussing the factors that may be responsible for large-scale declines in this species at the Falkland Islands since the 1930s (and especially in the mid-1980s), found the most plausible explanation to be changes in sea surface temperatures, which could in turn affect the available food supply (Clausen and Huin 2003, p. 394). Extreme El Niño-like warming of surface waters occurred during the 1985–86 period when the most severe decline occurred at the Falkland Islands (Boersma 1987, p. 96; Keyme *et al.* 2001, p. 168). None of these authors cites historical fisheries data to corroborate the hypothesis that prey abundance has been affected by changes in sea surface temperatures.

As noted above, changes in oceanographic conditions and their possible impact on prey have been cited in reports of southern rockhopper penguin declines around the world (Cunningham and Moors 1994, pp. 27–36; Crawford *et al.* 2003, p. 496; Crawford and Cooper 2003, p. 415; Clausen and Huin 2003, p. 394). We examine the case of Campbell Island in depth in the following paragraphs, since this provides the most studied example.

At Campbell Island, a 94-percent decrease in southern rockhopper penguin numbers occurred between the early 1940s and 1985. Cunningham and Moors (1994, pp. 27–36) compared the pattern of the penguin decline (from 800,000 breeding pairs in the early 1940s to 51,500 pairs in 1985) to patterns of sea surface temperature change. The authors concluded that drastic southern rockhopper penguin declines were related to increased sea surface temperature changes at Campbell Island. They found that peaks in temperature were related to the periods of largest decline in numbers within colonies, in particular in 1948–49 and 1953–54. One study colony rebounded in cooler temperatures in the 1960s; however, with temperature stabilization at higher levels (mean 49.5 °F (9.7 °C)) in the 1970s, declines continued. Colony sizes have continued to decline into the 1990s (Taylor 2000, p. 54), and preliminary survey data indicate that numbers at Campbell Island continue to decline (Houston 2008, p. 1).

Cunningham and Moors (1994, p. 34) concluded that warmer waters most likely affected the diet of the Campbell Island southern rockhopper penguins. In the absence of data on the 1940's diet of Campbell Island southern rockhopper penguins, the authors compared the 1980's diet of the species at Campbell Island to southern rockhopper penguins elsewhere. They found the Campbell Island penguins eating primarily fish—southern blue whiting (*Micromesisteus australis*), dwarf codling (*Austrophycis marginata*), and southern hake (*Merluccius australis*)—while elsewhere southern rockhopper penguins were reported to eat mainly euphausiid crustaceans (krill) and smaller amounts of fish and squid. Based on this comparison of different areas, the authors concluded that euphausiids left the Campbell Island area when temperatures changed, forcing the southern rockhopper penguins to adopt an apparently atypical, and presumably less nutritious, fish diet. The authors concluded that this led to lower departure weights of chicks and contributed to adult declines (Cunningham and Moors 1994, p. 34).

Subsequent research, however, has not supported the theory that southern rockhopper penguins at Campbell Island switched prey as their ''normal'' euphausiid prey moved to cooler waters (Cunningham and Moors 1994, pp. 34–35). This hypothesis has been tested through stable isotope studies, which can be used to extract historical dietary information from bird tissues (*e.g.*, feathers). In analyses of samples from the late 1800s to the present at Campbell Island and Antipodes Islands, Thompson and Sagar (2002, p. 11) found no evidence of a shift in southern rockhopper penguin diet during the

period of decline. They concluded that southern rockhopper penguins did not switch to a less suitable prey, but that overall marine productivity and the carrying capacity of the marine ecosystem declined beginning in the 1940s. With food abundance declining or food moving farther offshore or into deeper water, according to these authors, the southern rockhopper penguins maintained their diet over the long timescale, but were unable to find enough food in the less productive marine ecosystem (Thompson and Sagar 2002, p. 12).

Hilton *et al.* (2006, pp. 611–625) expanded the study of carbon isotope ratios in southern and northern rockhopper penguin feathers to most breeding areas, except those at the Falkland Islands and the tip of South America, to look for global trends that might help explain the declines observed at Campbell Island. They found no clear global-scale explanation for large spatial and temporal-scale rockhopper penguin declines. While they found general support for lower primary productivity in the ecosystems in which rockhopper penguins feed, there were significant differences between sites. There was evidence of a shift in diet to lower trophic levels over time and in warm years, but the data did not support the idea that the shift toward lower primary productivity reflected in the diet resulted from an overall trend of rising sea temperatures (Hilton *et al.* 2006, p. 620). No detectable relationship between carbon isotope ratios and annual mean sea surface temperatures was found (Hilton *et al.* 2006, p. 620).

In the absence of conclusive evidence for sea surface temperature changes as an explanation for reduced primary productivity, Hilton *et al.* (2006, p. 621) suggested that historical top-down effects in the food chain might have caused a reduction in phytoplankton growth rates. Reduced grazing pressure resulting from the large-scale removal of predators from the sub-Antarctic could have resulted in larger standing stocks of phytoplankton, which in turn could have led to lowered cell growth rates (which would be reflected in isotope ratios), with no effect on overall productivity of the system. Postulated top-down effects on the ecosystem of southern rockhopper penguins, which occurred in the time period before the warming first noted in the original Cunningham and Moors (1994, p. 34) study, are the hunting of pinniped populations to near extinction in the 18th and 19th centuries and the subsequent severe exploitation of baleen whale (Balaenopteridae) populations in the 19th and 20th centuries (Hilton *et al.* 2006, p. 621). While this top-down theory may explain the regional shift toward reduced primary productivity, it does not explain the decrease in abundance of food at specific penguin breeding and foraging areas.

Hilton *et al.* (2006, p. 621) concluded that considerably more development of the links between isotopic monitoring of rockhopper penguins and the analysis of larger-scale oceanographic data is needed to understand effects of human activities on the sub-Antarctic marine ecosystem and the links between rockhopper penguin demography, ecology, and environment.

Meteorologically, the events described for Campbell Island from the 1940s until 1985, including the period of oceanic warming, occurred after a record cool period in the New Zealand region between 1900 and 1935, the coldest period since record-keeping began (Cunningham and Moors 1994, p. 35). These historical temperature changes have been attributed to fluctuations in the position of the Antarctic Polar Front caused by changes in the westerly-wind belt (Cunningham and Moors 1994, p. 35). Photographic evidence suggests that southern rockhopper penguin numbers may have been significantly expanding as the early 1900s cool period came to an end (Cunningham and Moors 1994, p. 33) and just before the rapid decrease in numbers.

Without longer-term data sets on southern rockhopper fluctuations in numbers of penguins at Campbell Island and longer temperature data records at a scale appropriate to evaluating impacts on this particular breeding colony, it is difficult to draw conclusions on the situation described there. There are even fewer data for Auckland and Antipodes Islands.

For now, local-scale observations may be of more utility in explaining mass declines of southern rockhopper penguins. At the Falkland Islands, the mass starvation event of 1985–86 coincided with a Pacific El Niño event, and the unusually long and hot southern summer in the southwest Atlantic was analogous to the Pacific El Niño (Boersma 1987, p. 96; Keyme *et al.* 2001, p. 160). There was an influx of warm water seabirds from the north, indicating movement of warm water into the area, and it was hypothesized that warm weather negatively affected the growth and presence of food in a manner similar to what occurs when the warm El Niño current extends southwards off the Pacific coast of Peru. Perturbations of upwellings essential to sustaining the normal food chain appear to have been caused by unusually strong westerly winds in the Atlantic, with prey failure leading to a starvation event (Boersma 1987, p. 96; Keyme *et al.* 2001, p. 168). The severe El Niño event of 1996–97 has also been cited as a possible factor in the decline and disappearance of the small Isla Recalada colony in Chile, with the suggestion that response to this climatic event may have been one factor leading birds at this colony to disperse to other areas such as the large Isla Noir colony 75 mi (125 km) away (Oehler *et al.* 2007, pp. 502, 505).

In other local-scale observations, studies of winter behavior of southern rockhopper penguins foraging from colonies at Staten Island, Argentina, indicated that penguins respond behaviorally to different oceanographic conditions such as seasonal differences in sea surface temperatures by changing foraging strategies. Even with such behavioral plasticity, differences in winter foraging conditions (for example, between an average and a cold year) led to differences in adult survival, return rates to breeding colonies, and breeding success between years (Rey *et al.* 2007, p. 285).

Changes in the marine environment and possible shifts in food abundance or distribution in the marine environment have been cited as leading to historical and present-day declines in three areas within the distribution of southern rockhopper penguins around the world—the Falkland Islands in the South Atlantic (80-percent decline), Marion Island in the Indian Ocean (61-percent), and the New Zealand sub-Antarctic islands (Campbell Island (94-percent), Auckland Island (50-percent), and the Antipodes Islands (93-percent)).

While southern rockhopper penguin numbers have declined in some areas, there are significant areas of the southern rockhopper range (representing about one million pairs) where numbers have remained stable or increased. This indicates that the severity and pervasiveness of these factors in the marine environment are not uniform throughout the species' range. For example, declines have been reported at the Falkland Islands; however, nearby colonies at the southern tip of South America appear to have increased and now represent 72 percent of southern rockhopper abundance in the larger south Atlantic and southeast Pacific region. Similarly, at the Prince Edward Islands, declines have been documented at Marion Island; however, colonies at nearby Prince Edward Island have remained stable. As noted above, in large areas of the Indian Ocean, including the French Indian Ocean territories at Kerguelen

and Crozet Islands, large numbers are stable or increasing.

This difference in trends in locations within the species' range, and the limitation of declines to regional areas, illustrates that while temperature changes in the marine environment have been widely cited as an indicator of changing oceanographic conditions for southern rockhopper penguins, there is not a unitary explanation for phenomena observed in the widely scattered breeding locations across the Southern Hemisphere. In fact, as illustrated for the most studied example at Campbell Island, a detailed analysis of causality has so far led to further questions, rather than a narrowing down of answers. Nevertheless, in the absence of any major factors on land, the best available information indicates that some change in the oceanographic ecosystem has led to past declines in southern rockhopper penguins in some regions and has the potential to lead to future declines in southern rockhopper penguin colonies in those regions of New Zealand.

Large-scale measurements show that temperature changes have been occurring in the Southern Ocean since the 1960s. Overall, the upper ocean has warmed since the 1960s with dominant changes in the thick near-surface layers called ''sub-Antarctic Mode waters,'' located just north of the Antarctic Circumpolar Current (ACC) (Bindoff *et al.* 2007, p. 401). In mid-depth waters—2,952 feet (ft) (900 meters (m))—temperatures have increased throughout most of the Southern Ocean, having risen 0.31 °F (0.17 °C) between the 1950s and 1980s (Gille 2002, p. 1,275). However, the ocean temperature trends described are at too large a scale to relate meaningfully to the demographics of the southern rockhopper penguins, whether at any single penguin colony or breeding or foraging area, or to the variation in trends in colonies around the world at larger scales. We have noted above that attempts to ascribe trends in rockhopper penguin numbers to large-scale sea-temperature changes using biological measurements of southern rockhopper population and foraging parameters have been unsuccessful in revealing any causal links.

Despite larger-scale conclusions that Southern Ocean warming is occurring, we have not identified sea temperature data on an appropriate oceanographic scale to evaluate either historical trends or to make predictions on future trends and whether they will affect southern rockhoppers across the New Zealand/Australia region. For example, Gille (2002, p. 1,276) presented a figure of historical Southern Ocean deep-water temperatures to illustrate an overall warming trend. However, while the scale of measurement is too large to draw any conclusions at a local-scale, in the region of the New Zealand/Australia portion of the species' range, the figure provided appears to show that ocean temperatures have decreased on average from the 1950s to the 1990s.

Looking at the situation from the perspective of physical oceanography, attempts to describe the relationship between southern rockhopper penguin population trends and trends in ocean temperatures, based on large-scale oceanographic observations of temperature trends in the Southern Ocean, and to arrive at historical or predictive models of the impact of temperature trends on penguins are equally difficult. Such analyses are hampered by: (1) The fact that measurements of temperature and temperature trends are provided at an ocean-wide scale; (2) the measurement and averaging of temperatures over large water bodies or depths, which do not allow analysis of impacts at any one site or region or allow explanation of divergent trends between colonies in the same region; (3) lack of real-time data on temperature and trends at biologically meaningful geographical scales in the vicinity of breeding or foraging habitat for penguins; and (4) absence of consistent monitoring of southern rockhopper penguin abundance and demographic and biological parameters to relate to such oceanographic measurements. We have insufficient information to draw conclusions on whether directional changes in ocean temperatures are affecting southern rockhopper penguins throughout all of their range.

We have examined areas of the range of the southern rockhopper penguin where numbers have declined, such as at Campbell Island and the Falkland Islands. At the same time, numbers in the majority of the range of the southern rockhopper penguin have remained stable or increased. For example, in the region of the southern tip of South America, numbers have increased and now represent 72 percent of southern rockhopper abundance in the larger south Atlantic and southeast Pacific regions. At the Prince Edward Islands, declines at Marion Island have been accompanied by stability at nearby Prince Edward Island. At Kerguelen and Crozet Islands, numbers are increasing or stable.

Within the New Zealand/Australia portion of the species' range, the New Zealand islands have experienced severe declines; however, trend information for the Australian Macquarie Island colonies is much less certain, given the poor quality of the baseline estimate at Macquarie. Based on our review of the best available information (see above), we conclude that changes to the marine environment, which influence the southern rockhopper penguin, have affected the Campbell Plateau, but their effects on the Macquarie Ridge region are unknown. In the absence of identification of other significant threat factors and in light of the best available scientific information indicating that prey availability, productivity, or sea temperatures are affecting southern rockhopper penguins within the Campbell Plateau, we find that changes to the marine environment is a threat to the Campbell Plateau colonies of southern rockhopper penguins at Campbell, Auckland, and Antipodes Islands.

While rockhopper penguin numbers in certain areas of the species' range have been affected by changes to the marine environment, numbers in the majority of the range are stable or increasing. This indicates that the severity and pervasiveness of stressors in the marine environment are not uniform throughout the species' range, and we have not identified sea-temperature data on an appropriate oceanographic scale to be able to identify broad-scale trends or to make predictions on future trends about whether changes to the marine environment will affect southern rockhoppers penguins either across its range or within the New Zealand/Australia region.

On this basis, we find that the present or threatened destruction, modification, or curtailment of both its terrestrial and marine habitats is not a threat to the southern rockhopper penguin throughout all of its range now or in the future.

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Despite the overall increase in southern rockhopper penguin numbers in southern Chile, the Isla Recalada colony—a historical breeding site—declined from 10,000 pairs in 1989 to none in 2005 (Oehler *et al.* 2007, p. 505). In attempting to explain this local decline, Oehler *et al.* (2007, p. 505) cited the collection of adult penguins for export to zoological parks from 1984–1992 as a disturbance that may have caused adult penguins to move to other areas, but this has not been verified. The authors also reported that between 1992 and 1997, in times of shortage of fish

bait, local fishermen harvested adult southern rockhopper penguins at the Isla Recalada colony for bait for crab pots (Oehler *et al.* 2007, p. 505), but we have no information on the effect of this stressor in terms of numbers of individuals lost from the colony.

Collection for zoological parks is now prohibited, and the species is not found in trade (Ellis *et al.* 1998, p. 54). There is no information that suggests this ban will be lifted in the future.

Tourism and other human disturbance impacts are reported to have little effect on southern rockhopper penguins (BirdLife International 2007, p. 3).

In summary, although there is some evidence of historical and even relatively recent take of southern rockhopper penguins from the wild for human use, collection for zoological parks is no longer occurring, and other harvest that may be occurring for fish bait is not on a large enough scale to be a threat to this species. We have no reason to believe the levels of utilization will increase in the future. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the species in any portion of its range now or in the future.

Factor C: Disease or Predation

Investigations have ruled out disease as a significant factor in major population declines at Campbell Island in the 1940s and 1950s or in the sharp declines in the mid-1980s at the Falkland Islands. At Campbell Island, de Lisle *et al.* (1990, pp. 283–285) isolated avian cholera (*Pasteurella multocida*) from the lungs of dead chicks and adults sampled during the year of decline 1985–86 and the subsequent year 1986–87. They were unable to determine whether this was a natural infection in southern rockhopper penguins or one that had been introduced through the vectors of rats, domestic poultry, cats (*Felis catus*), dogs (*Canis familiaris*), or livestock that have been prevalent on the island in the past. While the disease was isolated in four separate colonies along the coast of Campbell Island, and there was evidence of very limited mortality from the disease, the authors concluded there was no evidence that mortality from this pathogen on its own may have caused the decline in numbers at Campbell Island (Cunningham and Moors 1994, p. 34). Assays for a variety of other infectious avian diseases found no antibody responses in southern rockhopper penguins at Campbell Island (de Lisle *et al.* 1990, pp. 284–285).

Following the precipitous decline of southern rockhopper penguins at the Falkland Islands in the 1985–86 breeding season, examinations and full necropsies were carried out for a large number of individuals. Mortality was primarily attributed to starvation. A large number of predisposing factors were ruled out, such as anthropogenic factors (oiling, fish net mortality, ingestion of plastic, trauma, or trapping at sea or on breeding grounds) or natural causes (heavy predation on or near breeding grounds, botulism at the breeding grounds, or dinoflagellate poisoning caused by red tides). Infectious diseases were considered in depth, but no specific disease was identified (Keyme *et al.* 2001, p. 166). A secondary factor, ''puffinosis,'' caused ulcers on the feet of some young penguins, but no mortality was associated with these lesions (Keyme *et al.* 2001, p. 167). Examination for potential toxic agents found high tissue concentrations for only cadmium; however, cadmium levels did not differ between the year of high mortality and the subsequent year when no unusual mortality occurred (Keyme *et al.* 2001, pp. 163–165).

Bester *et al.* (2003, pp. 549–554) reported on the recolonization of sub-Antarctic fur seals (*Arctocephalus tropicalis*) and Antarctic fur seals (*Arctocephalus gazelle*) at Prince Edward Island. Rapid fur seal recolonization is taking place at this island. There are now an estimated minimum 72,000 sub-Antarctic fur seals (Bester *et al.* 2003, p. 553); the population has grown 9.5 percent annually since 1997–98. Similarly, at Marion Island, sub-Antarctic fur seal populations increased exponentially between 1975 and 1995. Adult populations were 49,253 animals in 1994–95. Crawford and Cooper (2003, p. 418) expressed concern that the burgeoning presence of seals at Prince Edward and Marion Islands may be increasingly affecting southern rockhopper penguins through physical displacement from nesting sites, prevention of access to breeding sites, direct predation, and increasing competition between southern rockhopper penguins and seals for prey; however, these potential effects of fur seals on southern rockhopper penguins have not been investigated.

At Campbell Island in New Zealand, de Lisle *et al.* (1990, p. 283) ruled out Norway rats (*Rattus norvegicus*), which were present on the island at the time of precipitous declines, as a factor in those declines. Feral cats are present on Auckland Island, but have not been observed preying on chicks there (Taylor 2000, p. 55). Although it was suggested that introduced predators may affect breeding on Macquarie and Kerguelen Islands (Ellis *et al.* 1998, p. 49), no information was provided to support this idea.

In summary, based on our review of the best available information we find that neither disease nor predation is a threat to the southern rockhopper penguin in any portion of its range, and no information is available that suggests this will change in the future.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

The majority of sub-Antarctic islands are under protected status. For example, all New Zealand sub-Antarctic islands are nationally protected and inscribed as the New Zealand Subantarctic Islands World Heritage sites; human visitation of the islands is tightly restricted at all sites where penguins occur (Taylor 2000, p. 54; BirdLife International 2007, p. 4; UNEP WCMC (United Nations Environmental Program, World Conservation Monitoring Center) 2008a, p. 5). The Australian islands of Macquarie, Heard, and McDonald are also World Heritage sites with limited or no visitation and with management plans in place (UNEP WCMC 2008b, p. 6; UNEP WCMC 2008c, p. 6). In 1995, the Prince Edward Islands Special Nature Preserve was declared and accompanied by the adoption of a formal management plan (Crawford and Cooper 2003, p. 420). Based on our review of the existing regulatory mechanisms in place for each of these areas and our analysis of other threat factors, we find that the only inadequacy in existing regulatory mechanisms regarding the conservation of the southern rockhopper penguin (BirdLife International 2007, p. 4; Ellis *et al.* 1998, pp. 49, 53) to be the inability to ameliorate the effects of changes to the marine environment on the species in the Campbell Plateau portion of its range.

In Chile, collection for zoological display, which used to be permitted, is now prohibited, and the species is not found in trade (Ellis *et al.* 1998, p. 54). Fisheries activities in the Falkland Islands, which have increased dramatically since the 1970s, are now closely regulated. A series of conservation zones has been established, and the number of vessels fishing within these zones is regulated to prevent fish and squid stocks from becoming depleted. The Falkland Island Seabird Monitoring Program has been established to collect baseline data essential to identifying and detecting potential threats to seabirds (Putz *et al.*

2001, p. 794). As discussed under Factor E, current licensing arrangements limit squid harvest to between the beginning of February and the end of May and the beginning of August and the end of October, which minimizes overlap with the southern rockhopper penguin breeding season, when feeding demands are high (October to February) (Putz *et al.* 2001, p. 803).

In summary, aside from the inadequacy of regulatory mechanisms to ameliorate the threat of changes in the marine environment in the Campbell Plateau portion of the species' range, we find that the existing national regulatory mechanisms are adequate regarding the conservation of southern rockhopper penguins in all other parts of the species' range. There is no information available to suggest these regulatory mechanisms will change in the future.

Factor E: Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Fisheries

While competition for prey with commercial fisheries has been listed as a potential factor affecting southern rockhopper penguins in various portions of their range (Ellis *et al.* 1998, pp. 49, 53), we have found that it is only in the Falkland Islands where this potential competition between commercial fisheries and southern rockhopper penguins has emerged and been addressed. Bingham suggests that rapid southern rockhopper penguin declines at the Falkland Islands in the 1980's were a result of uncontrolled commercial fishing (but see analysis of El Niño under Factor A), but reports that following the establishment of a regulatory body in 1988, the effects of over-fishing at the Falkland Islands have been greatly mitigated (Bingham 2002, p. 815), and southern rockhopper penguin populations have stopped declining. At the Falkland Islands, the inshore area adjacent to colonies is not subject to fishing activities (Putz *et al.* 2002, p. 282). The diet of southern rockhopper penguins, in general, is dominated by crustaceans, with fish and squid varying in importance. At the Falkland Islands, squid, in particular Patagonian squid (*Loligo gahi*), is of greater importance in the diet than in other rockhopper penguins (Putz *et al.* 2001, p. 802). The Patagonian squid is also an important commercial species fished around the Falkland Islands. Current licensing arrangements limit squid harvest to between the beginning of February and the end of May and the beginning of August and the end of October, which minimizes overlap with the southern rockhopper penguin breeding season, when feeding demands are high (October to February). Nevertheless, reports of decreasing catch per unit of effort for squid indicate a declining squid stock over the 1990s (Putz *et al.* 2001, p. 803). Coincidentally, Patagonian squid has declined in southern rockhopper penguin diets. However, southern rockhopper penguin diets have shifted to notothenid fish, a prey that has higher nutritional value than squid and that has become more common. It is not certain whether squid abundance or fish abundance is driving the switch. Bingham (1998, p. 6) reported that there is no direct evidence that food availability has been affected by commercial fishing, but both he and Putz *et al.* (2003b, p. 143) drew attention to the need for careful monitoring of southern rockhopper penguin prey availability in the face of commercial fisheries development.

The winter foraging range of southern rockhopper penguins breeding at the Falkland Islands takes them into the area of longline fishing at Burdwood Bank and onto the northern Patagonian shelf. Birds are not in direct competition for fish prey species there. The risk of bycatch from longline fishing is not a threat to penguins, as it is to other seabird species, and on the northern Patagonian shelf where jigging is the primary fishing method, bycatch is not a significant threat (Putz *et al.* 2002, p. 282).

In our review of fisheries activities, we found no other reports of documented fisheries interaction or possible competition for prey between southern rockhopper penguins and commercial fisheries or of documented fisheries bycatch in any other areas of the range of the southern rockhopper penguin.

In summary, while fisheries activities have the potential to compete for the prey of southern rockhopper penguins, we find that there are adequate monitoring regimes and fisheries controls in place to manage fisheries interactions with southern rockhopper penguins throughout all of its range, and we have not reason to believe this will change in the future.

Oil Spills

Oil development is a present and future activity in the range of southern rockhopper penguins breeding at the Falkland Islands. A favorite winter foraging area of southern rockhopper penguins is the Puerto Deseado area along the coast of Argentina, which lies just to the south of Commodoro Rivadavia, a major refinery and oil shipment port. Oil pollution and ballast tank cleaning have been a significant threat to Magellanic penguins (*Spheniscus magellanicus*) north of this zone (Ellis *et al.* 1998, pp. 111–112). In 1986, 800 southern rockhopper penguins were found dead near Puerto Deseado, to the south of Commodoro Rivadavia, but consistent with trends for that year elsewhere in the range, the birds appeared to have starved and there were no signs of oiling (Ellis *et al.* 1998, p. 54). At the Falkland Islands, hydrocarbon development is planned for areas north and southwest of the Falkland Islands. As of 2002, oil-related activities in the Falkland Islands were suspended, but exploration and production may start again in the near future (Putz *et al.* 2002, p. 281). We have no information on petroleum development in other areas of the southern rockhopper penguin's range.

We recognize that an oil spill near a breeding colony could have local effects on southern rockhopper penguin colonies now and in the future. However, on the basis of the species' widespread distribution and its robust population numbers, we believe the species can withstand the potential impacts from oil spills. Therefore, we do not believe that oiling or impacts from oil-related activities are factors affecting the southern rockhopper penguin throughout all of its range now or in the future.

On the basis of analysis of potential fisheries impacts and possible impacts of petroleum development, we find that other natural or manmade factors are not threats to the southern rockhopper penguin in any portion of its range now or in the future.

Foreseeable Future

In considering the foreseeable future as it relates to the status of the southern rockhopper penguin, we considered the stressors and threats acting on the species. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species.

With respect to the southern rockhopper penguin, the available data do not support a conclusion that there is a current overall trend in population numbers, and the overall population numbers are high. As discussed above in the five-factor analysis, we were also unable to identify any significant trends affecting the species as a whole, with

respect to the stressors and threats we identified. There is no evidence that any of the stressors or threats are growing in magnitude. Thus, the foreseeable future includes consideration of the ongoing effects of current stressors and threats at comparable levels.

There remains the question of whether we can reliably predict future events (as opposed to ongoing trends) that will likely cause the species to become endangered. As we discuss in the finding below, we can reliably predict that changes to the marine environment will continue to affect some southern rockhopper penguins in some areas, but we have no reason to believe they will have overall population-level impacts. Thus, the foreseeable future includes consideration of the effects of such factors on the viability of the species.

Southern Rockhopper Penguin Finding Throughout Its Range

We identified a number of likely stressors to this species, including: (1) Changes in the marine environment, (2) human use and disturbance, (3) disease, (4) competition with fisheries, and (5) oil spills. To determine whether these stressors individually or collectively rise to a ''threat'' level such that the southern rockhopper penguin is in danger of extinction throughout its range, or likely to become so within the foreseeable future, we first considered whether the stressors to the species were causing a long-term, population-scale declines in penguin numbers, or were likely to do so in the future.

Based on a tally of estimated numbers of southern rockhopper penguins in each region of the species' range, there are approximately 1.4 million breeding pairs in the overall species' population. While there have been major declines in penguin numbers in some areas, particularly at the Falkland Islands and at Campbell Island and other New Zealand islands, colonies in the major portion of the species' range have experienced lesser declines, remained stable, or appear to have increased. Therefore, based on the best available data, we do not find an overall declining trend in the species' population. In other words, the combined effects of the likely stressors are not causing an overall long-term decline in the southern rockhopper penguin numbers. Because there appears to be no ongoing long-term decline, the species is neither endangered nor threatened due to factors causing ongoing population declines, and the overall population of about 1.4 million pairs or more appears robust.

We also considered whether any of the stressors began recently enough that their effects are not yet manifested in a long-term decline in species' population numbers, but are likely to have that effect in the future. Given that the effects of stressors have either been ameliorated (*e.g.*, human use, competition with fisheries), or because their effects appear to be restricted to a small portion of the species' range, we do not believe their effects would be manifested in overall population declines in the future. Therefore, the southern rockhopper penguin is not threatened or endangered due to threats that began recently enough that their effects are not yet manifested in a long-term decline.

Next, we considered whether any of the stressors were likely to increase within the foreseeable future, such that the species is likely to become an endangered species in the foreseeable future. As discussed above, we concluded that none of the stressors was likely to increase significantly.

Having determined that a current or future declining trend does not justify listing the southern rockhopper penguin, we next considered whether the species met the definition of an endangered species or threatened species on account of its present or likely future absolute numbers. The total population of about 1.4 million pairs appears robust. It is not so low that, despite our conclusion that there is no ongoing decline, the species is at such risk from stochastic events that it is currently in danger of extinction.

Finally, we considered whether, even if the size of the current population makes the species viable, it is likely to become endangered in the foreseeable future because stochastic events might reduce its current numbers to the point where its viability would be in question. Because of the wide distribution of this species, combined with its high population numbers, even if a stochastic event were to occur within the foreseeable future, negatively affecting this species, the population would still be unlikely to be reduced to such a low level that it would then be in danger of extinction.

Despite regional declines in numbers of southern rockhopper penguins, the species has thus far maintained what appears to be high population levels, while being subject to most if not all of the current stressors. The best available information suggests that the overall southern rockhopper penguin population is not declining, despite regional changes in population numbers. Therefore, we conclude that the southern rockhopper penguin is neither an endangered species nor likely to become an endangered species in the foreseeable future throughout all of its range.

Distinct Population Segment

Section 2(16) of the Act defines ''species'' to include ''any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' To interpret and implement the DPS provisions of the Act and Congressional guidance, the Service and National Marine Fisheries Service published a Policy regarding the recognition of Distinct Vertebrate Population Segments in the **Federal Register** (DPS Policy) on February 7, 1996 (61 FR 4722). Under the DPS policy, three factors are considered in a decision concerning the establishment and classification of a possible DPS. These are applied similarly to endangered and threatened species. The first two factors—discreteness of the population segment in relation to the remainder of the taxon and the significance of the population segment to the taxon to which it belongs—bear on whether the population segment is a valid DPS. If a population meets both tests, it is a DPS, and then the third factor is applied—the population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (*i.e.*, is the population segment endangered or threatened).

Discreteness Analysis

Under the DPS policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation) or (2) it is delimited by international boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Southern Rockhopper penguins are widely dispersed throughout the sub-Antarctic in colonies located on isolated island groups. With respect to discreteness criterion 1, many of these areas are clearly separated from others. Differences in physical appearance or plumage patterns have been described between the nominate *chrysocome* type, which breeds in the Falkland Islands and off the southern tip of South

America, and the eastern *filholi* type, which breeds in the Indian Ocean and southwest Pacific south of Australia and New Zealand, but we are unaware of further differences in physiological, ecological, or behavioral factors among any groups within the overall range (Marchant and Higgins 1990, p. 191). Among the prominent breeding areas of the southern rockhopper penguin, we have identified two areas that may be markedly separated from other populations of the same taxon or face significant differences in conservation status from other southern rockhopper populations: (1) The Falkland Islands, and (2) the islands to the south of Australia and New Zealand, including Macquarie, Campbell, Auckland, and Antipodes Islands, where southern rockhopper penguins breed.

Falkland Islands: The southern rockhopper penguin breeds at about 52 locations around the Falkland Islands in aggregations numbering from a few hundred to more than 95,000 nests or breeding pairs. The most recent population estimates are of approximately 210,000 breeding pairs (Kirkwood *et al.* 2007, p. 266). The Falkland Islands breeding sites are separated from the nearest major southern rockhopper penguin breeding concentrations at Staten Island, Argentina, by about 264 mi (425 km). At Staten Island, there are reported to be 180,000 breeding pairs (Schiavini 2000, p. 288). It is not known to what extent interbreeding or movement of breeding pairs occurs between the Falkland Islands and the extensive breeding colonies in southern Argentina and Chile, although the possibility of movement of breeding birds from the Falkland Islands to Staten Island has been suggested (Schiavini 2000, p. 290).

Winter foraging studies show that the relatively short distance between these colonies allows for interchange between the southern rockhopper penguins at the Falkland Islands and those at the southern tip of South America (Putz *et al.* 2006, p. 741). This overlap is by no means complete; at least half of the breeding rockhopper penguins from both the Falkland Islands and Staten Island forage in distinct winter foraging areas that are not used by birds from the other region (Putz *et al.* 2006, p. 741). However, in other areas there is extensive mixing on the winter foraging grounds. For example, about 17 percent of the birds from Staten Island foraged in the region of Burdwood Bank, an isolated extension of the Patagonian continental shelf, due east of Staten Island and due south of the Falkland Islands. About 25 percent of the birds from the southern colonies on the Falkland Islands also foraged in the Burdwood Bank region. Thus, Burdwood Bank is a foraging area for some 90,000 breeding southern rockhopper penguins over the winter period; about 31,000 originating from the Falklands and 60,000 from Staten Island. There is also mixing, although made up of a smaller percentage of Falkland Islands birds (6 percent), in the winter foraging areas along the northeastern coast of Tierra del Fuego.

While Falkland Islands colonies have historically been considered a significant stronghold of the southern rockhopper penguin in the southwestern Atlantic Ocean and declines there have been of significant concern, recent research has identified major previously undocumented colonies in the same region that are as significant, or more significant, in abundance, and occupy portions of the same ecological region. These include colonies at nearby Staten Island in Argentina and at Ildefonso and Diego Ramirez Archipelagos in Chile, which are about 149 miles (240 km) further west. The overall southern rockhopper penguin numbers in this region, including the Falkland Islands, total about 765,000 breeding pairs (Kirkwood *et al.* 2007, p. 266), with Falkland Islands colonies constituting 27 percent of this total. As discussed above, extensive ecological overlap in foraging range between Falkland Islands birds and the Staten Island colonies has been documented, with overlap in use of the Burdwood Bank and some shared foraging range on the Patagonian shelf. In turn, the foraging ranges of Staten Island birds are likely to overlap with those of the Chilean colonies to the west (Putz *et al.* 2006, p. 740). We find that the literature increasingly refers to the biology and conservation of the suite of colonies around the southern tip of South America and the Falkland Islands as a significant larger regional concentration, downplaying emphasis on the discreteness of the Falkland Islands colonies (Kirkwood *et al.* 2007, p. 266; Putz *et al.* 2006, pp. 743–744; Schiavini *et al.* 2000, p. 289). We concur with this conclusion; therefore, we find that the Falkland Islands colonies of the southern rockhopper penguin do not meet the criterion of discreteness for determination of a DPS. On this basis, we do not consider the Falkland Islands colonies of the southern rockhopper penguin to be a DPS.

New Zealand/Australia: With respect to the discreteness criterion 1, the southern rockhopper breeding islands south of New Zealand and Australia are geographically isolated from southern rockhopper breeding areas in the Indian Ocean and near the southern tip of South America, with the closest colonies being roughly 7,300 km (4536 miles) at the Heard and McDonald Islands.

Based on the large geographic distance between the populations south of New Zealand and Australia from other populations, we conclude that this segment of the population of the southern rockhopper penguin passes the discreteness conditions for determination of a DPS.

Significance Analysis

If a population segment is considered discrete under one or more of the conditions described in our DPS policy, its biological and ecological significance is to be considered in light of Congressional guidance that the authority to list DPSs be used ''sparingly'' while encouraging the conservation of genetic diversity. In carrying out this examination, we consider available scientific evidence of the population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to: (1) Its persistence in an ecological setting unusual or unique for the taxon; (2) evidence that its loss would result in a significant gap in the range of the taxon; (3) evidence that it is the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or (4) evidence that the DPS differs markedly from other populations of the species in its genetic characteristics. A population segment needs to satisfy only one of these criteria to be considered significant. Furthermore, the list of criteria is not exhaustive; other criteria may be used, as appropriate. Below, we consider the biological and ecological significance to the New Zealand/Australia DPS.

Historical numbers of southern rockhopper penguins in this region may have been as high as 960,000 breeding pairs, with declines recorded from the New Zealand islands. Currently there are approximately 89,600–101,500 breeding pairs in the region, which represents 6 to 7 percent of the current estimated population of 1.4 million southern rockhopper breeding pairs rangewide.

This group of breeding colonies inhabits a unique ecological and geographical position in the range of the southern rockhopper penguin. The underwater topography and oceanography of this area is unique and has been described in detail in the Macquarie Island Management Plan (Parks and Wildlife Service (Australia)

2006a, pp. 20–22). The islands sit in areas of relatively shallow water, generally less than 3,280 ft (1,000 m) deep. Macquarie Island is on the shallow Macquarie Ridge, which is associated with a deep trench to the east, and connects to the north with the broader Campbell Plateau, an extensive area of shallow water that is part of the continental shelf extending southeast from New Zealand. The New Zealand islands (Campbell, Auckland, and Antipodes), with breeding colonies of southern rockhopper penguins, sit on the Campbell Plateau. This region and all these islands sit just north of the Antarctic Polar Front Zone (APFZ), a distinct hydrographic boundary with cold nutrient-rich surface waters to the south and warmer, less rich, water to the north. In addition, the Macquarie Ridge and Campbell Plateau form a major obstruction to the ACC, which runs easterly at about 50° S latitude. This further increases the high degree of turbulence and current variability in the area and is likely to directly or indirectly encourage biological productivity (Parks and Wildlife Service (Australia) 2006a, pp. 20–22).

We conclude that loss of the colonies in the region would create a significant gap in the range of the taxon and remove southern rockhopper penguins from the unique ecological setting of the Macquarie Ridge and Campbell Plateau that lies in a unique position relative to the APFZ and the ACC. Therefore, because we find the New Zealand/Australia population segment to be discrete and because it meets the significance criterion, with respect to (1) Its persistence in an ecological setting unusual or unique for the taxon; and (2) evidence that its loss would result in a significant gap in the range of the taxon, it qualifies as a DPS under the Act.

New Zealand/Australia DPS Finding

Historical numbers of southern rockhopper penguins for this New Zealand/Australia DPS may have been as high as 960,000 breeding pairs; they are currently estimated at 89,600–101,500 breeding pairs. Significant historical declines have been reported, in particular, at Campbell Island, where a decline of 94 percent was recorded between the early 1940s and 1985; at Antipodes Islands, where a decline of 94 percent was recorded; and at Auckland Islands, where the numbers halved between 1983 and 1990. Current quantitative data is not available to indicate whether, and to what extent, numbers throughout all of this DPS continue to decline, but qualitative evidence indicates that numbers at Campbell Island continue to decline. At Macquarie Island, which represents 32 to 48 percent of this DPS, southern rockhopper penguin numbers were recently estimated to be lower than previous categorical estimates, but it is not clear whether this reflects a decline versus more precise surveys.

As described in our five-factor analysis, changes to the marine environment are cited as factors that have led to historic or recent large declines at some, but not all, of the breeding locations within the New Zealand/Australia DPS. While the oceanographic factors contributing to such declines have not been clearly explained, they appear to relate to changes in sea surface temperatures or to changes in marine productivity at scales affecting individual colonies or regions, leading to periodic or long-term reductions in food availability. There is little or no current information, however, on the effects of these changes on the breeding and foraging success of southern rockhopper penguins in areas of previous decline. Although changes in the marine environment appear to be affecting some southern rockhopper breeding areas within this DPS, information is not at a meaningful scale to evaluate current changes to the marine habitat in the overall New Zealand/Australia DPS or to make predictions on future trends about whether changes to the marine environment will affect southern rockhoppers penguins across the New Zealand/Australia DPS.

Although the data indicate that changes to the marine habitat may be a threat to New Zealand colonies on the Campbell Plateau, we do not find that historical declines there are currently rising to the level of having a significant effect on the entire DPS. Therefore, on the basis of the best available scientific and commercial information, we find that the present or threatened destruction, modification, or curtailment of this species' marine habitat or range is not a threat to the southern rockhopper penguin throughout the range of New Zealand/Australia DPS, now or in the future. Below, we will further consider whether the New Zealand colonies are a significant portion of the range (SPR) of the DPS.

We have not documented any significant changes to the terrestrial habitat of the southern rockhopper penguin. Also, on the basis of our five-factor analysis, we did not find any of the other factors to be threats to the southern rockhopper penguin's continued existence in any portion of the species' range in the New Zealand/Australia DPS now or in the future.

On the basis of our analysis of the best available scientific and commercial information, we find that the southern rockhopper penguin is not in danger of extinction throughout all of its range in the New Zealand/Australia DPS or likely to become so in the foreseeable future as a consequence of the threats evaluated under the five factors in the Act.

Significant Portion of the Range Analysis

Having determined that the southern rockhopper penguin is not now in danger of extinction throughout all of its range or in the New Zealand/Australia DPS or likely to become so in the foreseeable future as a consequence of the stressors evaluated under the five threat factors in the Act, we also considered whether there were any significant portions of its range where the species is in danger of extinction or likely to become so in the foreseeable future.

The Act defines an endangered species as one ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as one ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The term ''significant portion of its range'' is not defined by statute. For purposes of this finding, a significant portion of a species' range is an area that is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species.

The first step in determining whether a species is endangered in a SPR is to identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and endangered. To identify those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the

species, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether, in fact, the species is threatened or endangered in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, or the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. If the Service determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. If the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered pursuant to section 4(c)(1) of the Act.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability found within the range of the species. In addition, the portion may contribute to resiliency for other reasons—for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering. Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy important to the conservation of the species. Adequate representation ensures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

To determine whether any portions of the range of the southern rockhopper penguin warrant further consideration as possible threatened or endangered significant portions of the range, we reviewed the entire supporting record for the status review of this species with respect to the geographic concentration of threats and the significance of portions of the range to the conservation of the species. As previously mentioned, we evaluated whether substantial information indicated that (i) the portions may be significant and (ii) the species in that portion may be currently in danger of extinction or likely to become so within the foreseeable future. We have found that population declines are uneven across the range, indicating the possible occurrence of differential stressors or threats across the range of the southern rockhopper penguin. On this basis we determined that some portions of the southern rockhopper's range might warrant further consideration as possible threatened or endangered significant portions of the range.

The southern rockhopper penguin is widely distributed throughout the Southern Ocean. In our five-factor analysis we did not identify any factor that was found to be a threat to the species throughout all of its range or throughout all of the New Zealand/Australia DPS. In our status review, we identified the Falkland Islands, Marion Island, and finally, the Campbell Island Plateau region within the New Zealand/Australia DPS as areas where declines have occurred, indicating the possibility that the species may be threatened or endangered there.

Falkland Islands SPR Analysis

For the Falkland Islands, we first considered whether there is substantial information to indicate that this portion of the range may be in danger of extinction. The southern rockhopper penguin breeds at about 52 locations around the Falkland Islands in aggregations numbering from a few hundred to more than 95,000 nests or breeding pairs. In the period from 1932–33 to 1995–96, the Falkland Islands numbers declined from an estimated 1.5 million breeding pairs to 263,000 breeding pairs, or about 2.75 percent per year. However, since that time numbers have been largely stable, fluctuating from 263,000 pairs in 1995–96 to a high of 272,000 breeding pairs in 2000–01 to approximately 210,000 breeding pairs in 2005–06 (Kirkwood *et al.* 2007, p. 266). It is unclear from available information whether numbers are fluctuating or moving into another period of decline.

In summary, even though numbers of southern rockhopper penguins at the Falkland Islands have shown an overall decline over time, numbers have not declined at a consistent rate, but rather, there have been periodic decreases in numbers, as well as at least one period of increase. Therefore, we cannot assume a consistent rate of decline into the future. Furthermore, it is unclear to what extent the fluctuations in numbers are attributed to potential relocations to nearby Staten Island, where numbers are stable to increasing. Numbers at the Falkland Islands appear to be relatively high, at approximately 210,000 breeding pairs, and in our five-factor analysis, we were unable to identify ongoing threats to southern rockhopper penguin colonies at the Falkland Islands.

Therefore, we have determined that the Falkland Islands portion of the range does not satisfy one of the two initial tests, because there is not substantial information to suggest that southern rockhopper penguins in the Falkland Islands portion of the range may be currently in danger of extinction, and since we cannot establish a continuing declining trend in numbers or a continuing trend in threat factors, we have no reason to believe that the species is likely to become endangered there within the foreseeable future. Because we find that the southern rockhopper penguin is not threatened or endangered in this portion of the range, we need not address whether this portion of its range is significant.

Marion Island SPR Analysis

For the Marion Island portion of the southern rockhopper penguin's range, we first considered whether there is substantial information to indicate that this portion of the range is significant. In terms of abundance, Marion Island represents less than 5 percent of the overall southern rockhopper penguin population, which is estimated at more that 1.4 million breeding pairs, with colonies widely distributed around the Southern Ocean. Even not considering the breeding pairs at Marion Island, the distribution of the species includes other large, stable or increasing populations in high-quality habitat representing the environmental variability found within the range of the species. Therefore, even without the colonies at Marion Island, the species would have sufficient resiliency to recover from periodic disturbances.

Furthermore, given the wide distribution of the species, even without the colonies at Marion Island, the species would have sufficient redundancy of other populations, such that random perturbations in the system would only affect a few of the remaining populations. Finally, not considering colonies at Marion Island, we find that the species has adequate representation of its adaptive capabilities to enable the species to adapt to future environmental changes. For example, the number of southern rockhopper penguins at nearby Prince Edward Island appears to have been stable since the 1980s with 35,000–45,000 pairs present. Given Marion Island's position within the species' range (*i.e.*, far from the periphery of its range), and its proximity to other southern rockhopper breeding areas, we do not believe the penguins at Marion Island represent unique adaptive capabilities that would be lost if their breeding colonies were lost from the population. Therefore, we have determined that the Marion Island portion of the species' range does not satisfy the significance test of being a significant portion of the species' range, and we need not address whether this portion of its range is threatened or endangered.

Campbell Plateau SPR Analysis

In our analysis of the New Zealand/Australia DPS of southern rockhopper penguins, we identified major declines in numbers of southern rockhopper penguins at the New Zealand breeding locations at Campbell, Auckland, and Antipodes Islands, while numbers at Macquarie Island are reported to be stable. As reflected in our five-factor analysis, declines in penguin numbers at the locations identified above are attributed to changes in the marine environment, which may have affected overall marine productivity or the distribution and abundance of southern rockhopper prey species at these sites. We view the New Zealand Campbell Plateau colonies as an integral part of the geographic area encompassed by the New Zealand/Australia DPS, and not as discrete in and of itself. On this basis and on the basis of the severe declines in this area, we will analyze the Campbell Plateau portion of the range as a possible SPR.

With approximately 60,000 breeding pairs in the New Zealand range of the southern rockhopper penguin, the three Campbell Plateau breeding areas (Campbell, Auckland, and Antipodes Islands) make up over 60 percent of the New Zealand/Australia DPS and represent three out of its four breeding concentrations. The presence of four breeding areas in this DPS provides a measure of resiliency against periodic disturbance. The loss of the Campbell Plateau breeding colonies would greatly reduce the overall geographic range of this DPS to one location. The species would no longer inhabit the ecologically distinct Campbell Plateau, an area of historically high-quality habitat (as evidenced by previous high numbers at Campbell Island). Loss of some or all of these three breeding concentrations, two of which number less than 3,600 breeding pairs, would significantly reduce the redundancy of populations in this DPS and increase the impact of random or catastrophic perturbations on remaining population numbers in the New Zealand/Australia DPS. Therefore, we conclude that this Campbell Plateau portion of the range passes the significance criterion for evaluating a SPR.

We next evaluate the Campbell Plateau portion of the range relative to the geographical concentration of threats in this region. Among colonies of southern rockhopper penguins throughout the species' range, the three island groups within the Campbell Plateau portion of the range have experienced the most severe declines. While trends are unclear at Macquarie Island, overall numbers at Campbell Island are recorded to have been as high as 800,000 breeding pairs in the early 1940s, and the last 1985 census numbers indicated a 94-percent reduction to 51,500 pairs. Current qualitative information indicates that colonies are still in decline, although the rate of that decline is undocumented. In our analysis of the New Zealand/Australia DPS, we concluded that changes to the marine environment that influence the southern rockhopper penguin have affected the Campbell Plateau more than the Macquarie Ridge region; therefore, the present or threatened destruction, modification, or curtailment of its habitat or range is a risk factor that threatens the southern rockhopper penguin in the Campbell Plateau of the New Zealand/Australia DPS. On this basis, we conclude that there is substantial information indicating that listing of the Campbell Plateau portion of the range of the southern rockhopper penguin as threatened or endangered may be warranted.

Having determined that the Campbell Plateau populations of the New Zealand/Australia DPS of the southern rockhopper penguin are significant and that there is substantial information indicating that listing of this portion of the range as threatened or endangered may be warranted, we will now summarize our analysis on whether listing of the Campbell Plateau SPR is warranted.

Finding of Campbell Plateau SPR

Within the Campbell Plateau portion of the range of the southern rockhopper penguin, significant historical declines have been reported, in particular for Campbell Island where a decline of 94 percent was recorded between the early 1940s and 1985. Continued unquantified declines were reported to the present day. The most recent survey data available from Campbell Island is from 1985, when there were 51,500 breeding pairs (Cunningham and Moors 1994, p. 34). At Antipodes Islands, a decline of 94 percent was recorded between 1978 and 1995, and current estimates are of 3,400 breeding pairs. At the Auckland Islands, the number of penguins halved between 1983 and 1990 to 3,600 breeding pairs. There are no current quantitative data to indicate whether, and to what extent, declines have continued at any of these three island groups. Historical numbers of southern rockhopper penguins in the Campbell Plateau portion of the species' range may have been as high as 860,000 breeding pairs in the early 1940s; an overall decline of 94 percent or more has brought this number down to less than 60,000 breeding pairs today. Given the low numbers at Antipodes and Auckland Islands, Campbell Island is the primary stronghold for the Campbell Plateau portion of the species' range.

In our five-factor analysis (see above), we did not find documentation of any significant changes to the terrestrial habitat of the southern rockhopper penguin. Changes to the marine environment, however, are cited as factors that have led to historical or recent large declines within the Campbell Plateau portion of the range. While the oceanographic factors contributing to such declines have not been clearly explained, they appear to relate to periodic or long-term changes in sea surface temperatures within the summer or winter foraging ranges of southern rockhopper penguins, or to changes in marine productivity at scales affecting individual colonies or regions. These oceanographic changes have apparently led to reductions in food availability that may have occurred in short periods or extended over periods of years. The available regulatory mechanisms have not ameliorated the effects of these changes in the marine environment, and we have no reason to believe these changes in the marine environment will be ameliorated in the future; therefore, we find it reasonably likely that the effects on the species in

this portion of its range will continue at current levels or potentially increase. On the basis of the best available scientific and commercial information and evidence of precipitous decreases of penguin numbers in this area, we find that the present or threatened destruction, modification, or curtailment of its marine habitat or range is a threat to the southern rockhopper penguin in the Campbell Plateau portion of its range now and in the future.

On the basis of our five-factor analysis of the best available scientific and commercial information (see above), we find that overutilization for commercial, recreational, scientific, or educational purposes; disease; and predation are not threats to the southern rockhopper penguin in the Campbell Plateau portion of its range. On the basis of information on fisheries and oil development, we find that other natural or manmade factors are not a threat to the southern rockhopper penguin in the Campbell Plateau portion of its range.

We find that precipitous population declines have depleted the Campbell Plateau SPR to 6 percent of its prior abundance, and based on our review of the best available information, we find it is reasonably likely that these severe declines resulted from effects of changes in the marine environment. We have no reason to believe that these changes in the marine environment will not continue to affect southern rockhopper penguins in the Campbell Plateau SPR at current (and potentially greater) levels, further reducing population numbers.

Lower population numbers, a reasonably likely result in the foreseeable future, would make this species even more vulnerable to the threats from changes in the marine habitat, and would make the species vulnerable to potential impacts from oil spills and other random catastrophic events. Therefore, on the basis of our analysis of the best available scientific and commercial information, we find that the southern rockhopper penguin in the Campbell Plateau SPR of the New Zealand/Australia DPS is likely to become endangered with extinction in the foreseeable future.

Proposed Determination for the Southern Rockhopper Penguin in the Campbell Plateau Portion of its Range

On the basis of analysis of the five factors and the best available scientific and commercial information, find that listing the southern rockhopper penguin as a threatened species in the Campbell Plateau portion of its range under the Act is warranted. We, therefore, propose to list the southern rockhopper penguin as a threatened species in the Campbell Plateau portion of its range under the Act.

Final Determination for the Southern Rockhopper Penguin in All Other Portions of its Range (*i.e.*, not including the Campbell Plateau)

On the basis of analysis of the five factors and the best available scientific and commercial information, we find that listing the southern rockhopper penguin as threatened or endangered under the Act throughout all or in any other portion of its range is not warranted.

Northern Rockhopper Penguin

Distribution

The northern rockhopper penguin (*Eudyptes moseleyi*) is restricted to islands of the Tristan da Cunha region and Gough Island (St. Helena, United Kingdom) in the South Atlantic and St. Paul and Amsterdam Islands (French Southern Territories) in the Indian Ocean.

Two chicks banded at Amsterdam Island in 1992 were recovered off the coast of eastern and southern Australia 7 and 9 months later, indicating that immature Indian Ocean birds may winter off southern Australia (Guinard *et al.* 1998, p. 224).

Population

The overall breeding population of northern rockhopper penguins is estimated to be approximately 315,000–334,000 pairs on these island groups in the South Atlantic and Indian Oceans and is thought to be declining (Jouventin *et al.* 2006, p. 3,417; Guinard *et al.* 1998, p. 224; Woehler 1993, p. 58); however, based on the current information available on population trends throughout the species' range, as discussed below, the overall population trend of the northern rockhopper penguin appears uncertain. Documentation of current trend information is at this time only available for areas of Gough Island, as discussed below, which is only part of the species' overall range.

South Atlantic Ocean

Gough Island

Early records indicate that numbers were historically in the millions on both Gough Island and Tristan da Cunha. The most recent population estimates indicate that over the past 45 years, numbers have declined by about 96 percent on Gough Island, where there are currently estimated to be 32,000–65,000 breeding pairs (Cuthbert in litt., as cited in BirdLife International 2008a, pp. 2–3). Numbers on this island are reported to have experienced large declines prior to the 1980s (BirdLife International 2008a, p. 2), but were stable between 1982 and 2000 (Cuthbert and Sommer 2004, p. 101). Recent unpublished reports are said to indicate recent substantial declines (Jouventin *et al.* 2006, p. 3,422); however, we have no further information on the regional extent of decline, and so we cannot evaluate the effect of these declines on the overall population status of the northern rockhopper penguin.

Tristan da Cunha

Tristan da Cunha consists of a main island and several smaller islands. It is reported that the main island experienced a decline of about 98 percent 130 years ago until about 30 years ago, but over the past few decades numbers have been stable, with numbers currently estimated at 3,200–4,500 breeding pairs (Cuthbert in litt., as cited in BirdLife International 2008a, pp. 2–3.)

At Inaccessible Island, numbers may have declined ''modestly'' and are currently estimated at 18,000–27,000 breeding pairs. Trends at Nightingale and Middle Islands are poorly known, but recent observations suggest local declines in the main colony on Nightingale Island. The latest estimate of numbers of northern rockhopper penguins on these two islands was in the 1970's and was reported to be 125,000 pairs (Cuthbert in litt., as cited in BirdLife International 2008a, p. 3). No information is available on numbers or trends at Stoltenhof Island. In summary, given the numbers reported above, there appear to be from 146,200–156,500 breeding pairs of northern rockhopper penguins in the Tristan da Cunha Island group, not including those on Stoltenhoff Island. Although numbers appear stable at Tristan, the main island, trends are unknown throughout the remainder of this region.

Indian Ocean

Amsterdam Island

Northern rockhopper penguins at Amsterdam Island decreased in numbers from 58,000 breeding pairs in 1971 to 24,890 in 1993, for an overall decrease of 57 percent. The declines were most rapid, at 5.3 percent per year, between 1988 and 1993, but this was also a period when there was the widest fluctuation in numbers, from a low of 17,400 to a high of 39,871 breeding pairs (Guinard *et al.* 1998, pp. 226–227). After a lengthy period of gradual decline, the most recent available data indicate a period of population fluctuation with

both increases (up to 39,871 breeding pairs from 17,400 pairs) and decreases in numbers. With the final reported figure of 24,890, which is above previous lows, best available data do not allow us to evaluate if the colonies at Amsterdam Island continue to fluctuate, or are stable, increasing, or declining.

St. Paul Island

At St. Paul Island, 50 mi (80 km) south of Amsterdam Island, the numbers of northern rockhopper penguins increased by 56 percent over the period of 1971–1993, with a current estimate of 9,000 breeding pairs (Guinard *et al.* 1998, p. 227). This increase is considered to have begun after the cessation of the use of rockhopper penguins as bait in a crayfish industry, which operated in the 1930s, although all the interrelationships acting on this gradual, upward trend are not understood (Guinard *et al.* 1998, p. 227).

Other Status Classifications

The IUCN Red List classifies the northern rockhopper penguin as 'Endangered,' due to ''very rapid population decreases over the last three generations (30 years) throughout its range.''

Summary of Factors Affecting the Species

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

Terrestrial Habitat

We have found no current reports of threats to the terrestrial breeding habitat of northern rockhopper penguins, and we have no reason to believe threats to the terrestrial habitat will emerge in the future.

Climate-Related Changes in the Marine Environment

With respect to the marine environment, Guinard *et al.* (1998, p. 224) reported that sea surface temperatures declined significantly, approximately 1.4 °F (0.8 °C), around Amsterdam and St. Paul Islands between 1982 and 1993. The annual mean decrease correlated with declines in numbers of northern rockhopper penguins at Amsterdam Island in the same period. Summer (February) sea surface temperatures were also correlated with the numbers of northern rockhopper penguins at Amsterdam Island the following spring. However, there was no relationship between spring temperatures and the numbers of penguins at Amsterdam Island, and there were no significant correlations between sea surface temperatures and numbers at adjacent St. Paul Island, where penguin numbers increased 56 percent during this same period. The authors hypothesized that with cooling water temperatures, prey may have shifted towards more northern waters, which are less accessible for breeding penguins (Guinard *et al.* 1998, p. 227). Guinard *et al.* (1998, p. 226) did not find major differences in breeding success between the Amsterdam Island colony and study colonies in other areas. The absence of conclusive correlations and the opposing trends occurring at the two adjacent islands make it difficult to draw conclusions relative to the impact of sea surface temperature changes on northern rockhopper penguin marine habitat in these areas.

We have identified no reports of apparent marine habitat changes for northern rockhopper penguins at Gough Island and Tristan da Cunha, or reports of declines in the prey base in these areas.

Conclusion

Although it is possible that climate change will result in changes to the marine habitat of the northern rockhopper penguin, data on the relationship between sea surface temperature and other oceanic conditions are ambiguous and not sufficient to draw conclusions as to the contribution of changes in these conditions to the local declines at Amsterdam Island. This precludes us from being able to identify current relationships or to predict possible future trends.

Therefore, on the basis of the best available scientific and commercial information, we find that the present or threatened destruction, modification, or curtailment of this species' terrestrial and marine habitats or range is not a threat to the northern rockhopper penguin in any portion of its range now and we do not foresee that it will become so in the future.

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Use as Bait

Northern rockhopper penguins at the small colonies at St. Paul Island in the Indian Ocean were exploited heavily for bait to support a crayfish fishery in the 1930s, but this practice has been discontinued since the 1940s (Guinard 1998, p. 227), and we have no reason to believe it will recommence in the future.

In the Tristan da Cunha region, driftnet fishing and penguin use for bait is reported to have caused significant mortality in the past. Such activities are now prohibited and regarded as unlikely to return (BirdLife International 2007, p. 3).

Harvest of Eggs

In the South Atlantic, the United Kingdom Department for Environment, Food and Rural Affairs (DEFRA) reported that harvesting of many seabirds, including northern rockhopper penguins, was intensive in the past, but is now greatly reduced, and restricted to egg collection for traditional domestic use of the 269 residents of Tristan da Cunha. Under the 2006 Conservation Ordinance, egg collection is restricted to Nightingale (25,000 breeding pairs), Stoltenhof and Middle Islands (100,000 breeding pairs) in the Tristan da Cunha group (DEFRA 2007, p. 2; Tristan da Cunha Website 2008, p. 1). Rockhopper penguins lay two eggs, the first of which often fails during incubation. If the chick from the first egg hatches, this chick usually dies or is discarded as the parents raise the larger chick from the second egg. If the second egg fails to hatch or is lost, the chick from the first egg may survive (Marchant and Higgins 1990, p. 190); therefore, this information suggests that limited harvest of eggs for traditional domestic use can be conducted without influencing breeding success of the large colonies where collection occurs. However, we cannot evaluate whether this is true because: (1) Empirical data are not available to verify whether breeding success is affected by this practice; (2) population trends, which would be a partial indicator of population status, on these islands are unknown; and (3) since the restrictions on egg harvest were only recently adopted in 2006, there may not have been sufficient time to for the adopted restrictions on egg collection to have exhibited their affects on population growth. Nevertheless, given that northern rockhopper penguin numbers in the Tristan da Cunha region are estimated at 146,200–156,500 breeding pairs, we do not find over-harvest of eggs to be a threat to the species. Furthermore, we have no reason to believe that the level of egg harvest will increase in the future.

Collection of Penguins From the Wild

The United Kingdom permitted a one-time harvest of 146 live northern rockhopper penguins from Tristan da Cunha for exports to zoos in the autumn of 2003 (DEFRA 2007, p. 2). Under the 2006 Conservation Ordinance, no take, capture, removal, or collection of any native organism is allowed without a permit (Tristan da Cunha Website 2008,

p. 1). Any take of live penguins from the wild would reduce numbers, potentially acting as stressor to local colonies. However, given the large numbers of breeding pairs (146,200–156,500) in this region and the new (2006) regulations restricting take from the wild, we do not consider the current level of limited take of individuals from the wild to be a threat to this species. We have no reason to believe that the level of collection of individuals from the wild will increase in the future.

Scientific Research

Scientists studying northern rockhopper penguins at Amsterdam Islands applied flipper bands to all incubating birds in a study colony of from 100–300 breeding pairs. They reported that the mean adult survival rate of 72 percent was significantly lower in the first year after banding than in subsequent years (mean adult survival of 84 percent) suggesting that there was an effect of banding on the birds. There was a similar effect for banded chicks (Guinard *et al.* 1998, p. 223–224). Based on this information, we believe that bird banding acts as a stressor on northern rockhopper penguins in this region; however, given the small size of the study colony and the relatively small decrease in survival of a small number of birds, we conclude that the bird banding practice as described in the literature is not a threat to the northern rockhopper penguins at the Amsterdam Islands or elsewhere in the species' range. There is no information that suggests banding activities will increase in magnitude in any portion of the species' range in the future.

Conclusion

We conclude that the primary utilization of northern rockhopper penguins at this time in the Tristan da Cunha region is the regulated collection of eggs for traditional domestic consumption by the small number of residents, as well as regulated collection of individuals from the wild. Although there may have been insufficient time since regulations were put in place, to determine whether the current levels of egg and animal collection are acting as stressors on the species in this area, we believe that with the recent regulations in place, the effects of these activities on the species in this area have likely been reduced since 2006, and we expect that any as of yet unobserved effects of the regulations would result in positive effects on the conservation of the species. We have no reason to believe these collection and harvest activities will increase over the current levels. We do not have documentation of current population trends on the islands where egg collection is occurring, but given that the numbers in the Tristan da Cunha region are estimated at 146,200–156,500 breeding pairs, we do not find over-harvest of eggs, nor over-collection of individuals to be a threat to the species.

Based on the available information, the only other utilization of the species within its range that we were able identify is banding of individuals for scientific research at Amsterdam Island. As discussed above, we do not consider this activity a threat to the species now or in the future.

On the basis of this information, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the northern rockhopper penguin in any portion of its range now or in the future.

Factor C: Disease or Predation

Disease

We are aware of no reports in the literature on the effect of disease on northern rockhopper penguins anywhere within the species' range, and we have no information to suggest that disease incidence or transmission to the northern rockhopper penguin will increase in the future. Therefore, we find that disease is not a threat to the northern rockhopper penguin in any portion of the species' range now or in the future.

Predation by Sub-Antarctic Fur Seals

Predation by sub-Antarctic fur seals has been identified as a possible stressor on northern rockhopper penguins at Amsterdam Island, where numbers of fur seals increased from 4,868–35,028 between the 1970s and 1982 (Guinard *et al.* 1998, p. 227). This increase in fur seal numbers occurred within the time period (1971–1993) that northern rockhopper penguin numbers at Amsterdam Island reportedly declined by 57 percent. Fur seal numbers subsequently leveled off through the mid-1990s. It is reported that fur seals occasionally hunt and prey upon rockhopper penguins, and Guinard *et al.* (1998, p. 227) concluded that, even if penguins represent a minor part of the fur seal diet, the increase in predation could be contributing to the declines of northern rockhopper penguins observed at Amsterdam Island. The researchers indicated that further study is needed to evaluate the effect of fur seals on rockhopper penguins.

We acknowledge that fur seal predation has the potential to reduce numbers of northern rockhopper penguins; however, as of yet the extent of predation and its effect on the northern rockhopper penguin population has not been determined. Furthermore, because fur seal numbers have leveled off, we do not believe the possibility of predation on northern rockhopper penguins will increase in the future. Although the population trend at Amsterdam Island is unknown, according to the best available information, there are an estimated 24,890 breeding pairs there, which is above previously low numbers.

There is no information to suggest that predation from fur seals is or will become a threat to the northern rockhopper penguin in any other portion of its range in the future.

Therefore we find that predation by fur seals is not a threat to the northern rockhopper penguin in any portion of its range now or in the future.

Introduced Predators

Rats were eradicated from St. Paul Island in 1999 (Terres Australes and Antarctiques Francaises (TAAF) 2008, p. 3). At Gough Island, Jones *et al.* (2003, p. 81) reported on the presence of mice (*Mus musculus*), but did not indicate any effect on northern rockhopper penguin colonies. There is no information available that suggests predation is a threat to northern rockhopper penguins in any other portion of its range and no reason to believe predation will become a threat to this species in any portion of its range in the future.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

Northern rockhopper penguins are protected from human over-exploitation at the Tristan da Cunha area. Activities involving take of the species, specifically harvest of eggs for domestic use by the small community at Tristan da Cunha Island has been greatly reduced and restricted (BirdLife International 2007, p. 4; DEFRA 2007, p. 2; Tristan da Cunha Web site 2008, p. 1). Gough Island Wildlife Reserve is a Natural World Heritage site and was first protected under the Tristan da Cunha Wildlife Protection Ordinance in 1950. Inaccessible Island, also in the Tristan da Cunha group, was given protection under the Wildlife Protection Ordinance in 1997 and added to the Gough Island Wildlife Reserve World Heritage site in 2004 (UNEP WCMC 2008d, pp. 1–2; Ellis *et al.* 1998, p. 57).

Amsterdam Island was included in the French Antarctic National Park (Parc National Antarctique Francais) in 1938 (World Wildlife Fund and M. McGinley 2007, p. 4). Extensive restoration efforts

are underway at both Amsterdam and St. Paul Islands to restore native flora, control introduced predators and, in particular, to protect and restore the habitat of the endemic Amsterdam albatross (*Diomedea amsterdamensis*) (World Wildlife Fund and M. McGinley 2007, p. 4).

Regular monitoring of northern rockhopper penguins is reported to be taking place at Tristan da Cunha, and Gough, Amsterdam, and St. Paul Islands (Birdlife International 2007, p. 4).

The literature reviewed has not highlighted any current deficiencies in regulatory protection (Ellis *et al.* 1998, p. 57; BirdLife International 2007, p. 4), and we have no reason to believe the existing regulatory mechanisms will be reduced or will be less effective in the future. Therefore, on the basis of the information before us, we find that the existing regulatory mechanisms regarding the conservation of northern rockhopper penguins are adequate now and in the future throughout all or any portion of the species' range.

Factor E: Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Competition With Fisheries

We have found no information documenting competition for prey with fisheries. Reports of possible bycatch from driftnet fishing are identified as having occurred in the past and not likely to recur (BirdLife International 2007, p. 3). BirdLife International (2008a, p. 4) suggests that northern rockhopper penguin food supplies may be affected by squid fisheries, but we have no supporting information to evaluate this factor as potential threat now or in the future.

Oil pollution is a possible concern for northern rockhopper penguins, but we have no information to conclude that this rises to the level of a threat for this species (Ellis *et al.* 2007, p. 5) now or in the future.

Therefore, we find that other natural or manmade factors are not a threat to the northern rockhopper penguin throughout all or any portion of its range now or in the future.

Foreseeable Future

In considering the foreseeable future as it relates to the status of the northern rockhopper penguin, we considered the stressors acting on the species. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species.

With respect to the northern rockhopper penguin, the available data do not support a conclusion that there is a current overall trend in population numbers although the evidence suggests that there may have been significant declines in the past, and the overall population numbers are high. As discussed above in the five-factor analysis, we were also unable to identify any significant trends with respect to the stressors we identified. There is no evidence that any of the stressors are growing in magnitude. Although we believe that recent restrictions on egg collection and take from the wild may manifest itself in the future in a positive manner with respect to trends, with respect to the foreseeable future, we have considered the ongoing effects of current stressors at comparable levels.

There remains the question of whether we can reliably predict future events (as opposed to ongoing trends) that will likely cause the species to become endangered. As we discuss in the finding below, we acknowledge that periodic take from the wild and predation by fur seals may continue to reduce local numbers in some northern rockhopper penguin colonies, but we have no reason to believe they will have population-level impacts. We also acknowledge that restricted egg collection for traditional use and penguin banding activities may affect reproductive success in some colonies; however, we have no reason to believe these activities will have population-level impacts. Thus, the foreseeable future includes consideration of the effects of these factors on the viability of the northern rockhopper penguin.

Northern Rockhopper Penguin Finding Throughout Its Range

We identified a number of likely stressors to this species, including traditional egg harvest, take of individuals from the wild, bird banding associated with research activities, and predation by fur seals. To determine whether stressors individually or collectively rise to a ''threat'' level such that the northern rockhopper penguin is in danger of extinction throughout its range, or likely to become so within the foreseeable future, we first considered whether the stressors to the species were causing a long-term, population-scale decline in penguin numbers, or were likely to do so in the future.

As discussed above, the overall northern rockhopper population is estimated at 315,000–334,000 breeding pairs. Although this species declined severely in numbers over a large portion of its range, these long-term, large-scale declines appear to have ended due to the amelioration of historical threats: (1) Northern rockhopper penguin exploitation for use as bait at St. Paul Island ended in the 1940s, and the species' numbers there subsequently increased by 56 percent; (2) driftnet fishing and penguin use for bait in the Tristan da Cunha region is now prohibited; (3) fisheries bycatch has been reduced or eliminated; (4) egg collection at Tristan da Cunha has been restricted to traditional use for the small local population and has been restricted to certain areas since 2006; and (5) take of individuals from the wild at Tristan da Cunha has also been limited by regulation since 2006. Currently, the only recent documented declines are on Gough Island, which only represents 10 to 20 percent of the overall northern rockhopper population, but information is not available on the scope of the declines on Gough Island. We also do not know if local declines on Gough Island are being offset by increases in other areas. Because there appears to be no ongoing long-term decline, the species is neither endangered nor threatened due to factors causing ongoing population declines, and the overall population of 315,000–334,000 breeding pairs appears robust.

We also considered whether any of the stressors began recently enough that their effects are not yet manifested in a long-term decline, but are likely to have that effect in the future. The small, periodic decrease in numbers due to take from the wild is immediately reflected in population trends. Declines associated with fur seal predation began in the early 1970s, and since fur seal numbers leveled off through the 1990s, there has been sufficient time for the effect on population numbers to be reflected in population trends. The limited number of bird-banding activities has been demonstrated to manifest their effects on reproductive success the year subsequent to the banding activities. Any lag times associated with egg collection are unknown, but since this activity has been severely restricted, we expect any as of yet unobserved effects to be in the positive direction. Therefore, the northern rockhopper penguin is not threatened or endangered due to threats that began recently enough that their effects are not yet manifested in a long-term decline.

Next, we considered whether any of the stressors were likely to increase within the foreseeable future, such that the species is likely to become an

endangered species in the foreseeable future. As discussed above, we concluded that none of the stressors were likely to increase significantly.

Having determined that a current or future declining trend does not justify listing the northern rockhopper penguin, we next considered whether the species met the definition of an endangered species or threatened species on account of its present or likely future absolute numbers. The total population of approximately 315,000–334,000 breeding pairs appears robust. It is not so low that, despite our conclusion that there is no ongoing decline, the species is at such risk from stochastic events that it is currently in danger of extinction.

Finally, we considered whether, even if the size of the current population makes the species viable, it is likely to become endangered in the foreseeable future because stochastic events might reduce its current numbers to the point where its viability would be in question. Because of the wide distribution of this species, combined with its high population numbers, even if a stochastic event were to occur within the foreseeable future, negatively affecting this species, the population would still be unlikely to be reduced to such a low level that it would then be in danger of extinction.

The best available information suggests that the historical long-term, large-scale population declines have ended, largely due to an amelioration of historical threats to the species. Therefore, we conclude that the northern rockhopper penguin is neither an endangered species nor likely to become an endangered species in the foreseeable future throughout all of its range.

Distinct Population Segment

A discussion of distinct population segments and the Service policy can be found above in the southern rockhopper penguin Distinct Population Segment section.

We are not aware of any information that would lead us to conclude that the northern rockhopper penguin is comprised of population segments that are either discrete or significant. Therefore, we have not analyzed the northern rockhopper penguin under the Service's DPS policy.

Significant Portion of the Range Analysis

Having determined that the northern rockhopper penguin is not now in danger of extinction throughout all of its range or likely to become so in the foreseeable future as a consequence of the stressors evaluated under the five factors in the Act, we also considered whether there were any significant portions of its range where the species is in danger of extinction or likely to become so in the foreseeable future. See our analysis for southern rockhopper penguin for how we make this determination.

The northern rockhopper penguin is found in two primary areas of the South Atlantic and Indian Oceans. In our five-factor analysis, we did not identify any factor that was found to be a threat to the species throughout its range. In our status review, we identified Gough Island, Tristan da Cunha, and Amsterdam Island as areas where declines have occurred, indicating the possibility that the species may be threatened or endangered there.

Gough Island

The most recent population estimates indicate that over the past 45 years, numbers have declined by about 96 percent on Gough Island, where there are currently estimated to be 32,000–65,000 breeding pairs (Cuthbert in litt., as cited in BirdLife International 2008a, p. 2–3). Numbers on this island are reported to have experienced large declines prior to the 1980s (BirdLife International 2008a, p. 2), but were stable between 1982 and 2000 (Cuthbert and Sommer 2004, p. 101). Although recent unpublished reports are said to indicate recent substantial declines on Gough Island (Jouventin *et al.* 2006, p. 3,422), more detailed information on these declines is not currently available. Therefore, we cannot assess the regional extent in the declines or the magnitude of the decline. This precludes us from being able to evaluate the overall trend in numbers at Gough Island, and given the recent emergence of the reported decline, we are not able to predict if the decrease in numbers will continue into the future. We have not identified any threat to the species in this area, nor do we have reason to believe this will change within the foreseeable future. Therefore, we find that the northern rockhopper penguin is not threatened or endangered in this portion of its range, and we consequently need not address the question of significance.

Tristan da Cunha

It is reported that from 130 years ago until about 30 years ago the main island of Tristan experienced a decline of about 98 percent. However, since numbers have been stable for the past few decades, there is currently no ongoing long-term decline there. At Inaccessible Island, numbers are reported to have possibly declined ''modestly,'' but the limited information on the basis of this suggestion does not allow a sufficient analysis of trends in this area. Trends at Nightingale and Middle Islands are, likewise, poorly known, and no information is available for trends at Stoltenhof Island. In summary, given the numbers reported above, there appear to be from 146,200–156,500 breeding pairs of northern rockhopper penguins in the Tristan da Cunha Island group, not including those on Stoltenhof Island. Numbers appear stable at Tristan, the main island, but since trends are unknown throughout the remainder of this region, we are unable to establish an overall trend for the region.

Based on our five-factor analysis, we found that the known historical threats to this species in this region have been ameliorated: (1) Driftnet fishing and penguin use for bait is now prohibited; (2) fisheries bycatch has been reduced or eliminated; (3) egg collection has been restricted to traditional use for the small local population and has been restricted to certain areas since 2006; and (4) take of individuals from the wild has also been limited by regulation since 2006. In our five-factor analysis, we were unable to identify any current threats to the species in this area, and we have no reason to believe this will change in the future. Therefore, we find that the northern rockhopper penguin is not threatened or endangered in this portion of its range, and we consequently need not address the question of significance.

Amsterdam Island

The overall numbers at Amsterdam Island declined 57 percent between 1971, when there were 58,000 pairs, and 1993, when there were 24,890 pairs. During the last period from 1988–1993, the numbers fluctuated widely. For the years that survey data are available—in 1988, there were 39,871 pairs (69 percent of the 1971 estimate); in 1990, there were 30,000 pairs (51 percent); in 1991, there were 17,400 pairs (30 percent); in 1992, there were 35,000 pairs (60 percent); and in 1993, there were 24,890 pairs (43 percent). Given the wide fluctuations in this period, with both increases and decreases in numbers, with the last year of data above the lowest figure recorded, it is not possible to conclude that an overall declining trend has continued after this period. The wide fluctuations in this period and the ability of numbers of breeding pairs to rebound by 100 percent between two breeding seasons suggest that observed numbers at breeding colonies during years of low numbers in 1991 and perhaps in 1993

are not representative of the actual abundance in these years. There have been no survey data at Amsterdam Island for the past 15 years, and given the wide fluctuations during the last period of surveys, we cannot reliably predict a future population trend. The most recent population estimate of 24,890 breeding pairs is above previously low numbers, and based on our five-factor analysis, we have not identified any threat to the species in this area, nor do we have reason to believe this will change in the future. Therefore, we find that the northern rockhopper penguin is not threatened or endangered in this portion of its range, and we consequently need not address the question of significance.

Final Determination for the Northern Rockhopper Penguin

On the basis of analysis of the five factors and the best available scientific and commercial information, we find that listing the northern rockhopper penguin as threatened or endangered under the Act in all or any significant portion of its range is not warranted.

Macaroni Penguin

Background

Biology

The macaroni penguin (*Eudyptes chrysolophus*) is a large, yellow-crested, black-and-white penguin that inhabits sub-Antarctic islands from the tip of South America eastwards to the Indian Ocean (BirdLife International 2007, p. 1). It breeds in 16 colonies at 50 sites in: Southern Chile, Falkland Islands, South Georgia and the South Sandwich Islands, South Orkney and South Shetland Islands, Bouvet Island, Prince Edward and Marion Islands, Crozet Islands, Kerguelen Islands, Heard and MacDonald Islands, and locally on the Antarctic Peninsula (Woehler 1993, pp. 52–56; BirdLife International 2007, pp. 2–3).

Breeding colonies range in size from a few breeding pairs to large colonies of up to 180,000 breeding pairs or more (Crawford *et al.* 2003, p. 478; Trathan *et al.* 2006, p. 242). For example, at South Georgia Island in the South Atlantic, there are approximately 17 main breeding aggregations, ranging in size from 1,000 breeding pairs at Sheathbill Bay to 2,560,000 breeding pairs at the Willis Islands (Trathan *et al.* 2006, p. 241; Trathan *et al.* 1998, p. 266). Within these larger locations are individual colonies. For example, at Bird Island, the Fairy Point colony has about 500–600 pairs, Goldcrest Point colony has 43,811 pairs, and Macaroni Cwm colony has about 10,000 breeding pairs (Trathan *et al.* 2006, p. 242). In 2000–01 at Marion Island in the southwestern Indian Ocean, about 53 colonies were distributed around the entire perimeter of the 12 × 7 mi (19 × 12 km) island. Colonies at Marion Island range in size from a few breeding pairs to two large colonies of 143,000 and 186,812 breeding pairs, respectively (Crawford *et al.* 2003, p. 478).

The basic life history of macaroni penguins at breeding sites has been well-described, and there is reported to be little variation in the breeding biology of the members of the genus Eudyptes as a whole (Crawford *et al.* 2003, pp. 477–482). At both South Georgia and Marion Islands, after spending the winter at sea from May to September, breeding birds arrive at the colony synchronously in mid-October. During pre-breeding, incubation, and chick-brooding, the adults fast for long periods ashore, alternating with long periods at sea. At Marion Island, incubation was 35 days; chicks gathered into crèches at 23–25 days and fledged at 60 days around the third week of February (Crawford *et al.* 2003, p. 482). After abandoning the chicks, the adults leave the colony to feed and then return to molt before leaving the colonies for the winter. Age at first breeding at Marion Island is 2–3 years (Crawford *et al.* 2003, p. 482).

Given its large numbers and its widespread distribution, the macaroni penguin is considered to be one of the most abundant bird consumers of Antarctic krill (*Euphausia superba*). In global terms, the species is considered to be one of the most important avian predators, possibly consuming more food than any other seabird species (Trathan *et al.* 2006, pp. 239–240 ; Brooke 2004, p. 248).

Feeding habits studies have identified a variety of prey species consumed by macaroni penguins. At Marion Island, they were found to feed on crustaceans, mainly a decapod shrimp (*Nauticaris marionis*), euphausids (krill) (*Euphaudia vallenti* and *Thyssanoessa vicina*), and amphipods (*Themisto gaudichaudii*) (Crawford *et al.* 2003, p. 484). At South Georgia Island, the primary mass of the diet of macaroni penguins was found to contain krill (*Euphausia superba* (Antarctic krill) and *Thysanoessa* sp.), decapod shrimp (*Chorismus antarcticus*), and amphipods (*Themisto gaudichaudii*), as well as a number of cephalopod and fish species (Croxall *et al.* 1999, p. 128).

Macaroni penguins leave their colonies to forage at sea during the breeding season. At South Georgia Island, they forage in waters bathed by the ACC, which transports krill to the region from the waters around the western Antarctic Peninsula and the Scotia Sea (Trathan *et al.* 2003, p. 569; Trathan *et al.* 2006, p. 240; Reid and Croxall 2001, p. 382; Fraser and Hoffman 2003, p. 13). During the winter the birds leave the colonies, reportedly foraging widely north of the Antarctic Convergence and have been reported from the waters of Australia, New Zealand, southern Brazil, Tristan da Cunha, and South Africa (Shirihai 2002, p. 77).

The range of adults foraging at sea during ''brood guard'' (a portion of the chick provisioning stage—the period when males stay ashore to guard the chicks) is very tightly constrained, with females making limited duration foraging trips lasting about 12 hours (Trathan *et al.* 2006, p. 240). At South Georgia Island, females, when leaving the individual colonies, swim in straight lines along colony-specific trajectories toward predictable prey aggregations at the edge of the continental shelf. If prey is encountered before they reach the shelf edge, they stop and feed until they either return to the colony or move farther offshore to find more prey (Trathan *et al.* 2006, p. 248). In moving in predictable directions offshore during all parts of the chick provisioning stage, penguins move towards waters influenced by the southern ACC front, an area where krill abundance has been shown to be generally higher (Trathan *et al.* 2006, p. 249; Trathan *et al.* 2003, pp. 577, 579). These studies illustrate the importance of the southern ACC front in transporting krill from the region of the Antarctic Peninsula to the waters of South Georgia Island (Trathan *et al.* 2006, p. 240; Reid and Croxall 2001, p. 380).

Population

In 1993, the worldwide population of macaroni penguins was estimated at 11.8 million pairs (Woehler 1993, p. 52). Current estimates place the total population at 9 million pairs (BirdLife International 2007, p. 2; Ellis *et al.* 2007, p. 5; Ellis *et al.* 1998, p. 60), although due to potential underestimates in the South Georgia Island region (see South Atlantic Ocean discussion below), this estimate is, therefore, also likely to be an underestimate of the overall population size.

South Atlantic Ocean

In 1980, there were approximately 5.4 million pairs
± 25 to 50 percent, (Woehler 1993, pp. 3, 55) of macaroni penguins at South Georgia Island, yielding a range of 2.7–8.1 million pairs. At that same location, the current estimates are 2.5–2.7 million

pairs (BirdLife International 2007, p. 3; DEFRA 2007, p. 2). The current estimate, however, is likely to be an underestimate as it is based on extrapolations of counts in smaller areas to predict numbers in larger areas—an estimation technique of questionable use in this species (for example, at the Prince Edward Islands in the Indian Ocean, extrapolations of declining trends at small study colonies to estimates of overall trends for the overall island were not supported by empirical data; declines at larger colonies were much less significant than those at small colonies (Crawford *et al.* 2003, p. 485)).

At South Georgia Island, the current overall number was extrapolated from bird counts at a selected number of colonies that had declined by 50 percent over the last 2 decades of the 20th century (BirdLife International 2007, p. 3; Trathan *et al.* 2006, pp. 249–250). The conclusion that the overall South Georgia numbers had halved during that same time period has not been empirically verified in the literature (Trathan *et al.* 1998, p. 265; Trathan and Croxall 2004, p. 125; Trathan *et al.* 2006, pp. 249–250; Trathan 2004, p. 342). Furthermore, given the large variability in the 1980s estimate (2.7–8.1 million pairs) combined with the likely underestimate of current numbers at South Georgia Island (2.5–2.7 million pairs), we cannot reliably determine that there has been any decline in overall population numbers at South Georgia Island, nor can we reliably predict a declining population trend in the future.

South of the large concentrations of macaroni penguins at South Georgia Island, there are small colonies scattered locally around South Shetland Islands (about 7,080 total pairs), South Orkney Islands (about 50 pairs), and South Sandwich Islands (about 3,000 pairs), and a pair reported on the Antarctic Peninsula (Woehler 1993, p. 54–55; BirdLife International 2007, p. 3).

In the southeast Atlantic Ocean at Bouvet Island (Norwegian Territory), there were some 100,000 breeding pairs in the 1960s and early 1970s, but these are reported to have ''subsequently decreased'' but there is no current estimate (BirdLife International 2007, p. 3; Woehler 1993, p. 52).

Macaroni penguins also breed in small colonies in approximately 8 island sites around the southern tip of South America in southern Chile with abundance totaling up to 75,000 pairs and are reported to be stable (Woehler 1993, p. 56; BirdLife International 2007, p. 4).

Indian Ocean

In the Prince Edward Islands (South African Territory), there are about 300,000 pairs reported at Marion Island and 9,000 pairs at Prince Edward Island (Crawford and Cooper 2003, p. 417; Crawford 2007, p. 9). At Marion Island, there was a decline from 434,000 pairs in 1994–95 to 356,000 pairs in 2002–03, but given the magnitude of the population numbers, this 18-percent decline over the 8-year time period is not considered to be a significant change in the population (Crawford *et al.* 2003, p. 485). In the three subsequent breeding years (2003–06) small fluctuations between 350,000 and 300,000 pairs were observed (Crawford 2007, p. 9).

On a local scale at Marion Island, significant declines in three small study colonies (each under 1,000 pairs) have been reported, although the extent of the declines is questionable. Monitoring of these colonies between 1979–80 and 2002–03 indicated a cumulative decrease in numbers by 88 percent (Crawford *et al.* 2003, p. 485); however, changes in survey methodology, as explained below, limit the comparability of the survey data, calling into question actual changes in population numbers. While Crawford *et al.* (2003, p. 485) and Crawford (2007, p. 9) reported that the total number of breeding pairs in these colonies (comprising 9 to 20 percent of the total breeding numbers at Marion Island) decreased by 60 percent from 1994–95 to 2002–03, after a long period of relative stability, a sudden drop in numbers appeared at the same time as an apparent shift in the investigators' survey or tallying methodology (Crawford *et al.* 2003, p. 478). Despite the declines reported, breeding success increased from 1995–96 to 2004–05 in study colonies (Crawford *et al.* 2003, p. 484).

At Prince Edward Island, which has a fraction of the macaroni penguins of its neighboring Marion Island, numbers declined from approximately 17,000 pairs in 1976–77 to an estimated 9,000 pairs in 2001–02 (Crawford *et al.* 2003, p. 483). According to the more current information provided here, the current IUCN figures overestimate the percentage decline of the macaroni penguin at the Prince Edward Islands (BirdLife International 2007, p. 3). Summing the figures provided above on overall population declines at Marion and Prince Edward Islands, we calculate the total decline for the two islands to be approximately 32 percent since 1979, instead of the 50 percent reported.

Moving eastward in the southern Indian Ocean, Woehler (1993, p. 52; BirdLife International 2007, p. 4) reported up to 2 million breeding pairs at the Crozet Island. Farther east at the Kerguelen Islands, there are reported to be about 1.8 million pairs of macaroni penguin, with a reported increase of 1 percent per year between 1962 and 1985, and 1998 data indicate colonies are stable or increasing (BirdLife International 2007, p. 4).

The Heard and McDonald Islands south of the Kerguelen Islands are reported to have about 1 million breeding pairs each (Birdlife International 2007, p. 3; Woehler 1993, p. 53). There are no reports of trends.

Other Status Classifications

The macaroni penguin is categorized as 'Vulnerable' by IUCN Criteria because ''overall a majority of the world population appears to have decreased by at least 30 percent over 36 years (three generations).'' However, it is noted that this ''classification relies heavily on extrapolation from small-scale data, and large-scale surveys are needed to confirm the categorization'' (BirdLife International 2007, p. 1).

Population Summary

Current estimates place the total population of macaroni penguins at 9 million pairs (BirdLife International 2007, p. 2; Ellis *et al.* 2007, p. 5; Ellis *et al.* 1998, p. 60). Although penguin numbers appear to have declined by about 32 percent in the Prince Edward Islands since the late 1970s, this area represents only 3.4 percent of the overall current macaroni penguin population. As described above, in other parts of the species' range, trends are increasing, stable, or unknown due to poor or scant data. Given the different population dynamics observed throughout the range of the macaroni penguin, as described above, we cannot reliably predict nor do we have reason to believe that the overall population numbers will decline in the future.

Summary of Factors Affecting the Species

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

Terrestrial Habitat

We have found no current reports of threats to the terrestrial breeding habitat of the macaroni penguin, and we have no reason to believe threats to the terrestrial habitat will emerge in the future.

Reduced Prey Availability

Changes in the availability of prey to the macaroni penguin have been hypothesized for declines observed in study colonies at Marion and South Georgia Islands. Below, we discuss both the potential impacts of low prey availability, as well as potential causes of reduced prey availability, including interspecific competition and climate-related changes in the marine environment. In Factor E, we discuss the potential impacts of fisheries on prey availability.

At Marion Island, moderate decreases in macaroni penguin numbers have been attributed to an altered availability of food (Crawford and Cooper 2003, p. 417) based on changes in weight of returning birds after a winter at sea and variations in mass of chicks at fledging (Crawford *et al.* 2006, pp. 185–186), but there is currently insufficient research evaluating the causes of declines at Marion Island to draw science-based conclusions.

At South Georgia Island, researchers have looked in depth at the foraging behavior and diet of macaroni penguins and other marine predators and related them to interspecific competition, prey switching, and changes in the overall food base. While krill is known as the primary prey of the macaroni penguins, at South Georgia Island study colonies, the percentage of krill in the diet at Bird Island declined significantly from 1980–2000, particularly after 1995 (Reid and Croxall 2001, p. 379). During this period, there was also a decline in the small Bird Island study colony (Reid and Croxall 2001, p. 379). The percentage of krill in the macaroni penguin diet was significantly correlated to the density of krill in the region and was also directly related to prey-switching by the penguins (Barlow *et al.* 2002, p. 211). In 1984, for example, krill was abundant and comprised 95 percent of the mass of prey in the diet of macaroni penguins studied at South Georgia Island (Croxall *et al.* 1999, p. 115). However, in years when krill abundance was reduced, as in 1994 when there was a four-fold decrease in krill biomass from 1984, the penguins studied shifted their diet to other prey species, including amphipods (63.2 percent of the mass in the diet) and fish species (15 percent, in particular, myctophids (*Krefftichthys anderssonii*) and channichthids (*Pseudochaenichthys georgianus*)), while krill comprised only 13.1 percent of the diet (Croxall *et al.* 1999, p. 117). This prey-switching behavior suggests that the macaroni penguin has some adaptability in adjusting to temporary fluctuations in their preferred prey (krill).

Reduction of Prey Due to Competition

Barlow *et al.* (2002, pp. 205–213) examined whether the decreased availability of krill for macaroni penguins at South Georgia Island is a result of competition with the other major krill predator in the region, the Antarctic fur seal. Study colonies of macaroni penguins have declined at South Georgia Island over the past 2 decades (see Population discussion above), while fur seal numbers have increased at a very rapid rate since the 1950s. The fur seal has recovered from near extinction in the first half of the 20th century (to 400,000 in 1972 and to more than 3 million individuals breeding at South Georgia Island at the present day), and they have expanded their breeding range across the northwest end of South Georgia Island (Barlow *et al.* 2002, p. 206). These researchers found at the Bird Island study site that there was substantial overlap in the foraging range of macaroni penguins and Antarctic fur seals during the breeding season, and that the size and nature of krill prey consumed were very similar. They were unable to determine if the different population trajectories of the two species during the same period reflected ''different and independent species-specific responses to variation in krill availability, or whether (or to what extent) they have been substantially influenced by direct interspecific competition'' (Barlow *et al.* 2002, p. 211). Therefore, although the researchers suggest there is a dynamic interaction that currently favors Antarctic fur seals over macaroni penguins in the study area, this suggestion is speculation because the empirical data have not distinguished whether the penguins and fur seals each have different and independent responses to the variation in krill availability or, alternatively, whether the two species have been influenced by being in direct competition with each other (*i.e.*, the research has not confirmed that competition is occurring). Furthermore, given that the level of interspecific competition is uncertain, the authors' prediction that competition will likely increase as fur seals continue to increase (Barlow *et al.* 2002, p. 212) is also speculation.

With respect to changes in the krill abundance at South Georgia Island, Reid and Croxall (2001, pp. 377–384) examined population demographics of the krill prey in the diets of four marine predators breeding at Bird Island—Antarctic fur seals, macaroni penguins, gentoo penguins (*Pygoscelis papua*), and black-browed albatrosses (*Thalassarche melanphrys*). For data averaged over the decade of the 1980s, the two penguin species and the Antarctic fur seals were consistently consuming the majority of their krill diet from the largest of three size classes identified. For the decade of the 1990s, there was a change in all three species toward consuming krill in the middle size class (Reid and Croxall 2001, p. 380). At the same time, negative changes in the reproductive performance of all four species were recorded. For macaroni penguins in the colonies studied, arrival condition and reproductive output declined significantly in the second decade after stability in penguin numbers in those colonies in the 1980s. These results suggest that in the 1980s the biomass of krill in the largest size class was sufficient to support predator demand, but it was not in the 1990s (Reid and Croxall 2001, p. 378).

Indices of reproductive output for macaroni penguins in study colonies declined over the period from 1980–2000 (Reid and Croxall 2001, pp. 379–380). While it is difficult to separate the relative contribution to this decline from interspecific competition versus reduction of krill due to other reasons, macaroni penguins were found to be unique among the four predator species studied because they were able to compensate for low availability of krill by switching to other prey (Reid and Croxall 2001, pp. 379, 381; Croxall *et al.* 1999, p. 117).

Reid and Croxall (2001, p. 383) concluded that the balance between krill supply and predator demand altered substantially from 1980–2000. They suggested that a combination of two factors: (1) Changes in the krill population structure arriving from the Antarctic Peninsula source region, and (2) increased predator-induced mortality on the larger size classes of krill arriving in the region effectively removed the buffer of krill abundance and increased ''the frequency of years where the amount of krill is insufficient to support predator demand'' (Reid and Croxall 2001, p. 383). They suggested that this buffer or ''krill surplus'' noted in the 1980s may have dated from the time when whaling severely reduced the numbers of great whales in the Southern Ocean. This unusually high temporary biomass of krill might have supported a higher biomass of predators, potentially resulting in artificially high population numbers of certain predator species, such as macaroni penguins. We acknowledge that the change in ecosystem dynamics could lead to a

new predator-prey equilibrium, whereby, some species temporarily decline in numbers. This possibility precludes our ability to reliable extrapolate population trends into the future, as long as population numbers are relatively high, as they are in the macaroni penguin.

Reduction of Prey Due to Climate-Related Changes in the Marine Environment

Changes in climate could potentially impact aspects of the marine environment such as sea surface temperatures or shifts in currents, ultimately leading to changes in prey availability. Reid and Croxall (2001, p. 377) hypothesized that changes in the Antarctic Peninsula region could affect the recruitment of the Antarctic krill populations that supply the South Georgia Island marine ecosystem. Reid *et al.* (2002, p. 1) showed that the size structure of the local South Georgia Island krill population tracked closely with krill-recruitment events in the Elephant Island region at the northeastern tip of the Western Antarctic Peninsula (WAP). Events at Elephant Island, in turn, have been found to be coherent with events at the Peninsula itself (Fraser and Hoffman 2003, p. 9).

Trathan *et al.* (2003, p. 581) concluded that physical data at the spatial and temporal resolution necessary to identify possible relationships between large-scale variability within the ACC and the krill biomass at South Georgia Island are not available. They did note, on a preliminary basis, that periods of high krill abundance (*i.e.*, January 1992 and January 1998) were linked to unusually low sea surface temperatures in the southern ACC front near South Georgia Island and that periods of krill scarcity were linked to sea surface temperatures in the upper 20 percent of recorded values (*i.e.*, January 1991 and January 1994) (Trathan *et al.* 2003, p. 581). In describing warm and cold anomalies in the temperature of the southern ACC front, these authors did not address the question of whether there are consistent directional changes occurring in the temperature of this current (Trathan *et al.* 2003, pp. 569–582).

Fraser and Hoffman (2003, pp. 1–15) reviewed the krill cycle and the recruitment of krill and related them to cyclical patterns of sea-ice extent at the WAP. In studies similar to those at South Georgia Island, the authors examined data on krill size classes in the diet of a different species, the Adelie penguin (*Pygoscelis adeliae*) near Palmer Station on the WAP, and compared these data against cyclical variability in sea-ice extent between 1973 and 1996. Analyses have shown that WAP sea-ice extent exhibits 4- to 5-year cycles of high ice years followed by several low-ice years. The cycles follow the periodicity of the Antarctic Circumpolar Wave (a phenomenon of interannual anomalies in the atmospheric pressure, wind stress, sea surface temperature, and sea-ice extent over the Southern Ocean that propagates eastward with a period of over 4–5 years and takes 8–10 years to circle the globe) (White and Peterson 1996, p. 699; Fraser and Hoffman 2003, p. 8). At the WAP, Fraser and Hoffman (2003, p. 6) identified the beginning of five cycles between the 1973–74 and 1996–97 field seasons, and tracked four complete cycles (two 4-year, one 5-year, and one 6-year). They looked at trends in krill size classes within the diet of Adelie penguins and found that years of high krill recruitment followed years of maximum September (winter) sea-ice extent (Fraser and Hoffman 2003, p. 6). In the years following high krill-recruitment years, the Adelie penguin diet reflected the consumption of larger and larger krill each year as the dominant large cohort grew, through a 4-to 5-year period, until the next large krill-recruitment year occurred.

The strong age classes produced in a good ice year become the core spawning stock for the next cyclical sea-ice maximum, generally 4 or 5 years away, with smaller cohorts in the intervening years. Krill reach the limit of their life span after 5 years, and this age class is reduced from several years of predation and mortality. We have discussed above the work of Fraser and Hoffman (2003, pp. 1–15), who reviewed the krill cycle and the recruitment of krill and related them to cyclical patterns of sea-ice extent at the WAP. Of significance to the observed trends at South Georgia Island, a 6-year ice cycle occurred between 1980 and 1986 (a gap unique in the contemporary WAP sea-ice record), which had significant consequences for krill recruitment (Fraser and Hoffman 2003, p. 12). This ''senescence event'' in which the large krill cohort originating from the 1980 sea-ice maxima may have died before they could reproduce and contribute to the next generation of recruits may have led to a loss of most of the strong 1980–81 cohort and its reproductive potential (Fraser and Hoffman 2003, p. 12). The authors suggested this may have had major ecological consequences. Correspondingly, krill abundance was at its lowest recorded levels at Elephant Island in 1990, at the time the lost cohort would have been expected to spawn again and, at South Georgia Island, krill predators, including macaroni penguins at study colonies, began to decline significantly after being stable throughout the 1980s (Fraser and Hoffman 2003, p. 13). The authors noted that two or more closely spaced senescence events of this sort would have devastating consequences on the structure and function of krill populations and the ecosystems they support (Fraser and Hoffman 2003, p. 13).

The study of Trathan *et al.* (2003, p. 581) described 2 years of ''particularly high'' krill abundance and 2 years of ''particularly low'' krill abundance during the 1990s. The study raises questions as to the ability to generalize comparisons between the 1980s and 1990s to the current period (2001 to the present), for which we currently have little or no empirical data either for krill or macaroni penguin abundance or reproductive output. The decadal analyses of krill abundance and macaroni penguin reproductive output at study colonies at South Georgia Island through the year 2000 (Reid and Croxall 2001, p. 377), and of krill response off the WAP to climate change, physical forcing (*e.g.*, shifts in current or temperature patterns), and ecosystem response, suggest that the krill populations and the ecosystems they inhabit have become more vulnerable to climate-induced perturbations (Fraser and Hoffman 2003, p. 13) and that overall krill abundance has declined significantly in the last few decades (Atkinson *et al.* 2004, p. 101; Loeb *et al.* 1997, p. 897).

Conclusion for South Georgia Island

Significant changes in krill abundance and composition have been documented in study colonies of macaroni penguins on South Georgia Island during a period of decline (up to 50 percent) of macaroni penguins in those colonies over the last 2 decades of the 20th century. Although these declines have been associated with a variety of factors, including: (1) Variations in the temperature of the ACC at South Georgia Island (Trathan *et al.* 2003, p. 581) and cycles of sea-ice extent at the WAP, which have affected krill recruitment (Fraser and Hoffman 2003, p. 13), and (2) increases in numbers of Antarctic fur seals, which share the same food, suggesting competition, not enough information is known about these relationships to predict the availability of krill to macaroni penguins in the future.

Despite concurrent declines in macaroni penguin numbers and

increases in fur seal numbers in certain areas of the South Georgia region, studies have not confirmed that competition between the two species is occurring. Therefore, we cannot make reliable predictions about whether competition will occur in the foreseeable future, much less to what extent it would affect the availability of krill to the macaroni penguin.

Although it is possible that climate change will result in changes within the ACC and krill biomass and/or the frequency or severity of krill ''senescence events,'' potentially affecting the macaroni penguin population in the South Georgia Island region, we do not have sufficient physical data at the spatial and temporal resolution necessary to identify or predict possible trends or relationships between large-scale variability within the ACC, sea ice changes, and potential changes in the krill biomass.

Aside from our inability to identify future trends related to krill availability to the macaroni penguin at South Georgia Island, neither do we have enough information on the adaptability of the macaroni penguin to changing krill availability. For example we do not know the extent of flexibility it has in: (1) Relying on a greater diversity of prey species to satisfy its long-term biological needs; (2) altering its foraging routes; or (3) moving its breeding locations closer to more dependable food supplies.

Despite our inability to predict future trends with regard to changes in prey availability to the macaroni penguin or its ability to adapt to those potential changes, we do not believe that the changes in food availability currently acting on the macaroni penguin population at South Georgia Island are causing a long-term decline in this population. Although numbers may have declined locally, these declines could have been offset, at least to some extent, by increases elsewhere within the South Georgia Island region, and the population continues to survive there in large numbers.

Macaroni penguins at South Georgia Island appear to have some ability to switch to different prey at times of low krill abundance. Given its flexibility in switching to alternative prey species and the estimated abundance of the macaroni penguin population at South Georgia Island (2.5–2.7 million pairs, and likely greater due to potential underestimates), we believe that this population can withstand disturbances linked to the marine changes identified. Given the lack of comprehensive survey data throughout the South Georgia Islands, we cannot reliably predict, nor do we have reason to believe, that the overall population numbers will decline in the future as a result of the marine changes identified. Therefore, we find that the present or threatened destruction, modification, or curtailment of the species' marine habitat or range is not a threat to the macaroni penguin in the South Georgia Island portion of its range now or in the foreseeable future.

Conclusion for the Remainder of the Macaroni Penguin's Range

At Marion Island, moderate decreases in macaroni penguin numbers have been attributed to an altered availability of food (Crawford and Cooper 2003, p. 417), but there is currently insufficient research evaluating the causes of declines at Marion Island to draw any conclusions about the causes, much less make predictions about future trends of prey availability in that area. There is no information available suggesting that a reduction in prey availability is a threat to the macaroni penguin in any other portion of the species' range.

Although penguin numbers appear to have declined by about 32 percent in the Prince Edward Islands since the late 1970s, this area represents only 3.4 percent of the overall current macaroni penguin population. As described above (see Population discussion), in other parts of the species' range, trends are increasing, stable, or unknown due to poor or scant data. Given the different population dynamics observed throughout the remainder of the range of the macaroni penguin, we cannot reliably predict nor do we have reason to believe that the overall population numbers will decline in the future as a result of marine changes. Therefore, we find that the present or threatened destruction, modification, or curtailment of the species' marine habitat or range is not a threat to the macaroni penguin in any other portion of its range now or in the foreseeable future.

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We are not aware of any overutilization for commercial, recreational, scientific, or educational purposes that is a threat to the macaroni penguin in any portion of its range (BirdLife International 2007, pp. 1–3; Ellis *et al.* 1998, p. 61) now or in the foreseeable future.

Factor C: Disease or Predation

No blood-borne parasites (*haematozoa*) were found in any of 89 blood smears from macaroni penguins collected at Marion Island in 2001 (Crawford and Cooper 2003, p. 418). Although parasites and disease have not been identified as stressors at this island or other areas of the Prince Edward Islands, the potential susceptibility of sub-Antarctic penguins to haematozoan vectors has been recognized, and so strict measures have been put in place at the Prince Edward Islands to minimize the possibility of introducing avian diseases. Therefore, we do not have reason to believe that disease will become a threat at the Prince Edward Islands in the foreseeable future. Disease has not been identified as a threat to macaroni penguins in any other areas of the species' range, nor do we have reason to believe disease will become a threat in any portion of the species' range within the foreseeable future. Therefore, we find that disease is not a threat to the macaroni penguin in any portion of its range now or in the foreseeable future.

Predation has not been cited as a threat in macaroni penguins. Although predation by feral cats has been reported on Kerguelen Archipelago, remains of macaroni penguins were rarely found in scat analyses from feral cats there (Pontier *et al.* 2002, p. 835), and the rare exceptions could have been a result of scavenging on carcasses as opposed to predation. There have been no reported local or large-scale declines in macaroni penguin numbers at the Kerguelen Islands, and in fact, there were reported increases in numbers there at a rate of 1 percent per year between 1962 and 1985. The 1998 data indicate colonies are stable or increasing (BirdLife International 2007, p. 4). This suggests that predation is not affecting the macaroni penguin numbers there. There is no information available that suggests the number of predators at the Kerguelen Islands will increase in the foreseeable future or that the current potential predators will begin to affect penguins in the foreseeable future. Therefore, we do not consider predation to be a stressor, much less a threat to macaroni penguins on the Kerguelen Archipelago. There is no information available that suggests predation is a threat to macaroni penguins in any other portion of its range, now, nor do we expect it to become a threat in the foreseeable future.

Based on review of the best available scientific and commercial information, we find that predation is not a threat to the macaroni penguin in any portion of its range now or in the foreseeable future.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

The macaroni penguin is widely distributed on largely uninhabited islands in the territories of seven countries and the region under the jurisdiction of the Antarctic Treaty and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). Breeding islands are largely inaccessible, access is tightly controlled, and most of them are under protected status (BirdLife International 2007, p. 4; Ellis *et al.* 1998, p. 61). South Georgia Island is administered by the Government of South Georgia and South Sandwich Islands (GSGSSI). Research on macaroni penguins in South Georgia, for example at Bird Island, which is a Specially Protected Area under the South Georgia Environmental Management Plan, is conducted by the British Antarctic Survey under annual permits from the GSGSSI. Visitation to South Georgia is tightly controlled with visitors' permits required prior to visiting research sites (British Antarctic Survey 2008, p. 2). The Australian islands of Heard and McDonald are also World Heritage sites with limited or no visitation and with management plans in place (UNEP WCMC 2008, p. 6). In 1995, the Prince Edward Islands Special Nature Preserve was declared and accompanied by the adoption of a formal management plan (Crawford and Cooper 2003, p. 420). In our analysis of other factors, we determined that existing national regulatory mechanisms are adequate regarding the conservation of macaroni penguins throughout all or any portion of the species' range. (For example in our discussion of Factor E, we consider the adequacy of CCAMLR in the conservation and management of krill fisheries.) Furthermore, there is no information available to suggest this will change within the foreseeable future.

Factor E: Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Competition With Commercial Krill Fisheries

Another possible factor affecting krill abundance is commercial krill fisheries. Krill fisheries have operated in the region of South Georgia Island since the early 1980s and are managed by CCAMLR (Reid and Croxall 2001, p. 383). Harvesting occurs in the winter around South Georgia Island and moves south as the ice retreats in spring and summer. Krill fisheries have harvested only a fraction of the approved CCAMLR catch limits since 1993 (Croxall and Nichol 2004, p. 574). In their analysis of predator response to changes in krill abundance, Reid and Croxall (2001, p. 383) note that the fishery near South Georgia Island is small and that total catches actually declined by almost 50 percent since 1980 for commercial reasons, rather than due to lack of krill abundance. They do not cite competition with krill fisheries as a contributor to macaroni penguin declines (Reid and Croxall 2001, p. 383); however, given that we have already identified the reduced availability of krill as a stressor to the macaroni penguin (see Factor A), we recognize that commercial krill fisheries have the potential to contribute as one of several sources of this stressor. With respect to the local macaroni penguin declines observed, Reid and Croxall (2001, p. 383) note that the potential for competition with krill fisheries should be taken into account in future CCAMLR krill management strategies.

Croxall and Nicol (2004, pp. 570–574) reported on the ongoing efforts within CCAMLR to improve management procedures for the krill fishery in long-established fisheries areas and sub-areas in the Southern Ocean. These included improving the overall estimation of krill to redefine catch limits over large sectors of the Southern Ocean (Croxall and Nicol 2004, p. 573). Also, out of concern that krill management was being undertaken at a scale too large to prevent localized depletion of the krill resource if the fishery was concentrated in small proportions of a particular established area or sub-area, CCAMLR adopted approaches to better manage the area encompassing the Antarctic Peninsula, Scotia Sea, and South Georgia.

First, on the basis of the work of their scientific committee, the CCAMLR Commission in 2002 formally adopted smaller and more ecologically realistic management areas, referred to as Small-Scale Management Units (SSMUs) to manage krill fishing at scales most relevant to the natural environment—prey-predator interactions (Hewitt *et al.* 2004, p. 84). This includes three SSMUs established in the South Georgia region. At the same time, CCAMLR adopted precautionary catch limits, well below the catch limits identified in global scale analyses, to limit harvest in the fisheries areas while specific protocols for dividing harvest among the SSMUs are being developed (Hewitt *et al.* 2004, p. 84).

The process of establishing science-based approaches by which to allocate harvest to the SSMUs was agreed by the CCAMLR commission and is well underway. Allocation options have been developed (Hewitt *et al.* 2004, pp. 81–97); these are being evaluated in a series of meetings that have taken place over the last 3 years; and by spring 2008, a model will be developed to allocate catch limits (Trivelpiece 2008, pers. comm.). This model will allow testing of different approaches to allocating catch and lead to recommendations to the Scientific Committee and the CCAMLR Commission (Hewitt *et al.* 2004, p. 84). This work to establish decision rules includes assessing: (1) Spatial and temporal use of the area by krill predators and fisheries; (2) fluxes of krill into and out of the area; (3) competition between species; and (4) how to manage these areas to respond to ecosystem change (Croxall and Nicol 2004, p. 573). In support of development of allocation approaches at the level of SSMUs, CCAMLR has already adopted a requirement that krill catches be reported to very small geographical detail (10 x 10 nm) and over small 10-day time scales (Hewitt *et al.* 2004, p. 84). Parallel efforts by the CCAMLR Ecosystem Monitoring Program involve monitoring selected predator, prey, and environmental indicators of ecosystem status to detect and record changes in critical components of the ecosystem and distinguish the impacts of harvesting from other environmental variability (Croxall and Nichol 2004, pp. 573–574).

Conclusion for South Georgia Island

Based on: (1) The small size of krill fisheries in the region of South Georgia Island, and (2) the ongoing efforts under CCAMLR to sustainably manage krill species, efforts specifically designed to investigate and respond to the phenomena described for the South Georgia Island region (*e.g.*, the setting of precautionary catch limits designed to limit local impacts and the development and implementation of SSMUs), we find that competition with krill fisheries is not a threat to the macaroni penguin at South Georgia Island. Furthermore, we have no reason to believe that the krill fisheries will expand in this region in the foreseeable future or that the current management and regulatory mechanisms will be weakened or become less effective in the foreseeable future.

Conclusion for the Remainder of the Macaroni Penguin's Range

Given the ongoing efforts within CCAMLR to improve management procedures for the krill fishery in long-established fisheries areas and sub-areas in the Southern Ocean (Croxall and Nicol 2004, pp. 570–574), including: (1) Efforts already completed to provide better management of overall harvest

limits and the adoption of precautionary catch limits for smaller management areas, and (2) the substantial progress being made in bringing krill harvest management down to the scale of SSMUs, we find that regulatory mechanisms for the management of krill fisheries are adequate. We have no reason to believe that the current regulatory mechanisms will be weakened or become less effective in the future. As discussed above, management efforts even improved over the last several years. Therefore, we find that competition with krill fisheries is not a threat to the macaroni penguin in any other portion of its range now or in the foreseeable future.

Oil Spills

The possibility of oil pollution is cited in reviews of the conservation status of macaroni penguins (BirdLife International 2007, p. 3; Ellis *et al.* 1998, p. 61). At Marion Island, oil spills have had severe effects on penguins at landing beaches, but a new Prince Edward Islands Management Plan, prepared by the Republic of South Africa, now requires that utmost care be taken to avoid fuel spills during transfers at the islands (Crawford and Cooper 2003, p. 418).

Oil and chemical spills can have direct effects on the macaroni penguin in New Zealand waters, and based on previous incidents around New Zealand, we consider this a stressor to this species. For example, in March 2000, the fishing Vessel *Seafresh 1* sank in Hanson Bay on the east coast of Chatham Island and released 66 tons (60 tonnes (t)) of diesel fuel. Rapid containment of the oil at this very remote location prevented any wildlife casualties (New Zealand Wildlife Health Center 2007, p. 2). The same source reports that in 1998 the fishing vessel D*on Wong 529* ran aground at Breaksea Islets, off Stewart Island, outside the range of the erect-crested penguin. Approximately 331 tons (300 t) of marine diesel was spilled along with smaller amounts of lubricating and waste oils. With favorable weather conditions and establishment of triage response, no wildlife casualties of the pollution event were discovered (Taylor 2000, p. 94). We are not aware of reports of other oil spill incidents within the range of the macaroni penguin.

We recognize that an oil spill near a breeding colony could have local effects on macaroni penguin colonies. However, on the basis of the species' widespread distribution around the remote islands of the South Atlantic and southern Indian Oceans and its robust population numbers, we believe the species can withstand the potential impacts from oil spills. Also, given the remoteness of South Georgia Island, its relatively high population numbers, and the measures in place to control cruise vessel activities in the region, we believe the population on South Georgia Island can withstand the potential impacts from oil spills. Furthermore, we have no reason to believe that the frequency or severity of oil spills in any portion of the species' range will increase in the future or that containment capabilities will be weakened. Therefore, we conclude that oil pollution from oil spills is not a threat to the species in any portion of its range now or in the foreseeable future.

Foreseeable Future

In considering the foreseeable future as it relates to the status of the macaroni penguin, we considered the stressors acting on the macaroni penguin. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species.

With respect to the macaroni penguin, the available data do not support a conclusion that there is a current overall trend in population numbers, and the overall population numbers are high. As discussed above in the five-factor analysis, we were also unable to identify any significant trends with respect to the stressors we identified. There is no evidence that any of the stressors are growing in magnitude. Thus, the foreseeable future includes consideration of the ongoing effects of current stressors at comparable levels.

There remains the question of whether we can reliably predict future events (as opposed to ongoing trends) that will likely cause the species to become endangered. As we discuss in the finding below, we can reliably predict that periodic declines in prey availability and oil spills will continue to cause local declines in macaroni penguin colonies, but we have no reason to believe they will have population-level impacts. Thus, the foreseeable future includes consideration of the effects of such crashes on the viability of the macaroni penguin.

Macaroni Penguin Finding Throughout Its Range

We identified a number of stressors to this species: (1) Reduced prey (krill) availability due to (a) competition with Antarctic fur seals, (b) changes in the marine environment, or (c) competition with commercial krill fisheries; and (2) oil spills. To determine whether these stressors individually or collectively rise to a ''threat'' level such that the macaroni penguin is in danger of extinction throughout its range, or likely to become so within the foreseeable future, we first considered whether the stressors to the species were causing a long-term, population-scale decline in penguin numbers, or were likely to do so in the future.

As discussed above, the overall macaroni penguin population is estimated at 9 million pairs (BirdLife International 2007, p. 2; Ellis *et al.* 2007, p. 5; Ellis *et al.* 1998, p. 60) and is likely to be greater due to likely underestimates at South Georgia Island. Although penguin numbers appear to have declined by about 32 percent in the Prince Edward Islands since the late 1970s, this area represents only 3.4 percent of the overall current macaroni penguin population. In other parts of the species' range, trends are increasing, stable, or unknown due to poor or scant data. Based on the best available data, we conclude that the population is stable overall. In other words, the combined effects of reduced prey availability, competition with Antarctic fur seals, changes in the marine environment, competition with commercial krill fisheries, and the impacts from oil spills at the current levels are not causing a long-term decline in the macaroni penguin population. Because there appears to be no ongoing long-term decline, the species is neither endangered nor threatened due to factors causing ongoing population declines, and the overall population of 9 million pairs or more appears robust.

We also considered whether any of the stressors began recently enough that their effects are not yet manifested in a long-term decline, but are likely to have that effect in the future. There is little data on macaroni penguin prey availability prior to the last 3 decades, and even less information on causes of prey decline. In any case, the periodic declines in prey availability over the last 30 years have had sufficient time to be reflected in population trends, and there appears to be no overall trend, regardless of localized changes in abundance. In addition, no oil spill events have occurred recently enough

that the population effects would not yet be observed. Therefore, the macaroni penguin is not threatened or endangered due to threats that began recently enough that their effects are not yet manifested in a long-term decline.

Next, we considered whether any of the stressors were likely to increase within the foreseeable future, such that the species is likely to become an endangered species in the foreseeable future. As discussed above, we concluded that none of the stressors were likely to increase significantly.

Having determined that a current or future declining trend does not justify listing the macaroni penguin, we next considered whether the species met the definition of an endangered species or threatened species on account of its present or likely future absolute numbers. The total population of approximately 9 million pairs or more appears robust. It is not so low that, despite our conclusion that there is no ongoing decline, the species is at such risk from stochastic events that it is currently in danger of extinction.

Finally, we considered whether, even if the size of the current population makes the species viable, it is likely to become endangered in the foreseeable future because stochastic events might reduce its current numbers to the point where its viability would be in question. Because of the wide distribution of this species, combined with its high population numbers (approximately 9 million pairs), even if a stochastic event were to occur within the foreseeable future, negatively affecting this species, the population would still be unlikely to be reduced to such a low level that it would then be in danger of extinction.

Despite local declines in numbers of macaroni penguins in some colonies, the species has thus far maintained what appears to be high population levels, while being subject to most if not all of the current stressors. The best available information suggests that the overall macaroni penguin population is stable, despite localized changes in population numbers. Therefore, we conclude that the macaroni penguin is neither an endangered species nor likely to become an endangered species in the foreseeable future throughout all of its range.

Distinct Population Segment

A discussion of distinct population segments and the Service policy can be found above in the Distinct Population Segment section of the southern rockhopper penguin finding.

Macaroni penguins are widely dispersed throughout the sub-Antarctic in colonies located on isolated island groups. Among these groups, we have identified two possible segments to evaluate for DPS status: (1) The Prince Edward Islands, administered by South Africa, and (2) South Georgia Island, administered by the United Kingdom. For both of these areas, there may be differences in conservation status from other areas of the range of the macaroni penguin. Based on the data available, these are the only two areas where decreases in penguin numbers within colonies have been documented. Throughout the remainder of the macaroni penguin's range, population trends are for the most part unknown but in limited cases reported as stable or increasing (see Population discussion).

Discreteness Analysis

A discussion of discreteness can be found above in the southern rockhopper penguin Discreteness Analysis section.

Prince Edward Islands: Considering the question of discreteness, this island group is unique in the range of the macaroni penguin in being administered by the Republic of South Africa. Numbers are reported to have declined by approximately 18 percent at Marion Island between 1983–84 and 2002–03 and 47 percent at nearby Prince Edward Island in the same period for an overall 32-percent decline from about 451,000 to about 309,000 breeding pairs at the Prince Edward Islands. Based on its delimitation by international boundaries and its potentially different conservation status from other areas of abundance of the macaroni penguin, we conclude that this segment of the population of the macaroni penguin passes the discreteness conditions for determination of a DPS.

South Georgia Island: At this island, which is administered by the United Kingdom, macaroni penguin numbers at study colonies are reported to have declined by 50 percent in the last two decades of the 20th century. Based on its delimitation by international boundaries and its potentially different conservation status from other areas of abundance of the macaroni penguin, we conclude that this segment of the population of the macaroni penguin passes the discreteness conditions for determination of a DPS.

Significance Analysis

A discussion of significance can be found above in the southern rockhopper penguin Significance Analysis section.

Prince Edward Islands: The current abundance of about 309,000 breeding pairs of macaroni penguins at the Prince Edwards Islands represents 3 percent of the overall estimated population of macaroni penguins worldwide and 6 percent of the estimated numbers in the Indian Ocean. This does not provide a significant contribution globally to the abundance of the taxon. The Prince Edward Islands are the westernmost of one of four island groups that lie just north of the Antarctic Convergence Zone and comprise the Indian Ocean breeding habitat of the macaroni penguin. The Prince Edward Islands and the Crozet Islands sit 641 mi (1,066 km) apart in similar ecological settings, rising at about 46° S at the western and eastern ends, respectively, of the shallow Crozet Plateau. Both islands are adjacent to both the shallow waters of the plateau and the deeper water areas to the south of this region. Even though it is the westernmost breeding location in the Indian Ocean, loss of the Prince Edward Islands colonies would not create a significant gap in the range of the taxon. The Indian Ocean colonies are already very isolated (1,581 mi (2,545 km)) from the closest colonies to the west in the South Atlantic Ocean at Bouvet Island. The distance between Bouvet Island and the Prince Edward Islands is 1,581 mi (2,545 km) and the distance between Bouvet Island and Crozet Island is 2,135 mi (3,426 km). Loss of the Prince Edward Island population would increase the distance between Indian Ocean breeding areas and Bouvet Island by only 25 percent, or 554 mi (886 km). We do not have data to evaluate whether interchange occurs between these South Atlantic Ocean and Indian Ocean breeding colonies, so we do not know if the 25-percent increase in the distance between these breeding areas is significant. We also have no evidence that the Prince Edward Island populations differ markedly from others in genetic characteristics. On the basis of this information, we conclude that the Prince Edward Island birds do not comprise a significant numerical contribution to the overall population of macaroni penguins, they do not occupy an unusual or unique ecological setting for the taxon, and their loss would not result in a significant gap in the range of the taxon. This population is not the only surviving natural occurrence of this species, and it is not known to differ genetically from other populations of the species. On this basis, the Prince Edward Islands populations of the macaroni penguin are not significant to the taxon as a whole and therefore do not constitute a DPS.

South Georgia Island: The current abundance of macaroni penguins at South Georgia Island represents 28 percent of the global estimated population and is the largest known concentration of breeding colonies of

this species. For the South Atlantic region, the South Georgia Island population segment represents the core of a range that includes areas of abundance at the tip of South America and scattered small colonies in the islands at the tip of the Antarctic Peninsula. We conclude that loss of the colonies at South Georgia Island would create a significant gap in the range of the taxon and remove macaroni penguins from the unique ecological setting of South Georgia Island, which lies at the downstream end of the flow of nutrients and krill carried by the ACC from the vicinity of the Western Antarctic Peninsula. Therefore, we conclude that the South Georgia Island population of the macaroni penguin is significant to the taxon as a whole and qualifies as a distinct population segment.

South Georgia Island DPS Finding

We identified a number of stressors to the South Georgia Island DPS of the macaroni penguin: (1) Reduced prey (krill) availability due to (a) competition with Antarctic fur seals, (b) changes in the marine environment, or (c) competition with commercial krill fisheries; and (2) oil spills. To determine whether these stressors individually or collectively rise to a ''threat'' level such that the macaroni penguin is in danger of extinction in the South Georgia Island DPS, or likely to become so within the foreseeable future, we first considered whether the stressors were causing a long-term, population-scale decline in the DPS, or were likely to do so within the foreseeable future.

The macaroni penguin DPS at South Georgia Island is estimated to include 2.5–2.7 million breeding pairs; however, as previously discussed (see Population discussion) the current estimate is likely to be an underestimate as it is based on extrapolations of counts in smaller areas to predict numbers in larger areas—an estimation technique of questionable use in this species. Although study colonies within the South Georgia Island DPS have decreased steeply in numbers (by 50 percent) over the period from 1980–2000, we do not know the status of the remainder of the colonies throughout the DPS, and therefore, do not know the overall population trend for the South Georgia Island DPS. In a similar situation at the Prince Edward Islands, the use of figures from censuses of small study colonies would have led to a 100-percent overestimate of declines (*i.e.*, an inferred 50-percent decline, would actually be a 25-percent decline) (Crawford *et al.* 2003, p. 485). We also do not have information on whether the reported declines have continued over the last decade.

In our five-factor analysis for the macaroni penguin, we found that at South Georgia Island, reduced krill availability has been identified as a stressor associated with local declines of up to 50 percent at small study colonies over the last 2 decades of the 20th century. In our assessment of this stressor, we were unable to reliably identify the source of reduced krill availability to macaroni penguins in the South Georgia Island DPS. We do not have sufficient information as to the continued abundance of krill populations reaching the waters of South Georgia Island, nor predictive capability related to the future abundance of krill and other prey of the South Georgia DPS, to conclude that prey shortages will lead to future declines. Under CCAMLR, measures are being taken to monitor krill abundance and manage krill fisheries, which are small in scale, at ecosystem scales relevant to safeguarding prey for predator species at South Georgia, including the macaroni penguin. At the same time, studies have shown that macaroni penguins at South Georgia Island have some ability to compensate for declines in krill by switching to alternative prey. This may provide a means to mitigate, at least to some degree, against reproductive failure in times of reduced krill abundance.

With respect to other factors, we are not aware of any overutilization for commercial, recreational, scientific, or educational purposes that is a threat to the South Georgia DPS, and, based on review of the best available scientific and commercial information, we find that neither disease nor predation is a threat to the DPS. We find that regulatory mechanisms are adequate at South Georgia Island now or in the foreseeable future. With respect to other natural or manmade factors, we find that oil spills are not a threat to the DPS now or in the foreseeable future.

In evaluating the impact of these factors, we have also considered the size and trends of the South Georgia DPS of macaroni penguin. Recognizing the highlighted uncertainties about the overall population estimates for the South Georgia and the likelihood that these figures are likely to be underestimates, the best available information provided by the United Kingdom government indicates that there are estimated to be 2.7 million pairs (DEFRA 2007, p. 2). The previous estimate from 1980 has a large margin of error, which limits its use in establishing trends—5.4 million pairs ± 25 to 50 percent, (Woehler 1993, pp. 3, 55), yielding a range of 2.7–8.1 million pairs. Based on the poor quality of this population information, we cannot reliably establish an overall trend in the South Georgia Island DPS of the macaroni penguin. Therefore, there is no reliable data that lead us to believe that the combined effects of reduced prey availability, competition with Antarctic fur seals, changes in the marine environment, competition with commercial krill fisheries, and the impacts from oil spills at the current levels are causing a long-term decline in the South Georgia Island DPS of the macaroni penguin population. Because we cannot establish an ongoing long-term decline, this DPS is neither endangered nor threatened due to factors causing ongoing population declines, and the overall population estimate of 2.7 million pairs appears robust.

We also considered whether any of the stressors acting on colonies within the South Georgia DPS of the macaroni penguin began recently enough that their effects are not yet manifested in a long-term decline, but are likely to have that effect in the future. There is little data on macaroni penguin prey availability in the South Georgia region prior to the last 3 decades, and even less information on causes of prey decline. In any case, the periodic declines in prey availability over the last 30 years have had sufficient time to be reflected in population trends, and there is no reliable evidence of an overall population trend for the DPS, regardless of localized changes in abundance. In addition, no oil spill events have occurred recently enough that the population effects would not yet be observed. Therefore, the macaroni penguin is not threatened or endangered in the South Georgia Island DPS due to threats that began recently enough that their effects are not yet manifested in a long-term decline.

Next, we considered whether any of the stressors were likely to increase within the foreseeable future, such that the species is likely to become an endangered species in the foreseeable future. As discussed above, we concluded that within the South Georgia Island DPS, none of the stressors were likely to increase significantly.

Having determined that a current or future declining trend does not justify listing the South Georgia Island DPS of the macaroni penguin, we next considered whether the species met the definition of an endangered species or threatened species on account of its present or likely future absolute numbers. The total macaroni penguin

population in the South Georgia Island DPS is estimated at 2.7 million pairs, and appears robust. It is not so low that, despite our conclusion that there is no ongoing decline, the population is at such risk from stochastic events that it is currently in danger of extinction.

Finally, we considered whether, even if the size of the current population makes the species viable, it is likely to become endangered in the foreseeable future because stochastic events might reduce its current numbers to the point where its viability would be in question. Because of the large number of dispersed breeding areas (17 main breeding aggregations) throughout the South Georgia DPS, the large number of individual colonies within these larger areas, and finally, because of the large overall population size within the South Georgia DPS, we believe that even if a stochastic event were to occur within the foreseeable future, the population would still be unlikely to be reduced to such a low level that it would then be in danger of extinction.

Despite local declines in numbers of macaroni penguins in some colonies within the South Georgia DPS, the population has thus far maintained what appears to be high population levels, while being subject to most if not all of the current stressors, and there is no reliable information that shows an overall declining population trend of the South Georgia DPS. Therefore, we conclude that the South Georgia DPS of the macaroni penguin is neither an endangered species nor likely to become an endangered species in the foreseeable future.

Significant Portion of the Range Analysis

Having determined that the macaroni penguin is not now in danger of extinction or likely to become so in the foreseeable future throughout all of its range or in the South Georgia DPS as a consequence of the stressors evaluated under the five factors in the Act, we also considered whether there were any significant portions of its range, both within the South Georgia DPS, and within the remainder of the species' range where the species is in danger of extinction or likely to become so in the foreseeable future. See our analysis for southern rockhopper penguin for how we make this determination.

The macaroni penguin is widely distributed throughout the Southern Ocean. In our five-factor analysis, we did not identify any factor that was found to be a threat to the species throughout its range or throughout the South Georgia DPS.

SPR Analysis Within the South Georgia Island DPS

In an effort to determine whether this species is endangered or threatened in a significant portion of the range of the South Georgia Island DPS of the macaroni penguin, we first considered whether there was any portion of this range where stressors were geographically concentrated in some way. However, since we only have trend information on a limited number of colonies with respect to both stressors and population trends, we could not determine whether stressors were acting differently in one portion of the range versus another. Therefore, we were not able to identify any portions of the range within the South Georgia Island DPS that warrant further consideration.

SPR Analysis Within the Remainder of the Macaroni Penguin's Range

In an effort to determine whether this species is endangered or threatened in a significant portion of the remainder of the species' range (*i.e.*, anywhere within the species' range except the South Georgia DPS), we first considered whether there was any portion of this range where the species may be either endangered or threatened with extinction. Declines have been reported in the Prince Edward Islands. There was a decline from 451,000 pairs in 1983–84 to 356,000 pairs in 2002–03, but given the magnitude of the population numbers, this 18 percent decline over the 8-year time period is not considered to be a significant change in the population (Crawford *et al.* 2003, p. 485). In the three subsequent breeding years (2003–06) small fluctuations between 350,000 and 300,000 pairs were observed (Crawford 2007, p. 9). In our analysis, we found that the total decline has been approximately 32 percent since 1979. In our analysis of the five factors for the macaroni penguin we identified no unique stressor affecting the Prince Edward Islands populations. On the basis of its large population size and limited declines (relative to overall population numbers) observed over a period of 30 years, we conclude that there is not substantial information that the Prince Edward Islands portion of the range may currently be in danger of extinction or likely to become in danger of extinction in the foreseeable future. Therefore this portion of the range does not pass the test of endangerment for consideration as an SPR.

Final Determination for the Macaroni Penguin

On the basis of analysis of the five factors and the best available scientific and commercial information, we find that listing the macaroni penguin as threatened or endangered under the Act in all or any significant portion of its range or in the South Georgia DPS is not warranted.

Emperor Penguin

Background

Biology

The emperor penguin (*Aptenodytes forsteri*) is the largest living species of penguin. It is congeneric with the king penguin (*Aptenodytes patagonicus*), but is double the size of this next largest penguin species at 3–4 ft (1–1.3 m) in height and 44–90 lb (20–41 kg) in weight (Shirihai 2002, pp. 57, 59). Emperor penguins generally feed over continental shelf and continental margins of Antarctica, except for a wide-ranging and relatively undocumented juvenile life stage. In winter, they breed in colonies distributed widely along the sea ice fringing the coast of Antarctica. In summer, during the molting period when they must stay ashore, they depend on areas of stable pack ice or nearshore, land-fast ice (Kooyman 2002, pp. 485–495; Kooyman *et al.* 2000, p. 269).

Life History

The life history of emperor penguins is unique among birds, with breeding and incubation taking place in the Antarctic winter. Kooyman (2002, pp. 485–495) summarizes this life history. Breeding birds arrive in the colonies in April. After a period of courtship, egg-laying takes place in mid-May. Male emperor penguins incubate the eggs through the Antarctic winter until mid-July to early August. The females depart the colony soon after egg-laying and forage at sea for 2 months. When the females return, the males break their extensive winter fast. This fast of 110–115 days has been documented to last from before courtship, through incubation, and past the hatching of the chick (Kirkwood and Robertson 1997, p. 156). However, unlike previous natural history descriptions of emperor penguins, late fall transects have suggested that at some of the largest colonies in the northern Ross Sea, where open water is closely accessible in late fall, males and females may feed after courtship and immediately before egg-laying, thus shortening the fast and the energetic stress of incubation for males (Van Dan and Kooyman 2004, p. 317). After the single egg hatches, the female emperor penguin returns. At that point, the males and females begin to share the feeding of the chick, coming and going on foraging trips away from

the colony throughout the late winter and spring. These foraging trips last from 3 weeks to as little as 3 days, getting progressively shorter as the spring advances (Kooyman 2002, pp. 485–495; Kooyman *et al.* 1996, p. 397). The adults leave the colonies from mid-December to mid-January on pre-molt foraging trips, which may take them up to 186 mi (300 km) north of the continent and up to 745 mi (1,200 km) from the colony. By late January to early February they arrive in areas where they can find stable land-fast ice or pack ice to allow them to stay ashore for the 1-month molt (Kooyman *et al.* 2004, pp. 281–290; Wienecke *et al.* 2004, pp. 83–91). Following the molt, they embark on post-molt foraging trips, which bring breeding birds back to the colony in April.

The dispersal patterns of emperor penguin chicks after fledging are poorly known. Once they leave the colonies they are seldom seen and do not return again for several years. They return to the colony when 4 years old and breed the following year (Shirihai 2002, p. 61). Kooyman *et al.* (1996, p. 397) followed the movements of five radio-tagged juveniles at their departure from their colony at Cape Washington in the Ross Sea. All traveled north beyond the Ross Sea to the Antarctic Convergence, the boundary of the Southern Ocean, reaching 56.9° S latitude. While radio-signals were lost before the onset of winter, Kooyman *et al.* (1996, p. 397) suggested that the birds may have remained in the water north of the pack ice until at least June. He noted that at this crucial period of their lives, juvenile emperor penguins may be exposed to conditions similar to more northern penguin species, for example, commercial fishing in the Southern Ocean. It is hypothesized that juveniles ranging north from the Mawson Coast may feed and compete with king penguins that are foraging south in the fall and winter from their Indian Ocean breeding colonies.

Distribution

Emperor penguins breed on land-fast ice in colonies distributed around the perimeter of the Antarctic continent from the western Weddell Sea to the southwestern base of the Antarctic Peninsula (Kooyman 2002, p. 490; Lea and Soper 2005, p. 60; Woehler 1993, pp. 5–10;). For example, in the Ross Sea, six colonies are spaced 31–62 mi (50–100 km) apart along the Victoria Land coast (Kooyman 1993, p. 143).

Looking at the reported data, we conclude that the total number of historically or presently recorded colonies is approximately 45. Woehler (1993, pp. 5–10) documented 42 reported colonies around the continent, which included seven colonies discovered between 1979 and 1990 (Woehler 1993, p. 5). Colonies along Marie Byrd Land east of the Ross Sea are few or undocumented, with only one confirmed, recently discovered breeding colony at Siple Island (Lea and Soper 2005, pp. 59–60) and one outlying small colony at the Dion Islands at the western base of the Antarctic Peninsula (Woehler 1993, p. 9; Ainley *et al.* 2005, p. 177). At least three new locations have been discovered since 1990 (each with over 2,000 breeding pairs) and one other colony was confirmed (Woehler and Croxall 1997, p. 44; Coria and Montalti 2000, pp. 119–120; Lea and Soper 2005, pp. 59–60; Melick and Bremmers 1995, p. 426; Todd *et al.* 2004, pp. 193–194).

However, given the remote locations of emperor penguin colonies and the difficulties of accessing them, the number of colonies may vary from the 45 reported. At the time of the 1990's compilation of emperor penguin numbers and colony locations cited above, Woehler (1993, p. 5) stated that many colonies had not been observed or counted for many years, with in some cases, the most recent data dating to the 1950s and 1960s. On the other hand, in describing a new colony along the coast of Wilkes Land near a research base that had already been utilized for 35 years, Melick and Bremmers (1995, p. 427) cited a very strong likelihood that more emperor penguin colonies were waiting to be discovered in this area and that such discoveries could significantly raise the present estimates of emperor penguin numbers.

Breeding Areas

Emperor penguin breeding colonies are variable in size. In 1993, Woehler (1993, pp. 2–9) provided size estimates for 36 of the 42 colonies. Adding the 3 newly discovered colonies cited above, colony size for 39 colonies ranged from under 100 breeding pairs to 22,354 breeding pairs (with 2 colonies above 20,000 breeding pairs, 6 colonies between 10,000 and 20,000 pairs, 21 colonies between 1,000 and 10,000 pairs, and 10 colonies below 1,000 pairs). The largest colonies at Cape Washington and Coulman Island had 19,364 and 22,137 downy chicks (and accordingly the same number of breeding pairs), respectively, in 1990 (Kooyman 1993, p. 145), and 23,021 and 24,207 chicks, respectively, in 2005 (Barber-Meyer *et al.* 2007b, p. 7).

Emperor penguin breeding colonies are also variable in physical location. Scientists have attempted to describe the most important physical characteristics of colony locations and how they influence colony size. For six western Ross Sea colonies, Kooyman (1993, pp. 143–148) identified stable land-fast ice, nearby open water, access to fresh snow (for drinking water and thermal protection), and shelter from the wind as physical characteristics. At Beaufort Island, Cape Crozier, and Franklin Island, limited land-fast ice areas seem to dictate colony size (179, 477, and 4,989 fledgling chicks, respectively) because the birds were unable to move away from snow and ice that had been contaminated by guano over the course of the breeding season, and they had limited options to shelter from winds. At Coulman Island and Cape Washington, the largest known emperor penguin colonies (22,137 and 19,364 fledgling chicks, respectively), suitable land-fast ice areas were unlimited with a good base of snow. Access to open water in the winter is another major characteristic. Known locations of emperor penguin colonies have been found to be associated with known coastal polynyas-areas of winter open water in East Antarctica (Massom *et al.* 1998, p. 420).

Localized changes in colony size and breeding success have been recorded at specific colonies and attributed to local- or regional-scale factors. Changes in the physical environment can have an impact on individual colonies, especially smaller ones, which show higher year-to-year variation in live chick counts than larger colonies (Barber-Meyer *et al.* 2007b, p. 4).

Feeding Areas

The primary foods of emperor penguins are krill (*Euphausia superba*), Antarctic silverfish (*Pleurogramma antarcticum*), and some types of lanternfish and squid (Kirkwood and Robertson 1997, p. 165; Kooyman 2002, p. 491). The proportion of each of these in the diet is variable according to colony location and season, with fish comprising 20 to 90 percent, krill 0.5 to 68 percent, and squid 3 to 65 percent by weight in the diet (Kooyman 2002, pp. 488, 491).

During their winter feeding trips, female emperor penguins travel over ice to reach areas of open water or polynyas, which are generally accessible from emperor penguin colonies (Massom *et al.* 1998, p. 420). Penguins from the Auster and Taylor colonies on the Mawson coast of Antarctica, carrying time-depth recorders, took about 8 days to reach the ice edge and spent 50–60 days at sea foraging. They foraged about 62 mi (100 km) northeast of the colony in water over the outer

continental shelf and shelf slope. As penguins are visual foragers, foraging was limited to daylight, with penguins entering the water just after dawn and emerging at dusk after spending on average 4.71 hours in the water (Kirkwood and Robertson 1997, pp. 155, 168). Both on the journey north and between foraging days at sea, females occasionally huddled together in groups on the ice to minimize heat loss (Kirkwood and Robertson 1997, p. 161).

As mentioned above, juvenile penguins leaving their natal colonies upon fledging have been radio-tracked to 56.9° S latitude, the area of the Antarctic Convergence where they presumably feed (Kooyman *et al.* 1996, p. 397).

Molting Areas

The summer molt is a critical stage in the life history of the emperor penguin. The birds must find stable land-fast ice or pack ice to allow them to stay ashore for the 1-month molt (Kooyman *et al.* 2004, pp. 281–290; Wienecke *et al.* 2004, pp. 83–91). In the western Ross Sea, penguins departing their breeding grounds in December generally traveled an average straight-line distance of 745 mi (1,200 km) from their colonies to molt in the large consolidated pack-ice area in the eastern Ross Sea (Kooyman *et al.* 2000, p. 272). In 1998, molting birds were sighted on the southern edge of the summer pack ice in the western Weddell Sea (Kooyman *et al.* 2000, p. 275), and birds sighted were assumed to be from colonies in the eastern Weddell Sea up to 869 mi (1,400 km) to the east, although some may have come from the Snow Hill Colony recently discovered to the north of this area (Kooyman *et al.* 2000, pp. 275–276). Along the Mawson Coast, penguins departing colonies prior to molt traveled for 22–38 days and reached molting locations up to 384 mi (618 km) from the colony. Unlike Ross Sea penguins, they did not travel directly to consolidated pack-ice locations, but first moved north, apparently to feed, and then returned to molt in nearshore areas where land-fast ice persisted throughout the summer (Wienecke *et al.* 2004, p. 90).

Abundance and Trends

There are estimated to be 195,000 emperor penguin pairs breeding in approximately 45 colonies around the perimeter of the Antarctic continent. The population is believed to be stable rangewide (Woehler 1993, pp. 2–7; Ellis *et al.* 2007, p. 5) and in the Ross Sea (Barber-Meyer *et al.* 2007b, p. 3). As cited above, even as overall numbers remain stable, fluctuations in individual colony size have been reported for a number of colonies (Kato *et al.* 2004, p. 120; Kooyman *et al.* 2007, p. 37; Barber-Meyer *et al.* 2007b, p. 7; Barbraud and Weimerskirch 2001, pp. 183–186) and seem to reflect the impacts of local and regional physical and climatic variation in the harsh Antarctic environment, as well as the resilience of this species in responding to this variation.

Other Status Classifications

The emperor penguin is listed in the category of 'Least Concern' on the 2007 IUCN Red List on the basis of its large range and stable global population (BirdLife International 2007, p. 1). A species is considered of least concern when it has been evaluated against the IUCN criteria and does not qualify for 'Critically Endangered,' 'Endangered,' 'Vulnerable,' or 'Near Threatened.' Widespread and abundant species are included in this category (BirdLife International 2007, p. 1).

Summary of Factors Affecting the Species

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

The breeding range of the emperor penguin consists of land-fast ice along the continental margins of Antarctica. The emperor penguin is an ice-dependent species. Therefore, emperor penguins are vulnerable to changes in the winter land-fast ice and polynya system (Ainley 2005, p. 178; Croxall 2004, p. 90), which comprises their breeding habitat, and to changes in the pack ice or residual land-fast ice, which they use for summer molt haul-out areas (Barber-Meyer *et al.* 2007b, p. 11; Kooyman *et al.* 2004, p. 289).

Studies reviewed below indicate that the emperor penguin lives in a harsh and highly changeable environment. Changes and perturbations that affect emperor penguins occur on daily, seasonal, annual, decadal, and historical timeframes. Localized changes in colony size and breeding success have been recorded at specific colonies and attributed to local- or regional-scale factors.

Changes in the physical environment can have an impact on individual colonies, especially smaller marginal ones that show higher year-to-year variation in live chick counts than larger colonies (Barber-Meyer *et al.* 2007b, pp. 7, 10). A dramatic example of physical changes to the breeding and foraging environment comes from the periodic calving of giant icebergs from the Ross Ice Shelf, expected every 3–4 decades on average (Arrigo *et al.* 2002, p. 4).

For example, the calving in 2000 and subsequent grounding of two giant icebergs in the Ross Sea severely affected the Cape Crozier and Beaufort Island emperor penguin colonies. In 2001, nesting habitat was destroyed at Cape Crozier by the collision of iceberg B15A with the northwest tongue of the Ross Ice Shelf, dislodging the ice shelf and creating a huge collection of iceberg rubble. Adult mortality was high, either due to trauma from shifting and heaving sea ice or subsequent starvation of penguins trapped in ravines. The colony produced no chicks in 2001. The high mortality of adults (Kooyman *et al.* 2007, p. 37) and continued instability and unsuitability of the area of this traditional colony contributed to a reduction in chick production that ranged from 0 to 40 percent of the high count of 1,201 chicks produced in 2000 (Kooyman *et al.* 2007, pp. 31, 34–35). Chick counts fluctuated from 0 in the iceberg year of 2001, to 247 in 2002, to 333 in 2003, to 475 in 2004, to 0 in 2005, to 340 chicks in 2006. The situation in 2005 was highly unusual because the 437 adults in the colony in mid-October showed no signs of breeding (*i.e.*, no eggs and no chicks). The reason for breeding failure was not apparent (Barber-Meyer *et al.* 2007b, pp. 7, 9). However, preliminary reports from 2006 indicated that breeding success at Cape Crozier was again improved with about 340 live chicks (Barber-Meyer *et al.* 2007b, p. 9). Recovery may have been slowed as a consequence of the high adult mortality in 2001. While breeding birds have persistently returned to the colony after the iceberg departed in 2003, they may be waiting for conditions at the colony to improve before breeding there again (Kooyman *et al.* 2007, p. 37).

At the Beaufort Island colony, the arrival of iceberg B15A, along with iceberg C16 in 2001, did not physically affect the colony substrate itself, but separated the breeding birds in the colony from their feeding area in the Ross Sea polynya with a 93-mi (150-km) long barrier. In the 2001–2004 breeding seasons, adult birds were forced to walk up to 56 mi (90 km) before being able to enter the water. Chick counts in 2004, the worst year of this period, dropped to 131 (6 percent of the high count of 2,038 in 2000). Unlike at Cape Crozier, once the icebergs finally left the area by 2005, the surface conditions of the colony were restored to pre-iceberg condition and, with accessibility to the Ross Sea polynya restored, the first post-iceberg breeding season saw recovery in chick production to 446 chicks (Kooyman *et al.* 2007, p. 36) to 628

chicks (Barber-Meyer *et al.* 2007b, p. 7), a little under one-third of 2000 levels.

Changes in the physical environment have also been shown to affect the food sources of emperor penguins in the Ross Sea (Arrigo *et al.* 2002, pp. 1–4). The presence of the B15A iceberg in the Ross Sea blocked the normal drift of pack ice and resulted in heavier spring and summer pack ice in the region in 2000–01. This resulted in a delay in the initiation of the annual phytoplankton bloom in some areas and failure to bloom in others, with a reduction in primary productivity in the Ross Sea region by 40 percent. While emperor penguin diets were not reported, Adelie penguin diets shifted to a krill species normally associated with extensive sea-ice cover during the first year of this grounding event (Arrigo *et al.* 2002, p. 3). The very large emperor penguin colony at Cape Washington, about 124 mi (200 km) away, experienced reduced chick abundance in the period when B15A was in the area; the iceberg's presence may have modified breeding behavior and chick nurturing in some way. Chick numbers rebounded in 2004 and 2005 (Barber-Meyer *et al.* 2007b, p. 10).

Future iceberg calving events are likely to affect emperor penguin colonies in the Ross Sea. Calving of the Ross Ice Shelf, which led to the formation of icebergs B15A and C16, is described as a cyclical phenomenon expected every 3–4 decades on average from the northeast corner of the ice shelf. While the Ross Ice Shelf front has been relatively stable over the last century, such events are a consequence of the longer-term behavior of the West Antarctic Ice Sheet in the Ross sector. Current retreat of the Western Antarctic Ice Shelf has been underway for the past 20,000 years since the last glacial maximum, and retreat is expected to continue, with or without global climate warming or sea-level rise (Conway *et al.* 1999, pp. 280–283). Efforts are underway to understand and predict the overall behavior of the West Antarctic Ice Sheet (Bentley 1997, pp. 1,077–1,078; Bindschalder 1998, pp. 428–429; Bindschalder *et al.* 2003, pp. 1,087–1,989), but we are not aware of any current predictions of local-scale changes in calving rates in the Ross Sea in the near future.

A number of studies have attempted to relate population changes at individual emperor penguin colonies to the effects of regional and global oceanographic and climatic processes affecting sea surface temperatures and sea-ice extent. In the Ross Sea, which contains the highest densities of emperor penguins in Antarctica and the largest and smallest and most southerly of all penguin colonies, Barber-Meyer *et al.* (2007b, pp. 3–11) examined large-scale and local-scale climatic factors against trends in chick abundance in six colonies in the western Ross Sea from 1979–2005. They found that overall emperor penguin numbers in the Ross Sea were stable during this period. They were unable to find any consistent correlation between trends in chick abundance and any of the climate variables of sea-ice extent—sea surface temperature, annual Southern Oscillation Index, and Southern Hemisphere Annular Mode. They determined that chick abundance in smaller colonies was more highly variable than in large colonies, suggesting that small colonies occupy marginal habitat and are more susceptible to environmental change. While they concede that significant local events such as the grounding of iceberg B15A may have masked subtle relationships with local sea-ice extent and large-scale climate variable, their analysis indicated that the environmental change most affecting chick abundance is fine-scale sea-ice extent and local weather events (Barber-Meyer *et al.* 2007b, pp. 3–11).

Similar analyses have been conducted for a single, small emperor penguin colony located near the D'Urmont D'Urville Station in the Point Geologie archipelago in Adelie Land in a study that has been widely cited as demonstrating the impacts of climate change on this species (Barbraud and Weimerskirch 2001, pp. 183–186). In the late 1970s, a 50-percent decline in the number of breeding pairs at this small colony (from 5,000–6,000 pairs to 2,500–3,000 pairs) occurred at the time of an extended period of warmed winter temperatures at the colony and reduced sea-ice extent in the vicinity. After the period of decline, numbers stabilized at half the pre-1970 levels for the next 17 years. Meteorological data collected at the station were used as a proxy for sea surface temperatures. The authors found that overall breeding success was not related to sea surface temperatures or sea-ice extent. Instead, the decrease was attributed to increased adult mortality. Emperor penguin survival apparently was reduced when temperatures were higher and penguins survived better when sea-ice extent was greater. The authors hypothesized that with decreased sea-ice extent during the warmer period in the late 1970s, krill recruitment may have been reduced, making it more difficult for adults to find food. The authors attributed an increased variability in breeding success during the 17 years of population stability after this period to a combination of local- and annual-scale physical factors, such as blizzards and early break out of the ice supporting the colony (Barbraud and Weimerskirch 2001, pp. 183–186). This increased variability over the last 17 years is consistent with the observations for the Ross Sea (Barber-Meyer *et al.* 2007b, p. 7), where annual variability in breeding success is larger for smaller colonies.

The conclusions of the Barbraud and Weimerskirch study and the ability to generalize based on its results have been questioned by several authors. As noted above, the results and conclusions are not supported by a larger-scale study of six large and small penguin colonies in the Ross Sea, which represent 25 percent of the world's population (Barber-Meyer *et al.* 2007b, pp. 10–11). In discussing this study, Ainley *et al.* (2005, pp. 177–180) concluded that the confounding factors of severe blizzards and increases in early departure of the land-fast ice nesting substrate suggest that the continued low population numbers at Point Geologie have not been fully explained, and they questioned the conclusion that higher mortality of adult emperor penguins during 1976–1980 was caused by increased sea surface temperatures. Croxall *et al.* (2002, p. 1,513) stated ''that current data on environment-prey-population interactions are insufficient for deriving a single coherent model that explains these observations.''

Further work at this same Antarctic location, building from local observations of seabird dynamics and measurements of regional sea-ice extent and the Southern Oscillation Index, led Jenouvrier *et al.* (2005, p. 894) to suggest that in the late 1970s there may have been a regime shift in cyclical Antarctic environmental factors such as sea-ice extent and the Southern Oscillation Index, which may have affected the dynamics of the Southern Ocean. In another paper, Weimerskirch *et al.* (2003, p. 254) suggested that the decrease in sea-ice extent in the late 1970s in the Adelie Land area could be related to a regional increase in temperatures in the Indian Ocean during that period.

In related work, Ainley *et al.* (2005, pp. 171–182) further described decadal-scale changes in the western Pacific and Ross Sea sectors of the Southern Ocean during the early to mid-1970s and again during 1988–1989. These large-scale periods of warming and cooling and corresponding changes in weather and sea-ice patterns were linked to decadal shifts in two atmospheric pressure-related systems in the region. The first

is the semi-annual oscillation (the strengthening and weakening of the circumpolar trough of low pressure that encircles Antarctica), and the second is the Antarctic oscillation (now referred to as the Southern Annual Mode), the pressure gradient between mid latitudes and high latitudes (Ainley *et al.* 2005, p. 172). The study showed that environmental changes in a number of sea-ice variables during these cyclical periods, including polynya size, led to corresponding reductions and increases in a number of Adelie penguin colonies in the Ross Sea and changes in the number of adults breeding and the reproductive output at a number of individual Adelie penguin colonies in the Ross Sea. The authors attempted to compare Ross Sea data for Adelie penguins with the observations at Pointe Geologie for emperor penguins, but data from the much more detailed subsequent studies of Barber-Meyer *et al.* (2007b, pp. 3–11) leave the reader with only the general conclusion that the two species respond differently to these cyclical environmental changes (Ainley *et al.* 2005, p. 171).

The primary breeding and winter foraging habitat of the emperor penguin is land-fast ice along the margins of the Antarctic continent. While overall populations are stable, local- or regional-scale variations in physical, oceanographic, and climatological processes, as described above, lead to year-to-year variations in chick production or colony breeding success in colonies scattered widely along the coast of Antarctica. Field observations show that emperor penguins respond to such factors, when they occur, but given the stability of penguin numbers around Antarctica, we have found no consistent trends with respect to the destruction, modification, or curtailment of their habitat or range.

With respect to larger-scale observations of the climate of Antarctica and the extent of the sea ice that makes up the primary habitat of the emperor penguin, the Working Group I report to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), which reviewed the observations on the physical science basis for climate change, found that ''Antarctica sea ice extent continues to show interannual variability and localized changes, but no statistically significant overall trends, consistent with lack of warming reflected in atmospheric temperatures averaged across the region'' (IPCC 2007, p. 9).

Observations of climate and ice conditions are not uniform throughout Antarctica in any particular season or year. Attempts to describe and understand long-term observed conditions and to predict future conditions either on the basis of the demographic behavior of individual penguin colonies or on the basis of global-scale climate observations are difficult and incomplete. At a continent-wide scale, observational studies show sea-ice cover decreased significantly in the 1970s, but has increased overall since the late 1970s (Parkinson 2002, p. 439; Parkinson 2004, p. 387; Yuan and Martinson 2000, p. 1,712). More recently, the IPCC reported that Antarctic results show a small, positive trend in sea-ice extent that is not statistically significant (Lemke 2007, p. 351).

With respect to regional trends along the continent, satellite observational studies have shown, for Southern Ocean regions adjoining the South Atlantic, South Indian, and southwest Pacific Oceans, increasing trends in sea-ice cover, particularly during non-winter months. Regions adjoining the southeast Pacific Ocean, however, have shown decreasing trends in sea-ice coverage, particularly during the summer months (Stammerjohn and Smith 1997, p. 617; Kwok and Comiso 2002, p. 501; Yuan and Martinson 2000, p. 1,712). The distribution of sea-ice-extent anomalies (areas of more- or less-than-average sea ice) observed around the continent is bimodal with increased ice cover in the Indian Ocean sector, a slight decrease between the eastern Indian Ocean and Western Pacific, large increases in the western Pacific Ocean and Ross Sea sector, a large decrease in the Bellinghausen and Amundsen Seas of the eastern Pacific sector, and a large increase in the Weddell Sea (Curran *et al.* 2003, p. 1,205; Yuan and Martinson 2000, p. 1,712). Attempts to link south polar sea-ice trends to climate outside this polar region are extremely complex. In statistical and observational studies of Antarctic sea-ice extent and its global variability, sea-ice anomalies in the Amundsen Sea, Bellinghausen Sea, and Weddell Gyre, corresponding to the Western Antarctic Peninsula region, showed the strongest links to extrapolar climate (Yuan and Martinson 2000, p. 1,697) and to variations in the Southern Oscillation Index (Kwok and Comiso 2000, p. 500); however, these factors did not explain the trends of stable or increasing sea-ice extent for the majority of the continental coast of Antarctica, which encompasses the range of the emperor penguin.

Future Projections

With respect to the future of Antarctica, the IPCC reported, ''in 20th and 21st century simulations, Antarctic sea ice cover is projected to decrease more slowly than in the Arctic, particularly in the vicinity of the Ross Sea where most models predict a minimum in surface warming. This is commensurate with the region with the greatest reduction in ocean heat loss, which results from reduced mixing of the ocean'' (Meehl *et al.* 2007, p. 770).

Simulation models, comparing 1980–2000 observed winter and summer mean sea-ice concentrations around Antarctica with modeled 2080–2100 sea-ice concentrations, predicted declines in sea-ice concentrations in this timeframe (Bracegirdle *et al.* 2008, p. 8; Meehl *et al.* 2007, p. 771). While these models showed extensive deviation around mean predictions, they provided a general predictive picture of future Antarctic sea-ice conditions in the range of the emperor penguin. They showed winter sea-ice reductions by 2080–2100, with ice concentrations remaining high around the bulk of the continent and highest in the Ross, Amundsen, and Weddell Seas, and around the Mawson Coast in the Indian Ocean sector. Summer sea-ice concentrations also retreat, with sea ice persisting in the Ross and Weddell Seas and apparently greatly reduced or not persisting in the Indian Ocean sector. These large-scale model predictions seem to indicate that emperor penguins, especially in the Ross and Weddell Seas, are likely to continue to encounter suitable sea-ice habitat for breeding in the winter and molting in the summer in the 100-year timeframe. The IPCC is very clear on the limitations of these models—the report contains a section discussing the limitations and biases of sea-ice models and finding that even in the best cases, which involve Northern Hemisphere winter sea-ice extent, ''the range of simulated sea ice extent exceeds 50% of the mean and ice thickness also varies considerably, suggesting that projected decreases in sea ice remain rather uncertain'' (Randall *et al.* 2007, p. 616). It is difficult and premature, given the large geographic scale of these models, their extensive deviations around mean predictions, and their 100-year timeframe, to make specific predictions about the sea-ice conditions in any particular region of emperor penguin habitat around Antarctica. This is particularly difficult when empirical evidence to date suggests that such continent-wide sea-ice declines have not yet begun.

With respect to atmospheric temperatures, increases in the Southern Annular Mode (SAM) index (a monthly measure of differences in sea-level atmospheric pressure between the mid

latitudes and high latitudes of the Southern Hemisphere) (Trenberth *et al.* 2007, p. 287) from the 1960s to the present are associated with a strong warming over the Antarctic Peninsula and, to a lesser extent, with cooling over parts of continental Antarctica, the area of the range of the emperor penguin (Trenberth *et al.* 2007, p. 339). There is continued debate as to whether these trends in the SAM are related to stratospheric ozone depletion and to greenhouse gas increases (Trenberth *et al.* 2007, p. 292) or to decadal variation in teleconnections or large-scale patterns of pressure and circulation anomalies that span vast geographical areas and ''modulate the location and strength of storm tracks and poleward fluxes of heat, moisture and momentum'' (Trenberth *et al.* 2007, pp. 286–287). Reconstructions of century-scale records based on proxies of the SAM found that the magnitude of the current trend may not be unprecedented even in the 20th century (Trenberth *et al.* 2007, pp. 292–293). The response of the SAM to the ozone hole in the late 20th century, which has also had a warming affect on temperature, confounds simple extrapolation into the future (Christensen *et al.* 2007, p. 907).

At the regional scale, the IPCC reported that very little effort has been spent to model the future climate of Antarctica (Christenson 2007, p. 908). Annual warming over the Antarctic continent is predicted to be ''moderate but significant'' (2.5–9 °F (1.4–5 °C), with a median of 4.7 °F (2.6 °C)) at the end of the 21st century (Christenson 2007, p. 908). Models tend to show that the current pattern, which involves warming over the western Antarctic Peninsula and little change over the rest of the continent, is not projected to continue through the 21st century (Christenson 2007, p. 908). Ainley *et al.* (unpublished ms, n.d., pp. 1, 26–29), using a composite of selected climate models for 2025–2070, projected that an increase in earth's tropospheric temperature by 3.6 °F (2 °C) would result in a marked decline or disappearance of 50 percent of emperor colonies (40 percent of the population) at latitudes north of 70° S latitude because of severe decreases in pack-ice coverage and ice thickness, especially in the eastern Ross and Weddell Seas. Without further review and testing of this model, it would be premature to use this model's results to make specific predictions about the sea-ice conditions in the emperor penguin habitat around Antarctica.

We have examined current conditions and predictions for changes in sea ice and temperatures around Antarctica for the coming 100 years, which remain very general. We have paid particular attention to sea ice because it is the dominant habitat feature of the emperor penguin's life cycle. To date, evidence does not support the conclusion that directional changes in temperature or sea-ice extent are already occurring in the habitat of the emperor penguin. We do not discount the strong likelihood that predicted sea-ice changes will eventually reduce the habitat of emperor penguins. However, on the basis of: (1) Current observed conditions; (2) the stability of emperor penguin colonies throughout their range; (3) the likelihood in the 100-year timeframe that emperor penguin habitat requirements will continue to be met in current core areas of their range; and (4) the uncertainty of current large-scale predictive models and the absence of fine-scale climate models predicting conditions for the range of the emperor penguin, we conclude that there is not sufficient evidence to find that climate-change effects to the habitat of the emperor penguin will threaten the emperor penguin within the foreseeable future.

On the basis of this information, we conclude that the present or threatened destruction, modification, or curtailment of the emperor penguin's habitat or range is not a threat to the species in any portion of its range now or in the foreseeable future.

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The ecotourism industry in Antarctica has been growing, with an increase from 6,750 tourists during the 1992–93 summer season to a projected 35,000 tourists in 2007–08 (Austen 2007, p. 1). A few emperor penguin colonies have become the focus of increased, but limited, tourism activities in Antarctica. In particular, the newly discovered Snow Hill colony near the Antarctic Peninsula, which numbers about 4,000 pairs (Todd *et al.* 2004, pp. 193–194), is accessible to ice-breaking vessels coming to the Antarctic Peninsula from the southern ports of South America. The International Association of Antarctica Tourism Operators (IAATO 2007b, p. 1) reported that 909 visitors landed to visit the Snow Hill Colony in the 2006–07 summer season. These visitors all came off one vessel, the icebreaker *Kapitan Khlebnikov*. In November 2006, Burger and Gochfeld (2007, pp. 1,303–1,313) reported that there was one visit in 2004, no tour visits in 2005, and at least three visits in 2006. These authors concluded it was unlikely tourists would visit early in the season when chicks are most vulnerable.

Burger and Gochfeld (2007, pp. 1,303–1,313) examined whether the presence of tourists had an impact on the movement of emperor penguins between the colony and the sea. They found that penguins noticing the presence of people paused more often and for longer in their movements than those passing at a greater distance. The authors provided recommendations for tourist behavior to mitigate the effects of tourist presence on traveling penguins.

For the remainder of continental Antarctica tourists, visits and landings are extremely limited. For example, in 2006–07, 263 people are recorded as landing from one ship, again the icebreaker *Kapitan Khlebnikov,* at Cape Washington in the Ross Sea, the site of one of the largest emperor penguin colonies. Only 13 sites off the Antarctic Peninsula are recorded as receiving tourists (IAATO 2007c, p. 1).

The Antarctic Treaty sets out requirements for tourism operators and tourists entering the Antarctic Treaty region. Tourism operators are required to operate under the Antarctic Treaty's Guidance for those Organising and Conducting Tourism and Non-governmental Activities in the Antarctic: *Recommendation XVIII–1, adopted at the Antarctic Treaty Meeting, Kyoto, 1994*. This detailed guidance sets out requirements for: (1) Advance planning and advanced notification, as well as post-visit reporting of any proposed activities in the region, (2) preparation and compliance with contingency-response plans, including for waste management and marine pollution, and (3) awareness of and proper permitting related to Specially Protected Areas, Sites of Special Scientific Interest, and Historic Sites and Monuments (International Association of Antarctica Tour Operators (IAATO 2007a, p. 1). The Antarctic Treaty Guidance for Visitors to the Antarctic: *Recommendation XVIII–1, adopted at the Antarctic Treaty Meeting, Kyoto, 1994* is intended to ensure that all visitors to the Antarctic are aware of and comply with the treaty and its Protocol for Environmental Protection. This focuses in particular on the prohibition on taking or harmful interference with Antarctic wildlife, including care not to affect them in ways that cause them to alter their behavior, and on preventing the introduction of nonnative plants or animals into the Antarctic (Antarctic Treaty Secretariat 2007, pp. 1–5). Scientific research is also strictly regulated under the Antarctic Treaty.

On the basis that tourist activities reach very few penguin colonies, the number of tourists are limited, and their behavior is well regulated by the Antarctic Treaty, we find that tourism is not a threat to the emperor penguin in any portion of its range now or in the foreseeable future.

In addition, we are unaware of any overutilization for other commercial, recreational, scientific, or educational purposes that is a threat to the emperor penguin in any portion of its range now or in the foreseeable future.

Factor C: Disease or Predation

Antarctic species, such as the emperor penguin, are potentially susceptible to the introduction of avian diseases from outside the region (Jones and Shellam 1999, p. 182). Gardner *et al.* (1997, p. 245) found antibodies of an avian pathogen, Infectious Bursal Disease Virus (IBDV), in 65.4 percent of 52 emperor penguin chicks sampled at the Auster colony on the Mawson Coast in 1995, although no evidence of clinical disease was present. This pathogen of domestic chickens may have been introduced by humans into this area. The authors suggested that careless or inappropriate disposal of poultry products, allowing access by scavenging birds or inadvertent tracking by humans, was a potent source for spread of this environmental contaminant. The authors concluded that the potential for tourists or expeditions to be vectors of disease may pose a significant threat to Antarctic avifauna. Although disease may be a stressor to penguins, the Antarctic Treaty Parties have subsequently addressed concerns over the introduction of disease and invasive species in protocols to the treaty and guidelines arising out of them. These are discussed below under Factor D.

We are unaware of any information relative to detrimental predation impacts on the emperor penguin, either from native or nonnative species.

In conclusion, we find that neither disease nor predation is a threat to the species in any portion of its range now or in the foreseeable future.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

The Antarctic Treaty, which entered into force in 1961, applies to the area south of 60 °S latitude including all ice shelves (Antarctic Treaty area). The primary purpose of the treaty, which has 28 full members or Parties, is to ensure ''in the interests of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene of international discord'' (Jatko and Penhale 1999, p. 8). Measures for the Conservation of Antarctic Fauna and Flora arising out of language in Article IX of the treaty concerning ''preservation and conservation of living resources in Antarctica'' were adopted in 1964. They were incorporated into the Protocol on Environmental Protection to the Antarctic Treaty, which was ratified in 1991 and entered into force in January 1998. In the protocol, the Parties to the Antarctic Treaty committed themselves to the comprehensive protection of Antarctica's environment and dependent and associated ecosystems, and they designated Antarctic as a reserve devoted to peace and science (Jatko and Penhale 1999, p. 9). Five annexes to the protocol address specific areas of environmental protection, including environmental impact assessment, conservation of Antarctic fauna and flora, waste disposal and waste management, prevention of marine pollution, and the designation and management of protected areas. Annex II of the Protocol includes prohibitions on killing, capturing, handling, or disturbing animals or harmfully interfering with their habitat, as well as tight restrictions on the introduction of nonnative species; Annex III provides a comprehensive system of requirements for management of wastes generated in Antarctica, including elimination of landfills; and Annex IV addresses requirements to prevent marine pollution from ships operating in the Antarctic Treaty area (Jatko and Penhale 1999, pp. 9–10). As noted above, guidelines for activities in Antarctica directly address these prohibitions on the introduction of nonnative species as well as disposal of garbage (IAATO 2007a, pp.1–4). The Scientific Committee on Antarctic Research, originally established by the International Council of Scientific Unions, provides scientific advice to the Treaty Parties (Jatko and Penhale 1999, p. 8).

Because the Antarctic Treaty does not affect the rights of any State under international law with respect to the high seas, a series of separate conventions have been negotiated and ratified with respect to the exercise of rights in the seas around Antarctica. In particular, CCAMLR addresses the conservation of marine resources. Article II ''defines the objective of this Convention as the conservation of Antarctic marine living resources and states that conservation includes rational use of harvesting'' (Jatko and Penhale 1999, p. 11). CCAMLR operates on three principles: (1) Prevention of population decrease below that which ensures stable recruitment of harvested species; (2) maintenance of the ecological relationships among harvested, dependent, and related species; and (3) prevention of changes or minimization of risks of ecosystem changes. CCAMLR has been active in assessing the status of krill and species dependent upon krill, such as birds and mammals; regulating the harvest of Patagonian tooth fish (*Dissostichus* spp.); and ecosystem monitoring with the goal of detecting changes in critical components of ecosystems.

We find, on the basis of the protection and management of Antarctic ecosystems under the Antarctic Treaty and CCAMLR, that the inadequacy of regulatory mechanisms is not a threat to the emperor penguin in any portion of its range now or in the foreseeable future.

Factor E: Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Fishery Interactions

We have found no evidence of fishing impacts on emperor penguins in the foraging range of adults along the continental margins. Kooyman *et al.* (1996, p. 397) found that juveniles range north into waters where commercial fishing may occur and noted the importance of determining the dispersal patterns of the young to ensure adequate protection. Kooyman (2002, p. 492) also noted that the Antarctic Treaty and CCAMLR extend only to the 60th parallel in this region of Antarctica. However, we are unaware of any reports of fisheries interactions with emperor penguin juveniles and have no reason to believe that this potential stressor will occur at a level to impact this species in the future.

Oil Pollution

Annex IV of the Protocol on Environmental Protection to the Antarctic Treaty sets out requirements to prevent pollution from ships operating in the Antarctic Treaty area (Jatko and Penhale 1999, p. 10). The November 2007 sinking of the cruise ship *MV Explorer* near the Antarctic Peninsula illustrates the possibility of oil spills and other ship-based pollution from increased vessel traffic in Antarctic waters. The *MV Explorer,* which held about 48,000 gallons (181,680 liters) of marine diesel fuel when it sank (Austen 2007, p. 1), did not sink near emperor penguin colonies, but it did sink in the vicinity of colonies of other penguin species. As noted in the discussion of Factor B above, emperor penguin

colonies are not a significant destination of the increasing tourist activity in Antarctica. The wide dispersal of emperor penguin colonies around Antarctica mitigates the concern that a single vessel accident could affect the population of emperor penguins, as does the fact that emperor penguin activity at rookeries may be reduced at the time of year when vessel traffic becomes significant. Vessel operations in the vicinity of emperor penguin colonies, near summer molting areas or elsewhere in their foraging range, remain a source of concern. Although we consider this a potential stressor to the emperor penguin, we have no reason to believe oil pollution will occur at a level to impact this species in the future.

Therefore, we find that fishery interactions and oil pollution are not threats to the emperor penguin in any portion of its range now or in the foreseeable future.

Foreseeable Future

A general discussion of threatened species and foreseeable future can be found above in the southern rockhopper penguin Foreseeable Future section.

In considering the foreseeable future as it relates to the status of the emperor penguin, we analyzed the stressors acting on this species. We reviewed the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and, therefore, not yet manifested in a trend) that might affect the status of the species.

As discussed above in the five-factor analysis, we were unable to identify any significant trends with respect to the stressors we identified for this species: (1) Physical changes in the sea-ice and marine habitat; (2) potential introduction of avian diseases from outside the region; (3) potential fishery interactions with juveniles that range north into waters where commercial fishing may occur; and (4) possible oil pollution in the vicinity of summer molting areas or in the penguin's foraging range. There is no evidence that any of the stressors are growing in magnitude. Thus, the foreseeable future includes consideration of the ongoing effect of current stressors at comparable levels.

There remains the question of whether we can reliably predict future events (as opposed to ongoing trends) that will likely cause the species to become endangered. As we discuss in the finding below, we can reliably predict that physical changes in the sea-ice and marine habitats will continue to have an impact on individual colonies, especially smaller marginal colonies, but we have no reason to believe the physical changes will have population level impacts. Thus, the foreseeable future includes the consideration of the effects of such changes on the viability of the emperor penguin.

Emperor Penguin Finding

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the emperor penguin above. To determine whether the stressors identified above individually or collectively rise to the level of a threat such that the emperor penguin is in danger of extinction throughout its range or likely to become so within the foreseeable future, we considered whether the stressors were causing a long-term, population decline or were likely to do so in the future.

As discussed above, the overall emperor penguin population is estimated at 195,000 breeding pairs in approximately 45 colonies distributed around the perimeter of the Antarctic continent. We consider the population to be currently stable, and we are not aware of significant historical or current declines. Observed fluctuations in numbers at specific colonies, particularly smaller ones, are ongoing and have been attributed to physical events in the harsh Antarctic environment and seasonal, annual, and longer cyclical climatic or meteorological events. While observations of emperor penguin colonies are by nature constrained by the logistics of reaching remote sites, and many colonies are rarely visited or poorly described (Barber-Meyer *et al.* 2007a, p. 1,565), we are unaware of colony changes of significance to the overall population or of significant impacts to the emperor penguin's sea-ice or marine habitat. We also found no evidence that disease, fishery interaction, or oil pollution was affecting a decline in the emperor penguin population. Based on the best available data, we find that the identified stressors are not causing a long-term decline in the emperor penguin's population. Thus, we conclude that the species is neither threatened nor endangered due to factors causing ongoing population declines.

We also considered whether any of the stressors began recently enough that their effects are not yet manifested in a long-term decline, but are likely to have that effect in the future. As discussed above, the emperor penguin is an ice-dependent species, and changes in the physical environment can affect individual colonies. At the current time, based on the best available scientific evidence, we conclude that no current directional climatic changes are affecting the habitat of the emperor penguin, and we do not have sufficient scientific information to make reliable predictions as to declines of the species in the foreseeable future. Also, we are unaware of any reports of diseases in emperor penguins, fishery interactions with juvenile penguins, or oil spills that have affected emperor penguins. Therefore, the emperor penguin is neither threatened nor endangered due to threats that began recently enough that their effects are not yet manifested in a long-term decline.

Then, we considered whether any of the stressors were likely to increase within the foreseeable future, such that the species is likely to become endangered. As explained in greater detail in Factor A, climate model simulations of winter and summer mean sea-ice concentrations around Antarctica for the period 2080–2100 project declines in sea-ice concentrations from those observed in the 1980–2000 timeframe (Bracegirdle *et al.* 2008, p. 8; Meehl *et al.* 2007, p. 771). While these model simulations exhibit extensive deviation around mean predictions, they provide a general picture of future Antarctic sea-ice conditions in the range of the emperor penguin. They show winter sea-ice reductions by 2080–2100, with sea-ice concentrations remaining high around the bulk of the continent and highest in the Ross, Amundsen, and Weddell Seas, and around the Mawson Coast in the Indian Ocean sector. In the 2080–2100 timeframe, summer sea-ice concentrations also retreat, with sea ice persisting in the Ross and Weddell Seas and apparently greatly reduced or not persisting in the Indian Ocean sector.

The IPCC, Fourth Assessment Report (IPCC AR4), is very clear on the limitations of the climate models and their projections (Christenson 2007, p. 908; Randall *et al.* 2007, p. 616). It is difficult and premature to use these model results to make specific predictions about the sea-ice conditions in any particular region of emperor penguin habitat around Antarctica. This is particularly difficult when empirical evidence to date suggests that such continent-wide sea-ice declines have not yet begun. However, considering the species as a whole, these large-scale model predictions seem to indicate that emperor penguins, especially in the Ross and Weddell Seas, are likely to

continue to encounter suitable sea-ice habitat for breeding in the winter and molting in the summer in the 100-year timeframe (*i.e.*, 2080–2100). Therefore, we conclude that there is not sufficient evidence to find that climate change effects to the habitat of the emperor penguin are likely to be a threat to the emperor penguin in the foreseeable future. In addition, as discussed above, disease, fishery interaction with juveniles, and oil pollution are not likely to increase significantly in the future.

Next, we considered whether the species met the definition of an 'endangered' or 'threatened' species on the basis of its present or likely future numbers. The total population of 195,000 breeding pairs appears to be stable, and we are unaware of significant current declines. The population is widely distributed on the Antarctic Peninsula and the total number of penguins is not so low that the species is currently in danger of extinction.

Finally, we considered whether the species is likely to become endangered in the foreseeable future because stochastic events might reduce its current numbers to the point where its viability would be in question. Because this species is distributed in approximately 45 colonies on the Antarctic Peninsula, a future stochastic event that negatively affected the species would be unlikely to reduce the population to such a low level that the species would be in danger of extinction.

On the basis of analysis of the five factors and the best available scientific and commercial information, we find that the emperor penguin is not currently threatened or endangered in any portion of its range or likely to become so in the foreseeable future.

Distinct Population Segment

A discussion of distinct population segments and the Service policy can be found above in the southern rockhopper penguin Distinct Population Segment section.

Discreteness Analysis

A discussion of discreteness can be found above in the southern rockhopper penguin Discreteness Analysis section.

Emperor penguins have a continuous range from Marie Byrd Land east of the Ross Sea to the Weddell Sea. With respect to discreteness, while the emperor penguin can be found in three broadly defined areas of distribution, we are unaware of any marked separation between areas of abundance of the emperor penguin or of differences in physical, physiological, ecological, or behavioral factors among any groups within that range. We are unaware of any research on genetic or morphological discontinuity between any elements of the population. The range of the emperor penguin is entirely within the jurisdiction of the Antarctic Treaty and CCAMLR, except for one area of the Pacific Ocean where dispersing juveniles may spend some time outside of the CCAMLR zones. We find no significant differences in conservation status, habitat management, or regulatory mechanisms between any possible segment of the emperor penguin population. As a result of this analysis, we do not find any segments of the population of the emperor penguin that meet the criterion of discreteness for determination of a DPS. Therefore, we do not find a DPS for the emperor penguin.

Significant Portion of the Range Analysis

Having determined that the emperor penguin is not now in danger of extinction or likely to become so in the foreseeable future, we also considered whether there were any significant portions of its range where the species is in danger of extinction or likely to become so in the foreseeable future. See our analysis for the southern rockhopper penguin for how we make this determination.

First, we examined possible portions of the range that might be considered significant, and then we considered whether there were any portions of the range where the threats were different or concentrated in particular areas. Woehler (1993, p. 5) described three main areas, each of which encompasses a large area of the Antarctic coast: (1) The Weddell Sea and Dronning Maud Land; (2) Enderby and Princess Elizabeth lands; and (3) the Ross Sea. Within these areas, colonies are widely distributed along the coastline, and each is very isolated from its nearest neighbors. The area ''between'' these general regions is not a distinct geographical barrier, but an area where colonies are spread even more sparsely along the coast. In these areas, there is a longer distance between the individual colonies or ''links'' in the chain of colonies encircling most of the continent. During the period of molting, adult penguins range widely and often into the vicinity of other colonies. For example, Wienecke *et al.* (2004, p. 90) inferred potential mixing at sea between birds from four colonies along the Mawson Coast and suggested this was a potential vehicle for interbreeding of birds from different colonies.

In fact, the wider distribution of colonies between ''regions'' may actually be an artifact of the difficulty of visiting remote areas of the coast away from the few research stations that exist on the coast or difficulties of reaching these areas at a time when breeding can be detected (Kooyman 2002, p. 492). A recent discovery of a new colony along one of the longest stretches of Wilkes Land led researchers to predict that more colonies will be found in one of the longest gaps of recorded colonies. With each confirmed new discovery has come evidence indicating more colonies may exist. This would provide evidence of stronger connections between areas (Lea and Soper 2005, pp. 59–60; Melick and Bremmers 1995, p. 427) and greater potential for mixing or interbreeding between regions.

In the course of our review, we have discussed the declines that occurred at the small Cape Crozier and Beaufort Island colonies in the Western Ross Sea over the period of 2001–2005 as the result of the impact of iceberg B15A. The most recent data from 2005 indicated that the Beaufort Island colony had seen significant post-iceberg recovery in chick counts. After an initial breeding failure in 2001 at Cape Crozier, the year of iceberg impact, chick counts fluctuated from 247 in 2002, to 333 in 2003, to 475 in 2004, to 0 in 2005, and 340 chicks in 2006 (Barber-Meyer *et al.* 2007b, pp. 7, 9). Given the small current and historic size of these colonies (averaging 526 (Cape Crozier) and 896 (Beaufort Island) chicks over 22 years) and their location in the vicinity of four other larger emperor penguin colonies in the western Ross Sea with chick counts averaging from 2,843 (Franklin Island), to 19,776 (Cape Washington), to 23,859 (Coulman Island) and to 6,215 (Cape Roget) chicks) over the same period, we do not consider these colonies to represent a significant portion of the range of the emperor penguin.

Finding of Emperor Penguin SPR Analysis

Given the current stability of conditions for the emperor penguin throughout its range and the paucity of current stressors identified, we do not find through our five-factor analysis any stressor that has the potential to affect any one portion of the range of the emperor penguin differently than any other. With respect to the longer-term issue of changes in sea-ice cover, we do not find that current models provide sufficient predictive power to evaluate regional scenarios with confidence or to make distinctions as to the potential risks to any particular portion of the

range. For these reasons, we conclude that there are no portions of the emperor penguin's range that warrant further consideration as significant portions of the range.

Final Determination for the Emperor Penguin

On the basis of analysis of the five factors and the best available scientific and commercial information, we find that listing the emperor penguin as threatened or endangered under the Act in all or any significant portion of its range is not warranted.

Public Comments Solicited on the Proposed Rule To List the Southern Rockhopper Penguin in the Campbell Plateau Portion of Its Range

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial, trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by Federal governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the Campbell Plateau portion of the range of the New Zealand/Australia Distinct Population Segment (DPS) of the southern rockhopper penguin is not native to the United States, critical habitat is not being designated for these species under section 4 of the Act.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the Campbell Plateau portion of the range of the New Zealand/Australia Distinct Population Segment (DPS) of the southern rockhopper penguin. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

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

Peer Review

In accordance with our joint policy with National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period, on our specific assumptions and conclusions regarding this proposed rule.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see **DATES**). Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the

Federal Register at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

National Environmental Policy Act (NEPA)

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

Clarity of the Rule

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of the references cited in this notice is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The authors of this proposed rule are staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by adding a new entry for ''Penguin, southern rockhopper'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Penguin, southern rockhopper.	*Eudyptes chrysocome.*	Southern Ocean, South Atlantic Ocean, South Pacific Ocean, Southern Indian Ocean.	New Zealand—Campbell Plateau.	T		NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: December 2, 2008 .

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–29673 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–IA–2008–0118; 96000–1671–0000–B6]

RIN 1018–AW40

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Five Penguin Species Under the Endangered Species Act, and Proposed Rule To List the Five Penguin Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the yellow-eyed penguin (*Megadyptes antipodes*), white-flippered penguin (*Eudyptula minor albosignata*), Fiordland crested penguin (*Eudyptes pachyrhynchus*), Humboldt penguin (*Spheniscus humboldti*), and erect-crested penguin (*Eudyptes sclateri*) as threatened species under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to these species. This proposal also constitutes our 12-month finding on the petition to list these five species. The Service seeks data and comments from the public on this proposed rule.

DATES: We will accept comments and information received or postmarked on or before February 17, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 2, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS–R9–IA–2008–0118]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Pamela Hall, Branch Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial, trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires the Service to make a finding known as a ''90-day finding'' on whether a petition to add, remove, or reclassify a species from the list of endangered or threatened species has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If the Service finds that the petition has presented substantial information indicating that the requested action may be warranted (referred to as a positive finding), section 4(b)(3)(A) of the Act requires the Service to commence a status review of the species if one has not already been initiated under the Service's internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires the Service to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher-priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

In this notice, we announce a warranted 12-month finding and proposed rule to list five penguin taxa as threatened species under the Act, yellow-eyed penguin, white-flippered penguin, Fiordland crested penguin, Humboldt penguin, and erect-crested penguin. We will announce the 12-month findings for the African penguin (*Spheniscus demersus*), emperor penguin (*Aptenodytes forsteri*), southern rockhopper penguin (*Eudyptes chrysocome*), northern rockhopper penguin (*Eudyptes chrysolophus*), and macaroni penguin (*Eudyptes chrysolophus*) in one or more separate **Federal Register** notice(s).

Previous Federal Actions

On November 29, 2006, the Service received a petition from the Center for Biological Diversity to list 12 penguin species under the Act: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, snares crested penguin (*Eudyptes robustus*),

erect-crested penguin, macaroni penguin, royal penguin (*Eudyptes schlegeli*), white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Among them, the ranges of the 12 penguin species include Antarctica, Argentina, Australian Territory Islands, Chile, French Territory Islands, Namibia, New Zealand, Peru, South Africa, and United Kingdom Territory Islands. The petition is clearly identified as such, and contains detailed information on the natural history, biology, status, and distribution of each of the 12 species. It also contains information on what the petitioner reported as potential threats to the species from climate change and changes to the marine environment, commercial fishing activities, contaminants and pollution, guano extraction, habitat loss, hunting, nonnative predator species, and other factors. The petition also discusses existing regulatory mechanisms and the perceived inadequacies to protect these species.

In the **Federal Register** of July 11, 2007 (72 FR 37695), we published a 90-day finding in which we determined that the petition presented substantial scientific or commercial information to indicate that listing 10 species of penguins as endangered or threatened may be warranted: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, erect-crested penguin, macaroni penguin, white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Furthermore, we determined that the petition did not provide substantial scientific or commercial information indicating that listing the snares crested penguin and the royal penguin as threatened or endangered species may be warranted.

Following the publication of our 90-day finding on this petition, we initiated a status review to determine if listing each of the 10 species is warranted, and opened a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the 10 species of penguins. The public comment period closed on September 10, 2007. In addition, we attended the International Penguin Conference in Hobart, Tasmania, Australia, a quadrennial meeting of penguin scientists from September 3–7, 2007 (during the open public comment period), to gather information and to ensure that experts were aware of the status review and the open comment period. We also consulted with other agencies and range countries in an effort to gather the best available scientific and commercial information on these species.

During the public comment period, we received over 4,450 submissions from the public, concerned governmental agencies, the scientific community, industry, and other interested parties. Approximately 4,324 e-mails and 31 letters received by U.S. mail or facsimile were part of one letter-writing campaign and were substantively identical. Each letter supported listing under the Act, included a statement identifying ''the threat to penguins from global warming, industrial fishing, oil spills and other factors,'' and listed the 10 species included in the Service's 90-day finding. A further group of 73 letters included the same information plus information concerning the impact of ''abnormally warm ocean temperatures and diminished sea ice'' on penguin food availability and stated that this has led to population declines in southern rockhopper, Humboldt, African, and emperor penguins. These letters stated that the emperor penguin colony at Point Geologie has declined more than 50 percent due to global warming and provided information on krill declines in large areas of the Southern Ocean. They stated that continued warming over the coming decades will dramatically affect Antarctica, the sub-Antarctic islands, the Southern Ocean and the penguins dependent on these ecosystems for survival. A small number of general letters and e-mails drew particular attention to the conservation status of the southern rockhopper penguin in the Falkland Islands.

Twenty submissions provided detailed, substantive information on one or more of the 10 species. These included information from the governments, or government-affiliated scientists, of Argentina, Australia, Namibia, New Zealand, Peru, South Africa, and the United Kingdom, from scientists, from 18 members of the U.S. Congress, and from one non-governmental organization (the original petitioner).

On December 3, 2007, the Service received a 60-day Notice of Intent to Sue from the Center for Biological Diversity (CBD). CBD filed a complaint against the Department of the Interior on February 27, 2008, for failure to make a 12-month finding on the petition. On September 8, 2008, the Service entered into a Settlement Agreement with CBD, in which we agreed to submit to the **Federal Register** 12-month findings for the 10 species of penguins, including the five penguin taxa that are the subject of this proposed rule, on or before December 19, 2008.

We base our findings on a review of the best scientific and commercial information available, including all information received during the public comment period. Under section 4(b)(3)(B) of the Act, we are required to make a finding as to whether listing each of the 10 species of penguins is warranted, not warranted, or warranted but precluded by higher priority listing actions.

Species Information and Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Below is a species-by-species analysis of these five factors. The species are considered in the following order: Yellow-eyed penguin, white-flippered penguin, Fiordland crested penguin, Humboldt penguin, and erect-crested penguin.

Yellow-Eyed Penguin (Megadyptes antipodes)

Background

The yellow-eyed penguin, also known by its Maori name, hoiho, is the third largest of all penguin species, averaging around 24 pounds (lb) (11 kilograms (kg)) in weight. It is the only species in the monotypic genus *Megadyptes*. Yellow-eyed penguins breed on the southeast coast of New Zealand's South Island, from Banks Peninsula to Bluff at the southern tip; in Fouveaux Strait, and on Stewart and adjacent islands just 18.75 mi (30 km) from the southern tip of the New Zealand mainland; and at the sub-Antarctic Auckland and Campbell Islands, 300 mi (480 km) and 380 mi (608 km), respectively, south of the southern tip of the South Island. The distribution is thought to have moved north since the 1950s (McKinlay 2001, p. 8). The species is confined to the seas of the New Zealand region and forages over the continental shelf (Taylor 2000, p. 93).

Unlike more strongly colonial breeding penguin species, yellow-eyed penguins nest in relative seclusion, out of sight of humans and one another (Wright, 1998, pp. 9–10; Ratz and Thompson 1999, p. 205). Current terrestrial habitats range from native forest to grazed pasture (McKinlay 2001, p. 10). In some places, they nest in restored areas and, in other places, they nest in areas where livestock are still present (McKinlay 2001, p. 10). Prior to land clearing for agriculture by European settlers, historic habitat was in coastal forests and shrub margins (Marchant and Higgins 1990, p. 237).

The New Zealand Department of Conservation (DOC) published the Hoiho (*Megadyptes antipodes*) Recovery Plan (2000–2025) (Recovery Plan) in 2001 to state the New Zealand DOC's intentions for the conservation of this species, to guide the New Zealand DOC in its allocation of resources, and to promote discussion among the interested public (McKinlay 2001, p. 20). The goal of the Recovery Plan, which updates a 1985–1997 plan previously in place, is to increase yellow-eyed penguin numbers and have active community involvement in their conservation. The primary emphasis over the 25-year period is to ''retain, manage and create terrestrial habitat'' and to ''investigate the mortality of hoiho at sea'' (McKinlay 2001, p. 2).

Current estimates place the total population at 1,602 breeding pairs (Houston 2007, p. 3).

In the recent past, the number of breeding pairs has undergone dramatic periods of decline and fluctuation in parts of its range on the mainland of the South Island. Records suggest that the mainland populations declined at least 75 percent from the 1940s to 1988, when there were 380 to 400 breeding pairs (Darby and Seddon 1990, p. 59). There have been large fluctuations since a low of about 100 breeding pairs in the 1989–90 breeding season to over 600 in the 1995–96 breeding season (McKinlay 2001, p. 10). Current mainland counts indicate 450 breeding pairs on the southeast coast of the mainland of the South Island (Houston 2007, p. 3). As recently as the 1940s, there were reported to be individual breeding areas where penguin numbers were estimated in the hundreds; in 1988, only three breeding areas on the whole of the South Island had more than 30 breeding pairs (Darby and Seddon 1990, p. 59).

Just across the Fouveaux Strait at the southern tip of the South Island, at Stewart Island and nearby Codfish Island, yellow-eyed penguin populations numbered an estimated 178 pairs in the early 2000s (Massaro and Blair 2003, p. 110). While these populations are essentially contiguous with the mainland range, this is the first population estimate for this area based on a comprehensive count and it is lower than previous estimates. It is unclear whether numbers have declined in the past 2 decades or whether previous estimates, which extrapolated from partial surveys, were overestimates (Massaro and Blair 2003, p. 110), but evidence points to the latter. For example, Darby and Seddon (1990, p. 58) provided 1988 estimates of 470 to 600 breeding pairs which were extrapolated from density estimates. In the Hoiho Recovery plan, which reported these 1998 numbers, it is noted that, ''In the case of Stewart Island, these figures should be treated with a great deal of skepticism. Only a partial survey was completed in the early 1990's'' (McKinlay 2001, p. 8). Darby (2003, p. 148), one of the authors of the earlier estimate, subsequently reviewed survey data from the decade between 1984 and 1994 and revised the estimates for this region down to 220 to 400 pairs. In conclusion, while it is reported that the numbers of birds at Stewart and Codfish Islands have declined historically (Darby and Seddon 1990, p. 57), it is unclear to what extent declines are currently underway. Houston (2008, p. 1) reported numbers are stable in all areas of Stewart and Codfish Islands, except in the northeast region of Stewart Island where disease and starvation are impacting colonies, as discussed in detail below.

In the sub-Antarctic island range of the yellow-eyed penguin, there are an estimated 404 pairs on Campbell Island (down from 490 to 600 pairs in 1997); and 570 pairs on the Auckland Islands (Houston, 2007, p. 3).

The yellow-eyed penguin is listed as 'Endangered' by IUCN (International Union for Conservation of Nature) criteria (BirdLife International 2007, p. 1). When the New Zealand Action Plan for Seabird Conservation was completed in 2000, the species' IUCN Status was 'Vulnerable,' and it was listed as Category B (second priority) on the Molloy and Davis threat categories employed by the New Zealand DOC (Taylor 2000, p. 33). On this basis, the species was placed in the second tier in New Zealand's Action Plan for Seabird Conservation. The species is listed as 'acutely threatened—nationally vulnerable' on the New Zealand Threat Classification System List (Hitchmough *et al.* 2007, p. 45; Molloy *et al.* 2002, p. 20).

Summary of Factors Affecting the Yellow-Eyed Penguin

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Yellow-Eyed Penguin's Habitat or Range

Deforestation and the presence of grazing animals and agricultural activities have destroyed or degraded yellow-eyed penguin habitat throughout the species' range on the mainland South Island of New Zealand and much of the decline in breeding numbers can be attributed to loss of habitat (Darby and Seddon 1990, p. 60; Taylor 2000, p. 94). The primary historic habitat of the reclusive yellow-eyed penguin on the southeast coast of the South Island of New Zealand was the podocarp hardwood forest. During the period of European settlement of New Zealand, almost all of this forest has been cleared for agriculture, with forest clearing activities continuing into at least the 1970s (Sutherland 1999, p. 18). This has eliminated the bulk of the historic mainland breeding vegetation type for this species (Marchant and Higgins 1990, p. 237). With dense hardwood forest unavailable, the breeding range of yellow-eyed penguins has now spread into previously unoccupied habitats of scrubland, open woodland, and pasture (Marchant and Higgins 1990, p. 237). Here the breeding birds are exposed to new threats. In agricultural areas, breeding birds are exposed to trampling of nests by domestic cattle. For example, at the mainland Otago Peninsula in 1985, 25 out of 41 nests (60 percent) were destroyed by cattle (Marchant and Higgins 1990, p. 238). In some cases, efforts to fence penguin reserves to reduce trampling by cattle have created more favorable conditions for attack by introduced predators (see Factor C) (Alterio *et al.* 1998, p. 187). Yellow-eyed penguins are also more frequently exposed to fire in these new scrubland and agricultural habitats, such as a devastating fire in 1995 at the Te Rere Yellow-eyed Penguin Reserve in the southern portion of the mainland of the South Island, which killed more than 60 adult penguins out of a population of 100 adults at the reserve as well as fledgling chicks on shore (Sutherland 1999, p. 2; Taylor 2000, p. 94). Five years after the fire, there was little evidence of recovery of bird numbers at this reserve (Sutherland 1999, p. 3), although there had been considerable efforts to restore the land habitat through plantings, creation of firebreaks, and predator control.

Habitat recovery efforts, dating as far back as the late 1970s and set out in the 1985–1997 Hoiho Species Conservation

Plan (McKinlay 2001, p. 12), have focused on protecting and improving breeding habitats. Habitat has been purchased or reserved for penguins at the mainland Otago Peninsula, North Otago and Catlins sites, with 20 mainland breeding locations (out of an estimated 32 to 42) reported to be under ''statutory'' protection against further habitat loss (Ellis 1998, p. 91) and new, currently unoccupied areas have been acquired to provide the potential to support increased populations in the future (McKinlay 2001, p. 12). Fencing and re-vegetation projects have been carried out to restore nesting habitat to exclude grazing animals from breeding habitats (McKinlay 2001, p. 12). Despite these efforts, yellow-eyed penguin numbers on the mainland have not increased and have continued to fluctuate dramatically around low levels of abundance, with no sustained increases over the last 27 years (McKinlay 2001, p. 10). Although we did not rely on future conservation efforts by New Zealand in our analysis of threats, we note that efforts in the second phase of the Hoiho Recovery Plan continue to focus on managing, protecting, and restoring the terrestrial habitat of the yellow-eyed penguin (McKinlay 2001, p. 15).

On the offshore and sub-Antarctic islands of its range, feral cattle and sheep destroyed yellow-eyed penguin nests on Enderby and Campbell Islands (Taylor 2000, p. 94). All feral animals were removed from Enderby Island in 1993, and from Campbell Island in 1984 (cattle) and 1991 (sheep) (Taylor 2000, p. 95). There has been reported to be very little change in the terrestrial habitat of the yellow-eyed penguin habitat on these islands (McKinlay 2001, p. 7).

Significant public and private efforts have been undertaken in New Zealand over past decades to protect and restore yellow-eyed penguin breeding habitat on the mainland South Island. Individual locations remain susceptible to fire or other localized events, but the threat of manmade habitat destruction has been reduced over the dispersed range of the species on the mainland South Island. Nevertheless, recovery goals for mainland populations have not been achieved. Specifically, the goal in the 1985–1997 recovery plan of maintaining two managed mainland populations, each with a minimum of 500 pairs was not achieved (McKinlay 2001, p. 13) and, 8 years into the 2000–2025 recovery plan, the long-term goal to increase yellow-eyed penguin populations remains elusive. In our analysis of other threat factors, in particular Factor C, we will further examine why these goals have not been met. The species' island breeding habitats have either not been impacted or, if historically impacted, the causes of disturbance have been removed. For this reason, we find that the present or threatened destruction, modification, or curtailment of its terrestrial habitat or range is not a threat to the species in any portion of its range.

In the marine environment, yellow-eyed penguins forage locally around colony sites during the breeding season. They feed on a variety of fish and squid species including opal fish (*Hemerocoetes monopterygius*), blue cod (*Parapercis colias*), sprat (*Sprattus antipodum*), silverside (*Argentina elongata*), red cod (*Pseudophycis bachus*), and arrow squid (*Nototodarus sloani*). Birds tracked from breeding areas on the Otago Peninsula on the mainland of the South Island foraged over the continental shelf in waters from 131 to 262 feet (ft) (40 to 80 meters (m)) deep. In foraging trips lasting on average 14 hours, they ranged a median of 8 mi (13 km) from the breeding area (Moore 1999, p. 49). Foraging ranges utilized by birds at the offshore Stewart Island were quite small (ca. 7.9 mi^2 (20.4 km^2)) compared to the areas used by birds at the adjacent Codfish Islands (ca. 208 mi^2 (540 km^2)) (Mattern *et al.* 2007, p. 115).

There is evidence that modification of the marine environment by human activities may reduce the viability of foraging areas for yellow-eyed penguins on a local scale. Mainland population declines in 1986–1987 have been attributed to ''changes in the marine environment and failure of quality food'' (McKinlay 2001 p. 9), but we have not found evidence attributing recent population changes at either mainland colonies or the more distant Campbell and Auckland Islands' colonies to changes in the marine environment.

Mattern *et al.* (2007, p. 115) concluded that degradation of benthic habitat by commercial oyster dredging is limiting viable foraging habitat and increasing competition for food for a small portion of Stewart Island penguins breeding in areas on the northeast coast of that island, resulting in chick starvation (King 2007, p. 106). Chick starvation and disease are the two most important causes of chick death at the northeast Stewart Island study colonies (King 2007, p. 106), and poor chick survival and, presumably, poor recruitment of new breeding pairs, is the main cause of a decline in the number of breeding pairs (King 2007, p. 106). At the adjacent Codfish Island, where food is more abundant and diverse (Browne *et al.* 2007, p. 81), chicks have been found to flourish even in the presence of disease. Browne *et al.* (2007, p. 81) found dietary differences between the two islands, with Stewart Island chicks receiving meals comprised of fewer species and less energetic value than those at Codfish Island. The foraging grounds of these two groups do not overlap, suggesting that local-scale influences in the marine environment (Mattern *et al.* 2007, p. 115) are impacting the Stewart Island penguins. These authors concluded that degradation of benthic habitat by commercial oyster dredging is limiting foraging habitat for yellow-eyed penguins at Stewart Island. The 178 pairs on Stewart Island and adjacent islands make up 11 percent of the total current population, and only a portion of this number are affected by the reported degradation of benthic habitat by fisheries activities. Therefore, while the present or threatened destruction, modification, or curtailment of its marine habitat or range by commercial oyster dredging is a threat to chick survival for some colonies at Stewart Island, we find that the present or threatened destruction, modification, or curtailment of its marine habitat or range is not a threat to the species in any other portion of its range.

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

The yellow-eyed penguin has become an important part of the ecotourism industry on the mainland South Island of New Zealand, particularly around the Otago Peninsula and the Southland areas. We are not aware of tourism activities in the island portions of the range of the yellow-eyed penguin. Yellow-eyed penguins are extremely wary of human presence and will not land on the beach if humans are in sight. They select nest-sites with dense vegetative cover and a high degree of concealment (Marchant and Higgins 1990, p. 240) and prefer to be shaded from the sun and concealed from their neighbors (Seddon and Davis 1989, p. 653). Given these secretive habits, research has focused on the potential of increasing tourism to impact yellow-eyed penguins. In one study, yellow-eyed penguins showed lower breeding success in areas of unregulated tourism than in those areas visited infrequently for monitoring purposes only (McClung *et al.* 2004, p. 279). In another study, no impacts of tourist presence were found (Ratz and Thompson 1999, p. 208). In another study disturbance was associated with increased corticosterone levels (associated with stress) in parents and lower fledgling weights of chicks

(Ellenberg *et al.* 2007a, p. 54). The key impact from human disturbance described in the Recovery Plan is that incoming yellow-eyed penguins may not come ashore or may leave the shore prematurely after landing. These and more recent studies (Ellenberg *et al.* 2007b, p. 31) have provided information that is already being used in the design of visitor management and control procedures at yellow-eyed penguin viewing areas to minimize disturbance to breeding pairs. The Hoiho Recovery Plan identifies 14 mainland areas where current practices of viewing yellow-eyed penguins already minimize tourism impacts on yellow-eyed penguins and recommends that practices in these areas remain unchanged. Eight additional areas are identified as suitable for development as tourist destinations to observe yellow-eyed penguins where minimization of tourism impacts can be achieved (McKinlay 2001, p. 21). These existing lists are being used to guide the approval of tourism concessions by the New Zealand DOC. Overall, under the plan, tourism is being directed to those sites where impacts of tourism can be minimized.

Tourism is the primary commercial, recreational, and educational use of the yellow-eyed penguin. We have found no reports of impacts on this species from scientific research or any other commercial, recreational, scientific, or educational purposes.

We find that the New Zealand DOC through its Hoiho Recovery Plan has put in place measures, in cooperation with conservation, tourism, and industry stakeholders, to understand and minimize the impacts of tourism activities on the yellow-eyed penguin. For this reason, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the yellow-eyed penguin in any portion of its range.

Factor C. Disease or Predation

Disease has been identified as a factor influencing both adult and chick mortality in yellow-eyed penguins. We have identified reports of one major disease outbreak involving adult penguins and ongoing reports of disease in yellow-eyed penguin chicks.

Initial investigation of a major die-off of adult yellow-eyed penguins at Otago Peninsula in 1990 failed to identify the etiology of the deaths (Gill and Darby 1993, p. 39). This involved mortality of 150 adult birds or 31 percent of a mainland population estimated at the time to include 240 breeding pairs. Subsequent investigation of avian malaria seroprevalence among yellow-eyed penguins found that the mortality features, climatological data, and pathological and serological findings at the time conformed to those known for avian malaria outbreaks (Graczyck *et al.* 1995, p. 404), leading the authors to conclude that avian malaria was responsible for the die-off. These authors associated the outbreak with a period of warmer than usual sea and land temperatures. More recently, Sturrock and Tompkins (2007, pp. 158–160) looked for DNA from malarial parasites in yellow-eyed penguins and found that all samples were negative. This suggests that earlier serological tests were overestimating the prevalence of infection or that infection was transient or occurred in age classes not sampled in their current study. While this raises questions as to the role of avian malaria in the 1990 mortality event, the authors noted, given the spread of avian malaria throughout New Zealand and previous results indicating infection and mortality in yellow-eyed penguins, that continued monitoring of malarial parasites in this species should be considered an essential part of their management until the issue of their susceptibility is resolved. There have been no subsequent disease-related die-offs of adult yellow-eyed penguins at mainland colonies since the 1990s (Houston 2007, p. 3).

The haemoparasite *Leucocytozoon*, a blood parasite spread by blackflies, was first identified in yellow-eyed penguins at the offshore Stewart and Codfish Islands in 2004 (Hill *et al.* 2007, p. 96) and was one contributor to high chick mortality at Stewart Islands in 2006–07, which involved loss of all 32 chicks at the northeast Anglem Coast monitoring area of the Yellow-eyed Penguin Trust. This disease may have spread from Fiordland crested penguins which are known to house this disease (Taylor 2000, p. 59). Chick mortality was also reported at this area in 2007–08 (Houston, pers. comm. 2008). It is not clear if the *Leucocytozoon* predisposes animals to succumb from other factors, such as starvation or concurrent infection with other pathogens (such as diphtheritic stomatitis), or is the factor that ultimately kills them, but over 40 percent of chick mortality over three breeding seasons at Stewart Island study colonies was attributed to disease (King 2007, p. 106). The survival of infected chicks at nearby Codfish Island, where food is more abundant, indicates that nutrition can make a difference in whether mortality occurs in diseased chicks (Browne *et al.* 2007, p. 81; King 2007, p. 106). Healthy adults who are infected, but not compromised, by this endemic disease provide a reservoir for infection of new chicks through the vector of blackflies. No viable method of treatment for active infections in either chicks or adults has been identified.

At the mainland Otago Peninsula in the 2004–05 breeding season, an outbreak of *Corynebacterium* infection (diptheritic stomatitis, *Corynebacterium amycolatum*) caused high mortality in yellow-eyed penguin chicks (Houston 2005, p. 267) at many colonies in the mainland range and on Stewart Island (where it may have been a contributing factor to the mortalities discussed above from *Leucocytozoon*). Mortality was not recorded at Codfish Island or at the sub-Antarctic islands (Auckland and Campbell Islands). The disease produced lesions in the chicks' mouths and upper respiratory tract and made it difficult for the chicks to swallow. All chicks at Otago displayed the symptoms with survival being better in older, larger chicks. Treatment with broad spectrum antibiotics was reported to have achieved ''varying results,'' and it is not known how this disease is triggered (Houston 2005, p. 267).

In summary, disease has seriously impacted both mainland and Stewart Island populations of yellow-eyed penguins over the past two decades. A mainland mortality event in 1990, attributed to avian malaria, killed 31 percent of the mainland adult population of yellow-eyed penguin. While there is lack of scientific certainty over the impact of malaria on yellow-eyed penguins, the overall spread of this disease, the small population size of yellow-eyed penguins, and evidence of its presence in their populations lead us to conclude that this is an ongoing threat. Disease events contributed to or caused mortality of at least 20 percent of chicks at Stewart Island in 2006–07 and complete mortality in local colonies. The continuing contribution to yellow-eyed penguin chick mortality from *Leucocytozoon* and diptheritic stomatitus at Stewart Island and the recent high mortalities of mainland chicks from diptheritic stomatitis indicate the potential for future emergence or intensified outbreaks of these or new diseases. The emergence of disease at both mainland and Stewart Island populations in similar time periods and the likelihood that Leucocytozoon was spread to the yellow-eyed penguin from the Fiordland crested penguin point out the significant possibility of future transmission of known diseases between colonies or between species, and the possibility of emergence of new diseases at any of the four identified breeding locations of the yellow-eyed penguin. Therefore, on the

basis of the best available scientific information, we conclude that disease is a threat to the yellow-eyed penguin throughout all of its range.

Predation of chicks, and sometimes adults, by introduced stoats (*Mustela erminea*), ferrets (*M. furo*), cats (*Felis catus*), and dogs (*Canis domesticus*) is the principal cause of yellow-eyed penguin chick mortality on the South Island with up to 88.5 percent of chicks in any given habitat being killed by predators (Alterio *et al.* 1998, p. 187; Clapperton 2001, p. 187, 195; Darby and Seddon 1990, p. 45; Marchant and Higgins 1990, p. 237; McKinlay *et al.* 1997, p. 31; Ratz *et al.* 1999, p. 151; Taylor 2000, pp. 93–94). In a 6-year, long-term study of breeding success of yellow-eyed penguins in mainland breeding areas, predation accounted for 20 percent of chick mortality overall, and was as high as 63 percent overall in one breeding season (Darby and Seddon 1990, p. 53). Proximity to farmland and grazed pastures was found to be a factor accounting for high predator densities and high predation with 88 percent predation at one breeding area adjacent to farmland (Darby and Seddon 1990, p. 57). In a study of cause of death of 114 yellow-eyed penguin carcasses found on the South Island mainland between 1996 and 2003, one-quarter were attributed to predation, with dogs and mustelids the most common predators (Hocken 2005, p. 4).

In light of this threat, protection of chicks from predators is a primary objective under the second Hoiho Recovery Plan (2000–2025). Approaches to predator control are being established and refined at breeding sites on the mainland (McKinlay *et al.* 1997, pp. 31–35), targeting ferrets, stoats, and cats. The New Zealand DOC has concluded that this is a threat which may be manageable with trapping or other cost-effective methods to protect chicks in nests (McKinlay 2001, p. 18). Analysis in the recovery plan indicates that a minimum protection of 43 percent of nests would be needed to ensure population growth (McKinlay 2001, p. 18). The recovery plan establishes a goal of protecting 50 percent of all South Island nests from predators between 2000 and 2025. Where intensive predator control regimes have been put in place, they are effective (McKinlay *et al.* 1997, p. 31), capturing 69 to 82 percent of predators present. In a long-term analysis of three closely monitored study colonies, which make up roughly half the nests at the Otago Peninsula and about 10 to 20 percent of the nests on the mainland, Lalas *et al.* (2007, p.237) found that the threat of predation on chicks by introduced terrestrial mammals had been mitigated by trapping and shooting, and no substantial predation events had occurred between 1984 and 2005. We do not have information on the extent to which anti-predator measures are in place for the remaining 80 to 90 percent of yellow-eyed penguin nests on the mainland of the South Island of New Zealand. Other efforts to remove or discourage predation have not been as successful. A widely applied approach of establishing ''vegetation buffers'' around yellow-eyed penguin nest sites to act as barriers between predators and their prey was found to actually increase predation rates. Predators preferred the buffer areas and utilized penguin paths within them to gain easy access to penguin nests (Alterio *et al.* 1998, p. 189). Given these conflicting reports, we can not evaluate to what extent management efforts are moving toward the goal of protection of 50 percent of all yellow-eyed penguin nests on the mainland. Therefore, we conclude that predation from introduced terrestrial mammals is a threat to the yellow-eyed penguin on the mainland South Island of New Zealand.

Offshore, at Stewart and Codfish Islands, there are a number of introduced predators, but mustelids are absent. Initial research indicated that the presence of feral cats could be depressing the population of yellow-eyed penguins at Stewart Island relative to adjacent islands without feral cats (Massaro and Blair 2003, p. 107). Subsequent research has not found direct evidence of predation by Stewart Island's large population of feral cats (King 2007, p. 106). Weka (*Gallirallus australis*) have been eradicated from Codfish Island, but may prey on eggs and small chicks in the Fouveaux Strait and some breeding islands in the Stewart Island region at the southern tip of New Zealand (Darby 2003, p. 152; Massaro and Blair 2003, p. 111).

Some islands, including the Codfish and Bravo group, have Norway rats (*Rattus norvegicus, R. exulans, R. rattus*), which are thought to prey on small chicks (Massaro and Blair 2003, p. 107). Even though there are Norway rats present at Campbell Island, evidence of egg or chick predation by terrestrial mammalian predators was not observed at during two breeding seasons (Taylor 2000, pp. 93–94).

At Auckland Island, it is reported that feral pigs (*Sus scrofa*) probably kill adults and chicks (Taylor 2000, pp. 93).

Even as objectives are set to attempt to bring terrestrial predators under more effective control, an emerging threat at Otago Peninsula is predation by the New Zealand sea lion (*Phocarctos hookeri*). Since 1985, sea lions have re-colonized the area and predation of yellow-eyed penguins has increased. Penguin remains have been more frequently found in sea lion scat samples. Two penguin breeding sites in close proximity to the founding nursery area of female sea lions have been particularly impacted. The number of nests at these two colonies has declined sharply since predation was first observed and when colonization by female sea lions first took place. As discussed above, these two sites are among those which have been intensively and successfully protected from introduced terrestrial predators between 1984 and 2005 (Lalas *et al.* 2007, p. 237) so declines can be directly attributed to sea lion predation. The predation has been attributed to one female, the daughter of the founding animal. Population modeling of the effect of continued annual kills by sea lions predicts the collapse of small populations (fewer than 100 nests) subject to targeted predation by one individual sea lion. At the current time, none of the 14 breeding sites at Otago Peninsula exceed 100 nests. No action has been taken to control this predation although removal of predatory individuals has been suggested (Lalas *et al.* 2007, pp. 235–246). Similar predation by New Zealand sea lions was observed at Campbell Island in 1988 and was considered a probable cause for local declines there (Moore and Moffat 1992, p. 68). Some authors have speculated that New Zealand sea lion may take yellow-eyed penguins at Stewart Island, but there are no documented reports (Darby 2003, p. 152).

Because of its continued role in suppressing the recovery of yellow-eyed penguin populations and because of the continued impact of introduced terrestrial and avian predators and native marine predators, we find that predation is a threat to the yellow-eyed penguin throughout all of its range.

In summary, we find that disease and predation, which have impacted both mainland and island populations, are a threat to the yellow-eyed penguin throughout all of its range now and in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

All but seven seabird species in New Zealand, including the yellow-eyed penguin, are protected under New Zealand's Wildlife Act of 1953, which gives absolute protection to wildlife throughout New Zealand and its surrounding marine economic zone. No one may kill or have in their possession

any living or dead protected wildlife unless they have appropriate authority.

The species inhabits areas within Rakiura National Park, which encompasses Stewart and Codfish Island (Whenua Hou). Under section 4 of the National Parks Act of 1980 and Park bylaws, ''the native plants and animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be eradicated.'' In addition to national protection, all New Zealand sub-Antarctic islands, including Auckland and Campbell Islands, are inscribed on the World Heritage List (2008, p.16). We do not have information to evaluate whether and to what extent these National Park bylaws reduce threats to the yellow-eyed penguin in these areas.

The yellow-eyed penguin is considered a 'threatened' species and measures for its protection are outlined under the Action Plan for Seabird Conservation in New Zealand of the New Zealand DOC (Taylor 2000, pp. 93–94) (see discussion of Factor D for Fiordland crested penguin). Ellis *et al.* (1998, p. 91) reported that habitat has been purchased or reserved for penguins at the mainland Otago Peninsula, North Otago and Catlins sites, with 20 mainland breeding locations (out of an estimated 32 to 42 sites) reported to be under ''statutory protection'' against further habitat loss. We have not found a complete breakdown of the types of legal protection in place for these areas, of the percent of the total mainland population encompassed under such areas, or of the effectiveness, where they are in place, of such regulatory mechanisms in reducing the identified threats to the yellow-eyed penguin.

As a consequence of its threatened designation, a Hoiho Recovery Plan 2000–2025 has been developed. This plan builds on the first 1985–1997 phase of Hoiho Recovery efforts (McKinlay 2001, pp. 12–13). This plan lays out future objectives and actions to meet the long-term goal of increasing yellow-eyed penguin populations and achieving active community engagement in their conservation (McKinlay 2001, pp. 1–24). The Recovery Plan outlines proposed measures to address chronic factors historically affecting individual colonies, such as destruction or damage to colonies due to fire, livestock grazing and other manmade disturbance, predation by introduced predators, disease, and the impact of human disturbance (especially through tourism activities) (McKinlay 2001, pp. 15–22). Another objective of the plan is to providing enduring legal guarantees of protections for breeding habitat through reservation or covenant (McKinlay 2001, p. 12). Best available information does not allow us to evaluate in detail the progress in meeting the eight objectives of the 2000–2025 recovery plan; although, as discussed elsewhere, the population recovery goals of the original earlier plan continue to be hard to reach for all but the Auckland Islands, and the development of anti-predator measures is an ongoing challenge. We are aware, as discussed in analysis of other threat factors that concerted public and private efforts on these objectives continue. However, in the absence of concrete information on implementation of the plan and reports on its efficacy, we did not rely on future measures proposed in the Hoiho Recovery Plan in our threat factor analysis.

New Zealand has in place The New Zealand Marine Oil Spill Response Strategy, which provides the overall framework to mount a response to marine oil spills that occur within New Zealand's area of responsibility. The aim of the strategy is to minimize the effects of oil on the environment and people's safety and health. The National Oil Spill Contingency Plan promotes a planned and nationally coordinated response to any marine oil spill that is beyond the capability of a local regional council or outside the region of any local council (Maritime New Zealand 2007, p. 1). As discussed below under Factor E, rapid containment of spills in remote areas and effective triage response under this plan has shown these to be effective regulatory mechanisms (New Zealand Wildlife Health Center 2007, p. 2; Taylor 2000, p. 94).

Following a review of the best available information, which indicates that despite the existence of general, or in some cases specific, protective or regulatory measures to address the threats to the yellow-eyed penguin, predation pressure, fisheries bycatch, local marine habitat modification through oyster dredging, and disease continue as threats to the yellow-eyed penguin, we find that inadequacy of regulatory mechanisms is a threat to the yellow-eyed penguin throughout all of its range.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

The Action Plan for Seabird Conservation in New Zealand (Taylor 2000, p. 94) reported that there is no evidence that commercial or recreational fishing is impacting prey availability for the yellow-eyed penguin. Under Factor A, we have concluded that habitat modification by commercial oyster dredging is a threat to local yellow-eyed penguin colonies at Stewart Island, but we have not found evidence of direct competition for prey between yellow-eyed penguins and human fisheries activities. While following penguins from mainland colonies fitted with Global Positioning System (GPS) dive loggers, Mattern *et al.* (2005, p. 270) noted that foraging tracks of adult penguins were remarkably straight. They hypothesized that individuals were following dredge marks from bottom trawls, but there is not information to indicate that fishery interaction has any impact on the penguins. Therefore, we find that competition with fisheries is not a threat to this species in any portion of its range.

New Zealand's National Plan of Action to Reduce the Incidental Catch of Seabirds in New Zealand Fisheries, prepared by the Ministry of Fisheries and New Zealand DOC (MOF and DOC 2004, p. 57), listed yellow-eyed penguins as being incidentally caught in inshore set fishing nets (set nets). A study of bycatch of yellow-eyed penguins along the southeast coast of South Island of New Zealand from 1979–1997 identified gill-net entanglement as a significant threat to the species (Darby and Dawson 2000, p. 327). Mortality was highest in areas adjacent to the Otago Peninsula breeding grounds, with about 55 of 72 gill-netted penguins found in this area (Darby and Dawson 2000, p. 329). An analysis of 185 carcasses collected between 1975 and 1997 found that 42 (23 percent) showed features consistent with mortality from gill-net entanglement. In that period, a further 30 entanglements were reported to officials (Darby and Dawson 2000, p. 327). While these numbers may appear small for the timeframe under study, the authors consider them to be underestimates of actual bycatch mortality (Darby and Dawson 2000, p. 331) and, given the small sizes of local yellow-eyed penguin concentrations, significant to the maintenance of breeding colonies and the survival of adults in the population. Most entanglements reported by Darby and Dawson (2000, p. 331) are from a small geographic area at or near the Otago Peninsula, near the small concentrations of yellow-eyed penguins (in 1996 for example, there were approximately 350 breeding pairs of yellow-eyed penguin on the Otago Peninsula). Given these small numbers, the authors report that bycatch may be severe at a local scale; one small colony inside the entrance to

Otago harbor suffered 7 bycatch mortalities and was subsequently abandoned. The death of 32 birds along the north Otago coast over the period of the study is significant in light of the reported breeding population of only 39 pairs in this region, and, at Banks Peninsula, 7 reported mortalities occurred where there were only 8–10 breeding pairs (Darby and Dawson 2000, p. 331).

In response to bycatch of various species, set net bans have been implemented in the vicinity of the Banks Peninsula, which has been designated as a marine reserve. The 4-month set net ban is primarily designed to reduce entanglements of Hector's dolphin (*Cephalorhynchus hectori*), as well as yellow-eyed penguins and white-flippered penguins (NZ DOC 2007, p. 1). Early reports were that this ban had been widely disregarded (Taylor 2000, p. 70), and based on the best available information we are unable conclude that these measures at the Banks Peninsula have been effective in reducing bycatch of yellow-eyed penguins. In fact, the Hoiho Recovery Plan states that bycatch is likely the largest source of mortality at sea and outlines the need for research and liaison with fisheries managers to inform implementation of further measures to reduce the impact of fishing operations on yellow-eyed penguins (McKinlay 2001, p. 19). We do not have information on whether these proposed measures have been implemented. Therefore, for purposes of this analysis, we did not rely on these proposed measures to evaluate incidental take from gill-net entanglement.

With respect to the potential for bycatch from long-line fisheries, which impact a number of other New Zealand seabird species, the Action Plan for Seabird Conservation indicates it is unlikely that yellow-eyed penguins will be caught in long-lines and the National Plan of Action to Reduce the Incidental Catch of Seabirds in New Zealand Fisheries does not identify this as a threat to this species (MOF and DOC 2004, p. 57).

Based on the significant gill-net bycatch mortality of yellow-eyed penguins along the southeast coast of the South Island of New Zealand, which has the potential to impact over a quarter of the population, we find that fisheries bycatch is a threat to the mainland populations of the yellow-eyed penguin, but is not a threat in any other portion of its range.

We have examined the possibility that oil and chemical spills may impact yellow-eyed penguins. Such spills, should they occur and not be effectively managed, can have direct effects on marine seabirds such as the yellow-eyed penguin. In the range of the yellow-eyed penguin, the sub-Antarctic Campbell and Auckland Islands are remote from shipping activity and the consequent risk of oil or chemical spills is low. The Stewart Islands populations at the southern end of New Zealand and the southeast mainland coast populations are in closer proximity to vessel traffic and human industrial activities which may increase the possibility of oil or chemical spill impacts. Much of the range of the yellow-eyed penguin on mainland New Zealand lies near Dunedin, a South Island port city, and a few individuals breed at Banks Peninsula just to the south of Christchurch, another major South Island port. While yellow-eyed penguins do not breed in large colonies, their locally distributed breeding groups are found in a few critical areas of the coast of the South Island and its offshore islands. A spill event near the mainland South Island city of Dunedin and the adjacent Otago Peninsula could have a major impact on the 14 breeding sites documented there. Non-breeding season distribution along the same coastlines provides the potential for significant numbers of birds to encounter spills at that time as well. Two spills have been recorded in this overall region. In March 2000, the fishing vessel *Seafresh 1* sank in Hanson Bay on the east coast of Chatham Island and released 66 T (60 t) of diesel fuel. Rapid containment of the oil at this remote location prevented any wildlife casualties (New Zealand Wildlife Health Center 2007, p. 2). The same source reported that in 1998 the fishing vessel *Don Wong 529* ran aground at Breaksea Islets off Stewart Island. Approximately 331 T (300 t) of marine diesel was spilled along with smaller amounts of lubricating and waste oils. With favorable weather conditions and establishment of triage response, no casualties of the pollution event were discovered (Taylor 2000, p. 94). There is no doubt that an oil spill near a breeding colony could have a major effect on this species (Taylor 2000, p. 94). However, based on the wide distribution of yellow-eyed penguins around the mainland South Island, offshore, and sub-Antarctic islands, the low number of previous incidents around New Zealand, and the fact that each was effectively contained under the New Zealand Marine Oil Spill Response Strategy and resulted in no mortality or evidence of impacts on the population, we find that oil and chemical spills are not a threat to the yellow-eyed penguin in any portion of its range.

In summary, we find that fisheries bycatch is a threat to mainland populations of the yellow-eyed penguin in the foreseeable future, but is not a threat in any other portion of the range of the species.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this proposed rule, we defined the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the yellow-eyed penguin, we considered the threats acting on the yellow-eyed penguin, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends).

With respect to the yellow-eyed penguin, the available data indicate that historical declines, which were the result of habitat loss and predation, continue in the face of the current threats of predation from introduced predators, disease, and the inadequacy of regulatory mechanisms throughout the species' range. New or recurrent disease outbreaks are reasonably likely to occur in the future that may result in further declines throughout the species' range. There is no information to suggest that the current effects of predation by introduced predators will be reduced in the foreseeable future, nor that regulatory mechanisms will become sufficient to address or ameliorate the threats to the species. Furthermore, the threat of predation by endemic sea lions is impacting populations on the mainland and at the Campbell Islands, and we have no reason to believe this threat will not continue to reduce population numbers of the yellow-eyed penguin in that area. Bycatch in coastal gill-net fisheries is a threat to yellow-eyed penguins foraging from mainland breeding areas, despite efforts to regulate this activity; therefore we expect this threat to continue into the

foreseeable future. Based on our analysis of the best available information, we have no reason to believe that population trends will change in the future, nor that the effects of current threats acting on the species will be ameliorated in the foreseeable future.

Yellow-Eyed Penguin Finding

Yellow-eyed penguin populations number approximately 1,602 breeding pairs. After severe declines from the 1940s, mainland yellow-eyed penguin populations have fluctuated at low numbers since the late 1980s. The total mainland population of 450 breeding pairs (Houston 2007, p. 3) is well below single-year levels recorded in 1985 and 1997 (600 to 650 pairs) and well below historical estimates of abundance (Darby and Seddon 1990, p. 59). At Stewart Island and its adjacent islands, there are an estimated 178 breeding pairs. There are an estimated 404 pairs at Campbell Island where numbers have declined since 1997, and 570 pairs at the Auckland Islands.

The primary documented factor affecting yellow-eyed penguin populations is predation by introduced and native predators within the species' breeding range. The impact of predators is inferred from the decline of this species during the period of introduced predator invasion and from documentation of continuing predator presence and predation. New Zealand laws and the bylaws of the national parks, which encompass some of the range of the yellow-eyed penguin, provide some protection for this species, as well as programs for eradication of nonnative invasive species. However, while complete eradication of predators in isolated island habitats may be possible, permanent removal of the introduced mammalian predators on the mainland has not been achieved, and the ongoing threat of predation remains. Both intensive trapping and physical protection of significant breeding groups through fencing have proven successful for yellow-eyed penguins at local scales, but existing efforts require ongoing commitment, and not all breeding areas have been protected. More recently, local-scale predation by New Zealand sea lions reestablishing a breeding presence at the mainland Otago Peninsula has become a threat to yellow-eyed penguin populations as this rare and endemic Otariid species recovers. This threat has also been documented for Campbell Island. The threat of predation by introduced species or recovering native species is a significant risk for yellow-eyed penguins.

Disease is an ongoing factor negatively influencing yellow-eyed penguin populations. Disease has seriously impacted both mainland and Stewart Island colonies of yellow-eyed penguins in the last two decades. In mainland populations, avian malaria is thought to have led to mortality of 31 percent of the adult population on the mainland of New Zealand in the early 1990s and an outbreak of *Cornybacterium* infection cause high chick mortality in 2004–2005 and contributed to disease mortality at Stewart Island. Entire cohorts of penguin chicks at one breeding location at Stewart Island have been lost to the pathogen *Leucocytozoon*, especially at times when other diseases and other stress factors, such as food shortages, were present. Given the ongoing history of disease outbreaks at both island and mainland locations, it is highly likely that new or renewed disease outbreaks will impact this species in the foreseeable future with possible large-scale mortality of adults and chicks and consequent breeding failures and population reductions. Emergence or recurrence of such outbreaks on the mainland, where there are currently 450 breeding pairs, or at island breeding areas could result in severe reductions for a species which totals only 1,602 breeding pairs range wide.

The yellow-eyed penguin is also impacted by ongoing activities in the marine environment. Oyster dredging on the sea floor has been implicated in food shortages at penguin colonies at Stewart Island, which combined with disease, has led to years of 100 percent mortality of chicks at local breeding sites there. Bycatch in coastal gill-net fisheries is a threat to yellow-eyed penguins foraging from mainland breeding areas despite efforts to regulate this activity.

We considered whether pollution from oil or chemicals is a threat to the yellow-eyed penguin. Documented oil spill events have occurred within the range of this species in the last decade, but there have been no documented direct or indirect impacts on this species. Such events are rare and New Zealand oil spill response and contingency plans have been shown to be in place, and effective, in previous events; therefore, we have not identified this as a threat to the yellow-eyed penguin.

The yellow-eyed penguin has experienced consistent widespread declines in the past, and declines and low population numbers persist. This species has a relatively high reproductive rate (compared to other penguins) and substantial longevity. Despite these life history traits, which should provide the ability to rebound, and despite public and private efforts undertaken in New Zealand to address the threats to its survival, the species has not recovered. Historical declines resulting from habitat loss and predation continue in the face of the continued impact of predators, disease, and the inadequacy of regulatory mechanisms throughout its range. The threat of predation by endemic sea lions is impacting populations on the mainland and at the Campbell Islands. New or recurrent disease outbreaks are likely to cause further declines throughout the range in the foreseeable future. Just offshore of the southern tip of the South Island, local breeding groups at Stewart Island have been impacted by disease in concert with food shortages brought on by alteration of their marine habitat. At the Auckland Islands, the population has remained stable, but exists at low numbers and, like all yellow-eyed penguin populations, is susceptible to the emergence of disease and impacts of predation. Because of the species' low population size (1,602 breeding pairs), its continued decline in 3 out of 4 areas, and the threats of predation by introduced and native species, disease, and fisheries, we find that the yellow-eyed penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

Having determined that the yellow-eyed penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range, we also considered whether there are any significant portions of its range where the species is currently in danger of extinction.

The Act defines an endangered species as one ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as one ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The term ''significant portion of its range'' is not defined by statute. For purposes of this finding, a significant portion of a species' range is an area that is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

The first step in determining whether a species is endangered in a significant portion of its range is to identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and where the species is not in danger of extinction. To identify those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the species, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether in fact the species is threatened or endangered in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, or the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. If the Service determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. If the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range where the species is in danger of extinction pursuant to section 4(c)(1) of the Act.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability found within the range of the species. In addition, the portion may contribute to resiliency for other reasons—for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering. Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy is important to the conservation of the species. Adequate representation ensures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

To determine whether any portion of the range of the yellow-eyed penguin warrants further consideration as possibly endangered, we reviewed the entire supporting record for this proposed listing determination with respect to the geographic concentration of threats and the significance of portions of the range to the conservation of the species. As previously mentioned, we evaluated whether substantial information indicated that (i) the portions may be significant and (ii) the species in that portion may be currently in danger of extinction. We have found that the occurrence of certain threats is uneven across the range of the yellow-eyed penguin. On this basis, we determined that some portions of the yellow-eyed penguin's range might warrant further consideration as possible endangered significant portions of the range.

The yellow-eyed penguin range can be divided into four discrete areas. The first area consists of mainland colonies distributed along the southeast coast of the South Island of New Zealand. This mainland area is separated from three island based concentrations to the south. Just to the south is the Stewart Island/Codfish Island group which lies 18.75 mi (30 km) from the mainland South Island across the Fouveaux Strait. Stewart Island is a large island of 1,091 square mi (1,746 square km), and Codfish Island is a small island 8.75 square mi (14 square km) located within 6.25 mi (10 km) west of Stewart Island. The third and fourth discrete areas of yellow-eyed penguin habitat are the sub-Antarctic Auckland Islands and Campbell Island, which lie 300 mi (480 km) and 380 mi (608 km), respectively, to the south of the southern tip of the South Island. These are clearly isolated from each other and from other portions of the yellow-eyed penguin range.

To determine which areas may warrant further consideration, we evaluated these four areas of the entire range of the yellow-eyed penguin. Under the five-factor analysis, we determined that predation, disease, and inadequacy of regulatory mechanisms are threats to the yellow-eyed penguin throughout all of its range. In addition, we determined that fisheries bycatch and marine habitat modification from oyster dredging are threats to the species in only some portions of its range.

Bycatch has been identified as a threat only for mainland populations. Marine habitat modification through oyster dredging has been identified as a unique threat at Stewart Island/Codfish Island. Therefore, we have determined that there is substantial information that yellow-eyed penguins on the mainland and at the Stewart/Codfish Islands may face a greater level of threat than populations at the Auckland and Campbell Islands. In addition, the mainland populations of 450 pairs represent more than a quarter of the overall reported population of 1,602 pairs, indicating that this may be a significant portion of the range. Having met these two initial tests, a further evaluation was deemed necessary to determine if this portion of the range is both significant and endangered. The Stewart Island/Codfish Island population represents only 11 percent of the overall population of yellow-eyed penguins and is small in terms of geographical area. Given the proximity of this small population to the more numerous mainland portion of the range, with a contiguous distribution to colonies at the southern tip of the South Island, we do not find that this portion of the range is significant relative to the conservation of this species. We determined that the Auckland Islands and Campbell Islands portions of the range do not satisfy the two initial tests, because there is not substantial information to suggest that the species in those portions may currently be in danger of extinction.

Having identified one portion of the range which warrants further consideration—the mainland portion—

we then proceeded to determine whether this portion is both significant and endangered.

There have been large fluctuations in the mainland population of yellow-eyed penguins since at least 1980, with cyclical periods of population decline, followed by some recovery. As described in our threat factor analysis, these larger fluctuations have been tied to changes in the marine environment and the quality of food, as well as to periodic outbreaks of disease. The species is described as inherently robust, but recovery from these fluctuations is hampered by chronic predation threats as well as by the ongoing impact of fisheries bycatch. The combination of these cyclical and chronic factors has kept the mainland population fluctuating within the range of a few hundred to about 600 pairs over the last 3 decades. We have no evidence that the single factor of fisheries bycatch is driving the species toward extinction. Because the current population trend for the mainland populations is one of decline and fluctuation around low numbers, rather than precipitous decline, and because reproduction and recruitment are still occurring, we have determined the population is not currently in danger of extinction, but is likely to become so within the foreseeable future.

As a result, while the best scientific and commercial data available allows us to make a determination as to the rangewide status of the yellow-eyed penguin, we have determined that there are no significant portions of the range in which the species is currently in danger of extinction. Because we find that the yellow-eyed penguin is not endangered in the portions of the range that we previously determined to warrant further consideration (mainland populations), we need not address the question of significance for this portion.

Therefore, we propose to list the yellow-eyed penguin as threatened throughout all of its range under the Act.

White-Flippered Penguin (Eudyptula minor albosignata)

Background

The white-flippered penguin breeds on Motunau Island and the Banks Peninsula of the South Island of New Zealand. Birds disperse locally around the eastern South Island. Breeding adults appear to remain close to nesting colonies in the non-breeding season (Taylor 2000, p. 69; Challies and Burleigh 2004, p. 5; Brager and Stanley 1999, p. 370). White-flippered penguins feed on small shoaling fish such as pilchards (*Sardinops neopilchardus*) and anchovies (*Engraulis australis*) (Brager and Stanley 1999, p. 370).

The petitioner considers the white-flippered penguin to be a separate species (*Eudyptula albosignata*) on the basis of a 2006 paper by Baker *et al.* However, this paper (Baker *et al.* 2006, pp. 13–16) does not treat the specific question of the species or subspecies status of the group of *Eudyptula* penguins (little penguins). Among those researchers who have considered the phylogeny of the little penguin group in detail, Banks *et al.* (2002, p. 35), supported by Peucker *et al.* (2007, p. 126), make a strong case that the white-flippered penguin is part of one of two distinct lineages, or clades, of *Eudyptula* species (the Australian-Otago clade and the New Zealand clade, which includes the white-flippered penguin), each descended from one common ancestor.

Limited evidence for subspeciation within the New Zealand clade is found in some genetic differences, but the taxonomic status of these Banks Peninsula birds remains somewhat unclear (Peucker *et al.* 2007, p. 126). The New Zealand DOC considers the white-flippered penguin, with its distinct life history and morphological traits, as the southern end of a clinal variation of the little penguin (Houston 2007, p. 3). Consistent with the findings of Banks *et al.* (2002, p. 35), the New Zealand DOC recognizes the white-flippered penguin as an endemic sub-species in its Action Plan for Seabird Conservation in New Zealand (Taylor 2000, p. 69). We recognize the findings of Banks *et al.* (2002, p. 35), and the determination of the New Zealand Department of Conservation, and consider the white-flippered penguin (*Eudyptula minor albosignata*) as one of six recognized subspecies of the little penguin (*Eudyptula minor*).

The overall population of little penguins, which are found around Australia and New Zealand, numbers 350,000 to 600,000 birds. The total breeding population of the white-flippered subspecies, which is only found in New Zealand, is about 10,460 birds (Challies and Burleigh 2004, p. 1).

It is estimated that the Peninsula-wide population comprised tens of thousands of pairs at the time of European settlement. White-flippered penguins were ''very common'' on the Banks Peninsula in the late 1800s (Challies and Burleigh 2004, p. 4). Distribution of colonies was more widespread on the shores of the Banks Peninsula during the 1950s, with penguins nesting from the seaward headlands around to the inshore heads of bays.

At Motunau Island there are an estimated 1,650 breeding pairs or about 4,590 birds (Ellis *et al.* 1998, p. 87). This population is reported to have increased slightly since the 1960s (Taylor 2000, p. 69). On Banks Peninsula, exhaustive counts of all colonies in 2000–01 and 2001–02 found 68 colonies with a total of 2,112 nests or about 5,870 birds (Challies and Burleigh 2004, p. 5). This detailed survey increased the previously reported minimum estimates of 550 pairs published in 1998 (Ellis *et al.* 1998, p. 87), which were derived from partial surveys of only easily accessible colonies (Challies and Burleigh 2004, p. 1). While baseline information is lacking, Challies and Burleigh (2004, p. 5) have estimated that the present population is less than 10 percent of an estimated tens of thousands of pairs occupying the Peninsula prior to European settlement. Detailed monitoring of four individual colonies indicated that severe declines continue, with an overall loss of 83 percent of 489 nests monitored over the period from 1981–2000 (Challies and Burleigh 2004, p. 4).

The little penguin is listed as a species of 'Least Concern' in the IUCN Red List (BirdLife International 2007, p. 1), there is no separate status for the white-flippered subspecies. On New Zealand's Threat Classification system list, the white-flippered subspecies is listed as 'acutely threatened—nationally vulnerable,' indicating small to moderate population and moderate recent or predicted decline (Hitchmough *et al.* 2007, p. 45; Molloy *et al.* 2002, p. 20). This species was addressed in the Action Plan for Seabird Conservation in New Zealand, and it was ranked as Category B (second priority) on the Molloy and Davis threat categories employed by the New Zealand DOC (Taylor 2000, p. 33).

Summary of Factors Affecting the White-Flippered Penguin

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of White-flippered Penguin's Habitat or Range

The terrestrial breeding habitat of the white-flippered penguin comprises the shores of the Banks Peninsula south of Christchurch, New Zealand, and of Motunau Island about 62 mi (100 km) north. Banks Peninsula has a convoluted coastline of approximately 186 mi (300 km), made up of outer coast and deep embayments (Challies and Burleigh 2004, p. 1). Motunau is a small island of less than 0.3 mi (0.5 km) in length. While cattle or sheep sometimes trample nests at Banks Peninsula, white-

flippered penguin nest sites are usually in rocky areas or among tree roots where they are inaccessible to such damage (Taylor 2000, p. 69). Fire has also been identified as a factor which could threaten white-flippered penguin habitat, but we are not aware of documented fire incidents (Taylor 2000, p. 69).

On the basis of this information, we find that the present or threatened destruction, modification, or curtailment of its habitat or range is not a threat to the white-flippered penguin in any portion of its range.

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

White-flippered penguins are the object of privately managed local tourism activities at the Banks Peninsula (Taylor 2000, p. 70). Neither the New Zealand Action Plan for Seabird Conservation nor the IUCN Conservation Assessment and Management Plan provides any evidence that tourism is a factor affecting white-flippered penguin populations (Taylor 2000, p. 69; Ellis *et al.* 1998, p. 87). There is no evidence of use of the species for other commercial, recreational, scientific or educational purposes.

On the basis of this information, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the white-flippered penguin in any portion of its range.

Factor C. Disease or Predation

There is no evidence of disease as a threat to the white-flippered penguin.

The most significant factor impacting white-flippered penguins is predation at Banks Peninsula by introduced mammalian predators. Ferrets, stoats, and feral cats take eggs and chicks and sometimes kill adult white-flippered penguins (Challies and Burleigh 2004, p.1). Populations are reported to have declined drastically since 1980 due to predation (Williamson and Wilson 2001, pp. 434–435). Dogs have also been cited as a potential predator (Taylor 2000, p. 69). In the past 25 years, predators have overrun colonies at the accessible heads and sides of bays at Banks Peninsula, reducing colony distribution to less accessible and more remote headlands and outer coasts (Challies and Burleigh 2004, p. 4). Thirty-four colonies (fifty percent) surveyed in 2000 to 2002, containing 1,345 nests (69 percent of the nests at Banks Peninsula), were considered to be vulnerable to predation. Seven of the 12 largest colonies (each containing more than 20 nests) contained either the remains of penguins that had been preyed on or other evidence predators had been there (Challies and Burleigh 2004, p. 4). The five large colonies not considered vulnerable to predation were either protected by bluffs or, in one case, located on an island.

The encroachment of predators destroyed the most accessible colonies first, in a progression from preferred habitat at the heads of bays towards the coast along a gradient of increasing coastal erosion. In the 1950s, penguins were still nesting around the heads of bays. These colonies disappeared soon thereafter (Challies and Burleigh 2004, p. 4). Of four colonies of greater than 50 nests on the sides of bays, one was destroyed between 1981 and 2000, and nest numbers in the other three colonies were reduced by 72 to 77 percent. In these four colonies, the total number of nests decreased 83 percent between 1981 and 2000, from 489 nests down to 85 nests. The surviving colonies are almost all inside the bays close to the headlands or on the peripheral coast (Challies and Burleigh 2004, p. 4), with white-flippered penguins breeding primarily on rocky sites backed by bluffs. Challies and Burleigh (2004, p. 4) concluded, given the species' historical habitat and the difficulties of landing at these exposed breeding sites, that predation has forced white-flippered penguins into marginal, non-preferred habitat.

At the present time, colonies are largest either on inshore predator-free islands or in places on the mainland where predators are being controlled or which are less accessible to predators. The historic decline in penguin numbers is clearly continuing based on the current evidence of predation in existing recently surveyed colonies (Challies and Burleigh 2004, p. 5). In addition to documenting direct overland access to colonies, Challies and Burleigh (2004, p. 5) documented predation at colonies thought not to be accessible over land. For example, there is evidence that stoats, which are good swimmers, are reaching colonies at otherwise inaccessible parts of the shoreline, indicating that the spread of predation continues.

The potential for dispersal and establishment of new colonies, which might allow for expansion of white-flippered penguin numbers, is also severely limited by predation. Fifty percent or more of adults attempt to nest away from their natal colony. Historically, such movements led to interchange between colonies and maintenance of colony size even as dispersal took place. With the presence of predators, this dispersal now leads breeding birds to settle in areas accessible to predators where they are eventually killed (Challies and Burleigh 2004, p. 5). One consequence of this pattern of dispersal and predation is that colonies suffer a net loss of breeding adults.

Predator trapping started in 1981 and is carried out by a network of volunteers and private landowners around the Banks Peninsula. Some small predator-proof fences were erected to protect vulnerable colonies (Taylor 2000, p. 70; Williamson and Wilson 2001, p. 435). It is not clear how widespread such efforts are over the large geographical area of the Banks Peninsula or how successful they are. Williamson and Wilson (2001, p. 435) reported on two predator trapping programs at two relic colonies at the heads of Flea and Stony Bays. Their preliminary results indicated numbers were stable at Flea Bay, but Stony Bay populations of white-flippered penguins were in decline. Even though such trapping efforts began in 1981, Challies and Burleigh (2004, p. 5) concluded on the basis of data collected in the 2000–01 and 2001–02 breeding seasons that the historic decline in white-flippered penguin numbers is continuing.

At Motunau Island, the only other breeding area for this subspecies, there are no introduced predators. Rabbits, which could have impacted breeding habitat, were eradicated in 1963 (Taylor 2000, p. 70). The Action Plan for Seabird Conservation in New Zealand lists pest quarantine measures to prevent new animal and plant pest species reaching Motunau Island as a needed future management action (Taylor 2000, p. 70), but we have no reports on whether such measures are now in place, and we cannot discount the current or future risk of predator introduction to Motunau Island.

Predators are present at the larger Banks Peninsula colony (56 percent of the nests for the species), but not currently at the smaller colony at Motunau Island (46 percent of the nests) although the risk of future predator introduction to Motunau Island exists. On the basis of information on the impact of predators, the failure of existing programs to eliminate them, and the possibility of dispersal of predators to current predator-free areas such as Motunau Island, we conclude that predation by introduced mammals is a threat to the white-flippered penguin throughout all of its range currently and in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

All but seven seabird species in New Zealand, including the white-flippered penguin, are protected under New Zealand's Wildlife Act of 1953, which gives absolute protection to wildlife throughout New Zealand and its surrounding marine economic zone. No one may kill or have in their possession any living or dead protected wildlife unless they have appropriate authority.

The IUCN Conservation Assessment and Management Plan (CAMP) data sheet for white-flippered penguin (Ellis *et al.* 1998, p. 87) concluded in 1998 that the deteriorating status of this subspecies was not a high priority for the New Zealand DOC due to budgetary constraints. The CAMP noted that activities to date had not been government funded, but self-funded by investigators or by grants from non-governmental organizations. Since then, the New Zealand DOC has adopted the Action Plan for Seabird Conservation, which includes recommendations on management of terrestrial threats to the white-flippered penguin as well as threats within the marine environment. We did not rely on these measures in our analysis because we do not have reports on which measures, if any, have been implemented and how they relate, in particular, to efforts to reduce the threat of predation on white-flippered penguins at Banks Peninsula.

The Banks Peninsula marine waters have special protective status as a marine sanctuary, which was established in 1988 and primarily directed at protection of the Hector's dolphin (*Cephelorhynchus hectori*) from bycatch in set nets. The 4-month set net ban, from November to the end of February, which also includes Motunau Island, is designed to reduce entanglements of these dolphins and to reduce the risk of entanglement of white-flippered penguins and yellow-eyed penguins (NZ DOC 2007, p. 1). Ten years ago, in the Action Plan for Seabird Conservation, this ban was reported to have been widely disregarded (Taylor 2000, p. 70). That Action Plan states that restriction on the use of set nets near key white-flippered penguin colonies may be necessary to protect the species and recommends an advocacy program to encourage set net users to adopt practices that will minimize seabird bycatch. We have information indicating that white-flippered penguins are frequently caught in set nets and no current information to indicate whether, or to what extent, set net restrictions have reduced take at either Banks Peninsula or Motunau Island.

New Zealand has in place The New Zealand Marine Oil Spill Response Strategy, which provides the overall framework to mount a response to marine oil spills that occur within New Zealand's area of responsibility. The aim of the strategy is to minimize the effects of oil on the environment and people's safety and health. The National Oil Spill Contingency Plan promotes a planned and nationally coordinated response to any marine oil spill that is beyond the capability of a local regional council or outside the region of any local council (Maritime New Zealand 2007, p. 1). As discussed below under Factor E, rapid containment of spills in remote areas and effective triage response under this plan have shown these to be effective regulatory mechanisms (New Zealand Wildlife Health Center 2007, p. 2; Taylor 2000, p. 94). However, given the location of the only two major concentrations of white-flippered penguins near a major South Island port, we conclude under Factor E that oil spills are a threat to this species.

On the basis of a review of available information and on the basis of the continued threats of predation, fisheries bycatch, and oil spills to this species, we find that inadequacy of existing regulatory mechanisms is a threat to the white-flippered penguin throughout all of its range now and in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

New Zealand's Action Plan notes that white-flippered penguins are frequently caught in nearshore set nets, especially around Motunau Island (Taylor 2000, p. 69). The number of birds caught is not known but there is a history of ''multiple net catches'' of penguins around Motunau Island (Ellis *et al.*, 1998, p. 87). Restrictions on the use of set nets in the areas of Banks Peninsula and Motunau Island were instituted in 1988 (see discussion under Factor D above), but bans on leaving nets set inshore overnight were reported to be widely disregarded a decade ago (Ellis *et al.* 1998, p. 87). Such impacts interact with the more severe threat of predation at Banks Island, exacerbating declines there. Reports indicate bycatch impacts are most severe at Motunau Island, which is currently predator free. Based on the best available information we do not have a basis to conclude that rates of bycatch will decline in the foreseeable future, and we have found no current information to indicate that net restrictions have reduced take. Therefore, we find that bycatch of the white-flippered penguin by fishing activities is a threat to this species of penguin throughout all of its range.

We have examined the possibility that oil and chemical spills may impact white-flippered penguins. Such spills, should they occur and not be effectively managed, can have direct effects on marine seabirds, such as the white-flippered penguin. The entire subspecies nests in areas of moderate shipping volume coming to Port Lyttelton at Christchurch, New Zealand. This port lies adjacent to, and just north of, the Banks Peninsula and just south of Motunau Island.

On this basis, the Action Plan for Seabird Conservation in New Zealand specifically identifies a large oil spill as a key potential threat to this species (Taylor 2000, pp. 69–70) and recommends that penguin colonies be identified as sensitive areas in oil spill contingency plans (Taylor 2000, pp. 70–71).

Two spills have been recorded in the overall region of the South island of New Zealand and its offshore islands. These spills did not impact the white-flippered penguin. In March 2000, the fishing vessel *Seafresh 1* sank in Hanson Bay on the east coast of Chatham Island and released 66 T (60 t) of diesel fuel. Rapid containment of the oil at this remote location prevented any wildlife casualties (New Zealand Wildlife Health Center 2007, p. 2). The same source reported that in 1998 the fishing vessel *Don Wong 529* ran aground at Breaksea Islets, off Stewart Island. Approximately 331 T (300 t) of marine diesel was spilled along with smaller amounts of lubricating and waste oils. With favorable weather conditions and establishment of triage response, no casualties of the pollution event were discovered (Taylor 2000, p. 94).

While New Zealand has a good record of oil spill response, an oil spill in the vicinity of one of the two breeding colonies of the white-flippered penguin which lie closely adjacent to the industrial port of Port Lyttelton, could impact a large portion of the individuals of this subspecies if not immediately contained. Previous spills have been in more remote locations, with more leeway for longer-term response before oil impacted wildlife. Based on the occurrence of previous spills around New Zealand, the low overall numbers of white-flippered penguins, and the location of their only two breeding populations adjacent to Christchurch, a major South Island port, there is a high likelihood that oil spill events, should they occur in this area, will impact white-flippered penguins. Therefore, we find that oil spills are a threat to the

white-flippered penguin in the foreseeable future.

We find that fisheries bycatch and the potential for oil spills are threats to the white-flippered penguin throughout all of its range now and in the foreseeable future.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this proposed rule, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the white-flippered penguin, we considered the threats acting on the subspecies, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends).

With respect to the white-flippered penguin, the available data indicate that the historic decline in penguin numbers is clearly continuing based on the current evidence of predation by introduced species in existing recently surveyed colonies at Banks Island. Given that existing programs have failed to eliminate introduced predators and that these predators appear to be spreading, we believe their impact on the white-flippered penguin will continue in the future. There is no information to suggest that the current effects of bycatch will be reduced in the foreseeable future, nor that regulatory mechanisms will become sufficient to address or ameliorate this threat to the subspecies. Based on the occurrence of previous oil spills around New Zealand and the location of the only two breeding populations of white-flippered penguins adjacent to Christchurch, a major South Island port, we find that oil spills will likely occur in the future. Furthermore, because of the low overall numbers of white-flippered penguins, there is a high likelihood that oil spill events, should they occur in this area, will impact white-flippered penguins. Based on our analysis of the best available information, we have no reason to believe that population trends will change in the future, nor that the effects of current threats acting on this subspecies will be ameliorated in the foreseeable future.

White-Flippered Penguin Finding

Predation by introduced mammalian predators is the most significant factor threatening white-flippered penguin within the species' breeding range. Predation by introduced species has contributed to the historical decline of this subspecies since the late 1800s and is reducing numbers at the current time. In addition to reducing numbers in existing colonies, the presence of predators has been documented as a barrier to the dispersal of breeding birds and the establishment of new colonies, perhaps indicating larger declines are to be expected. New Zealand laws require protection of this native subspecies. Anti-predator efforts have not stopped declines of white-flippered penguins at Banks Peninsula, although eradication of predators has been achieved at Motunau Island. Removal of introduced mammalian predators on the mainland Banks Peninsula is an extremely difficult, if not impossible, task. Trapping and physical protection of a few local breeding groups through fencing have proven locally successful but these efforts are not widespread. The Banks Peninsula with 186 mi (300 km) of coastline and 68 white-flippered penguin colonies, is a very large area to control and predation impacts will continue. The threat of reinvasion remains, both at Motunau Island and in areas of the Banks Peninsula where predator control has been implemented (Taylor 2000, p. 70; Challies and Burleigh 2004, p. 5). We find that predation is a threat to the white-flippered penguin throughout all of its range.

The white-flippered penguin is also impacted by threats in the marine environment. While set-net bans have been in place since the 1980s to reduce take of white-flippered penguins and other species, bycatch in coastal gill-net fisheries is known to result in mortality to white-flippered penguins foraging from breeding areas. Although we do not have quantitative data on the extent of bycatch, the best available information indicates that such impacts are an underlying threat which interacts with the more severe threat of predation at Banks Island and which especially impacts populations at Motunau Island. Based on the best available scientific and commercial information, we conclude that bycatch is a threat to the white-flippered penguin throughout all of its range.

Documented oil spills have occurred in the vicinity of the South Island of New Zealand in the last decade. While such events are rare, future events have the potential to impact white-flippered penguins. A spill event near the city of Christchurch and the adjacent Banks Peninsula, which was not immediately contained, would be very likely to impact either, or both, of the two breeding sites of the white-flippered penguin in a very short time, affecting up to 65 percent of the population at one time. While New Zealand oil spill response and contingency plans have been shown to be effective in previous events, the location of the only two breeding areas of this subspecies near industrial areas and marine transport routes increase the likelihood that spill events will impact the white-flippered penguin.

Major reductions in the numbers of nests in individual colonies and the loss of colonies indicate the population of white-flippered penguin at Banks Peninsula is declining as the threat of predation impacts this subspecies. The subspecies has a low population size (10,460 individuals) with breeding populations concentrated solely in two highly localized breeding areas. Bycatch from fisheries activities is an ongoing threat to members of this subspecies breeding at both Motunau Island and the Banks Peninsula. For both breeding areas, which are close to an industrial port and shipping lanes, oil spills are a threat to the white-flippered penguin in the foreseeable future. Based on the best available scientific and commercial information, we find that the white-flippered penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

Having determined that the white-flippered penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range, we also considered whether there are any significant portions of its range where the species is currently in danger of extinction. See our analysis for the yellow-eyed penguin for how we make this determination.

White-flippered penguins breed in two areas, one on the shores of the Banks Peninsula south of Christchurch New Zealand, the other at Motunau Island about 62 mi (100km) north. It appears that colonization of any possible intermediate breeding range is precluded by predation (Challies and Burleigh 2004, p. 5). The Banks Island colony is larger, with about 2,112

breeding pairs, and Motunau Island has about 1,635 breeding pairs. Threats in the marine environment, particularly fisheries bycatch have similar impact on the two areas and, given the proximity of each colony to the port of Christchurch, we conclude that oil spills are a threat in both areas. Predation by introduced predators is documented at Banks Peninsula, and introduction of predators is a potential future threat at Motunau Island, where population numbers are stable. This leads us to consider whether the Banks Peninsula portion of the range, where population declines are ongoing, may be in danger of extinction. While the threat of introduced predators is greater at the Banks Peninsula, a combination of local management protection of some colonies and the existence of inaccessible refugia from predators for some small colonies on the outer coast and offshore rocks and islands leads us to conclude that there is not substantial information to conclude the species in this portion of the range may currently be in danger of extinction. We determine that the Motunau Island and Banks Island portions of the range do not satisfy the two initial tests because there is not substantial information to conclude that the species in those portions may currently be in danger of extinction.

As a result, while the best available scientific and commercial data allows us to make a determination as to the rangewide status of the white-flippered penguin, we have determined that there are no significant portions of the range in which the species is currently in danger of extinction.

Therefore, we propose to list the white-flippered penguin as threatened throughout all of its range under the Act.

Fiordland Crested Penguin (Eudyptes pachyrhynchus)

Background

The Fiordland crested penguin, also known by its Maori name, tawaki, is endemic to the South Island of New Zealand and adjacent offshore islands southwards from Bruce Bay. The species also nests on Solander Island (0.3 square miles (mi^2) (0.7 square kilometers (km^2))), Codfish Island (5 mi^2 (14 km^2)), and islands off Stewart Island at the south end of the South Island (Taylor 2000, p. 58). Major portions of the range are in Fiordland National Park (4,825 mi^2 (12,500 km^2)) and Rakiura National Park (63 mi^2 (163 km^2)) on Stewart and adjacent islands. Historically, there are reports of breeding north to the Cook Straits and perhaps on the southernmost part of the North Island (Ellis *et al.* 1998, p. 69). The Fiordland crested penguin breeds in colonies situated in inaccessible, dense, temperate rainforest along shores and rocky coastlines, and sometimes in sandy bays. It feeds on fish, squid, octopus, and krill (BirdLife International 2007, p. 3).

Outside the breeding season, the birds have been sighted around the North and South Islands and south to the sub-Antarctic islands, and the species is a regular vagrant to southeastern Australia (Simpson 2007, p. 2; Taylor 2000, p. 58). Houston (2007a, p. 2) of the New Zealand DOC comments that the appearance of vagrants in other locations is not necessarily indicative of the normal foraging range of Fiordland crested penguins; he also states that the non-breeding range of this species is unknown.

A five-stage survey effort, conducted from 1990–1995, documented all the major nesting areas of Fiordland crested penguin throughout its known current range (McLean and Russ 1991, pp. 183–190; Russ *et al.* 1992, pp. 113–118; McLean *et al.* 1993, pp. 85–94; Studholme *et al.* 1994, pp. 133–143; McLean *et al.* 1997, pp. 37–47). In these studies researchers systematically surveyed the entire length of the range of this species, working their way along the coast on foot to identify and count individual nests, and conducting small boat surveys from a few meters offshore to identify areas to survey on foot. The coastline was also scanned from a support ship, to identify areas to survey (McLean *et al.* 1993, p. 87). A final count of nests for the species resulted in an estimate of between 2,500 and 3,000 nests annually (McLean *et al.* 1997, p. 45) and a corresponding number of 2,500 to 3,000 breeding pairs. The staging of this survey effort reflects the dispersed distribution of small colonies of this species along the convoluted and inaccessible mainland and island coastlines of the southwest portion of the South Island of New Zealand.

Long-term and current data on overall changes in abundance are lacking. The June 2007 Fiordland National Park Management Plan (New Zealand Department of Conservation (NZ DOC) 2007, p. 53) observed that Fiordland crested penguin numbers appear to be stable, and reported on the nesting success of breeding pairs at island (88 percent) versus mainland (50 percent) sites. The Management Plan raises uncertainty as to whether 50 percent nesting success will be sufficient to maintain the mainland population long term. Populations on Open Bay Island decreased by 33 percent between 1988 and 1995 (Ellis *et al.* 1998, p. 70), and a long-term decline may have occurred on Solander Island (Cooper *et al.* 1986, p. 89). Historical data report thousands of individuals in locations where numbers in current colonies are 100 or fewer (Ellis *et al.* 1998, p. 69). The species account in the New Zealand Action Plan for Seabird Conservation states that ''the population status of the species throughout its breeding range is still unknown and will require long-term monitoring to assess changes'' (Taylor 2000, p. 58).

The IUCN Red List (BirdLife International 2007, p. 1) classifies this species as 'Vulnerable' because it has a small population assumed to have been undergoing a rapid reduction of at least 30 percent over the last 29 years. This classification is based on trend data from a few sites, for example at Open Bay Island there was a 33 percent decrease for the time period from 1988–1995. The Fiordland crested penguin is listed as Category B (second priority) on the Molloy and Davis threat categories employed by the New Zealand DOC (Taylor 2000, p. 33) and placed in the second tier in New Zealand's Action Plan for Seabird Conservation. The species is listed as 'acutely threatened—nationally endangered' on the New Zealand Threat Classification System list (Hitchmough *et al.* 20077, p. 38; Molloy *et al.* 2003, pp. 13–23). Under this classification system, which is non-regulatory, species experts assess the placement of species into threat categories according to both status criteria and threat criteria. Relevant to the Fiordland crested penguin evaluation are its low population size and reported declines of greater or equal to 60 percent in the total population in the last 100 years (Molloy *et al.* 2003, p. 20).

Summary of Factors Affecting the Fiordland Crested Penguin

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Fiordland Crested Penguin's Habitat or Range

The Fiordland crested penguin has a patchy breeding distribution from Jackson Bay on the west coast of the South Island of New Zealand southward to the southwest tip of New Zealand and offshore islands, including Stewart Island. A major portion of this range is encompassed by the Fiordland National Park on the South Island and Rakiura National Park on Stewart and adjacent islands at the southern tip of New Zealand. The majority of the breeding range of the Fiordland crested penguin lies within national parks and is currently protected from destruction

and modification. The only reported instance of terrestrial habitat modification comes from the presence of deer (no species name provided) in some colonies that may trample nests or open up habitat for predators (Taylor 2000, p. 58).

We find that the present destruction, modification, or curtailment of the terrestrial habitat or range of the Fiordland crested penguin is not a threat to the species in any portion of its range.

The marine foraging range of the Fiordland crested penguin is poorly documented. Recent observations on the foraging behavior of the species around Stewart and Codfish Islands found birds foraging very close to shore and in shallow water (Houston 2007a, p. 2), indicating the species may not be a pelagic feeder. The species is a vagrant to more northerly areas of New Zealand and to southeastern Australia, but that is not considered indicative of its normal foraging range (Houston 2007a, p. 2).

''Prey shortage due to sea temperature change'' while foraging at sea has been cited as a threat (Ellis *et al.* 2007, p. 6) and changes in prey distribution as a result of slight warming of sea temperatures have been implicated for declines of southern rockhopper penguins at Campbell Island and mentioned as a possible threat for Fiordland crested penguins (Taylor 2000, p. 59). However, the Action Plan for Seabird Conservation in New Zealand concluded that the effects of oceanic changes or marine perturbations such as El Niño events on the Fiordland crested penguin are unknown (Taylor 2000, p. 59) and identified the need for future research on distribution and movements of this species in the marine environment (Taylor 2000, p. 61).

Based on this analysis, we find that the present or future destruction, modification, or curtailment of the terrestrial and marine habitat or range is not a threat to the Fiordland crested penguin in any portion of its range.

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

Human disturbance of colonies is rare because the birds generally nest in inaccessible sites. However, in some accessible areas, such as in the northern portion of the range at South Westland, large concentrations of nests occur in areas accessible to people and dogs. In addition, nature tourism may disturb breeding (McLean *et al.* 1997, p. 46; Taylor 2000, p. 58). The Action Plan for Seabird Conservation in New Zealand stated that guidelines are needed to control visitor access to mainland penguin colonies and accessible sites should be protected as Wildlife Refuges (Taylor 2000, p. 60). It is not clear, based on the information available whether such measures have been implemented. Similarly, research activities may disturb breeding birds. Houston (2007a, p. 1) reported that monitoring of breeding success at Jackson's Head has been abandoned due to concerns of adverse effects of the research on breeding success and recruitment. There is no evidence of use of the species for other commercial, recreational, scientific or educational purposes.

Therefore, we find that the present overutilization for commercial, recreational, scientific, or educational purposes, particularly human disturbance, is a threat to the survival of the Fiordland crested penguin throughout all of its range now and in the foreseeable future.

Factor C. Disease or Predation

Reports from 1976 documented that Fiordland crested penguin chicks have been infected by the sandfly-borne protozoan blood parasite (*Leucocytozoon tawaki*) (Taylor 2000, p. 59) (see discussion under Factor C for the yellow-eyed penguins). Diseases such as avian cholera, which has caused the deaths of southern rockhopper penguin adults and chicks at Campbell Islands, are inferred to be a potential problem in Fiordland crested penguin colonies (Taylor 2000, p. 59). However, with no significant disease outbreaks reported, the best available information leads us to conclude that disease is not a threat to this species.

Predation from introduced mammals and birds is a threat to the Fiordland crested penguin (Taylor 2000, p. 58; Ellis *et al.* 1998, p. 70). Comments received from the New Zealand DOC link historical declines of Fiordland crested penguins to the time of arrival of mammalian predators, particularly stoats, to the area (Houston 2007a, p. 1). Only Codfish Island, where 144 nests have been observed, is fully protected from introduced mammalian and avian predators (Studholme *et al.* 1994, p. 142). This island lies closely adjacent to Stewart Island so the future possibility of predator reintroduction cannot be discounted. Mustelids, especially stoats, are reported to take eggs and chicks in mainland colonies and may occasionally attack adult penguins (Taylor 2000, p. 58). The Norway rat, ship rat (*Rattus rattus*), and Pacific rat (*Rattus exulans*) may be predators, but there is no direct evidence of it. Feral cats and pigs are also potential predators, but they are not common in nesting areas. Recent observations since the development of the Action Plan (Taylor 2000, p. 58), which originally discounted the impact of the introduced possum (*Trichosurus vulpecula*), indicate that this species has now colonized the mainland range of the Fiordland crested penguin in South Westland and Fiordland. Initially thought to be vegetarians, it is now documented that possums eat birds, eggs, and chicks and also compete for burrows with native species. It is not yet known if they compete for burrows or eat the eggs of Fiordland crested penguins, as they do other native species, but this is thought to be likely (Houston 2007b, p. 1). Domestic dogs are reported to kill adult penguins and disturb colonies near human habitation (Taylor 2000, p. 58).

Weka, which are omnivorous, flightless rails about the size of chickens and native to other regions of New Zealand, have been widely introduced onto offshore islands of New Zealand. At Open Bay Islands and Solander Islands, this alien species has been observed to take Fiordland crested penguin eggs and chicks. At Open Bay Island colonies, weka caused 38 percent of egg mortality observed and 20 percent of chick mortality (St. Clair and St. Clair 1992, p. 61). The decline in numbers of Fiordland crested penguin on the Solander Islands from ''plentiful'' to a few dozen since 1948 has also been attributed to egg predation by weka (Cooper *et al.* 1986, p. 89). Among the future management actions identified as needed in New Zealand's Action Plan for Seabird Conservation are weka eradication from Solander Island and addressing the problem of weka predation at Open Bay Islands (Taylor 2000, p. 60).

Predator control programs have been undertaken on only a few islands in a limited portion of the Fiordland crested penguin's range and are not practicable in the inaccessible mainland South Island strongholds of the species (Taylor 2000, p. 59).

Predation by introduced mammalian species is the primary threat facing the Fiordland crested penguin on the mainland South Island of New Zealand. At breeding islands free of mammalian predators, *e.g.,* Open Bay Islands and Solander Island, an introduced bird, the weka, is a predator on Fiordland penguin eggs and chicks. Only Codfish Island is fully protected from introduced mammalian and avian predators. Therefore, we find that predation by introduced species is not a threat to the Fiordland crested penguin on Codfish Island, but is a

threat to this species in other portions of its range now and in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

All but seven seabird species in New Zealand, including the Fiordland crested penguin, are protected under New Zealand's Wildlife Act of 1953, which gives absolute protection to wildlife throughout New Zealand and its surrounding marine economic zone. No one may kill or have in their possession any living or dead wildlife unless they have appropriate authority.

The majority of the range of the Fiordland crested penguin is within the Fiordland National Park (which includes Solander Island) and adjacent parks, including Rakiura National Park. Fiordland National Park covers 15 percent of public conservation land in New Zealand. Under section 4 of the National Parks Act of 1980 and Park bylaws, ''the native plants and animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be eradicated'' (NZ DOC 2007, p. 24). The June 2007 Fiordland National Park Management Plan (NZ DOC 2007, pp. 1–4) contains, in its section on Preservation of Indigenous Species and Habitats, a variety of objectives aimed at maintaining biodiversity by preventing the further loss of indigenous species from areas where they were previously known to exist. The Fiordland crested penguin is specifically referenced in the audit of biodiversity values to be preserved in the Park (NZ DOC 2007, p. 53). In addition, the Fiordland Marine Management Act of 2005 establishes the Fiordland Marine area and 8 marine reserves within that area, which encompasses more than 2.18 million ac (882,000 ha) extending from the northern boundary of the Park to the southern boundary (excluding Solander Island) (NZ DOC 2007, p. 29). The species also inhabits Rakiura National Park, which encompasses Stewart Island and Whenua Hou (Codfish Island) and also falls under the National Parks Act of 1980 and Park bylaws.

The Fiordland National Park is encompassed in the Te Wahipounamu—South West New Zealand World Heritage Area. World Heritage areas are designated under the World Heritage Convention because of their outstanding universal value (NZ DOC 2007, p. 44). Such designation does not confer additional protection beyond that provided by national laws.

Despite these designations and the possibility of future efforts, we have no information to indicate that measures have been implemented that reduce the threats to the Fiordland crested penguin.

The Fiordland crested penguin has been placed in the group of birds ranked as second tier threat status in New Zealand's Action Plan for Seabird Conservation on the basis of its being listed as 'Vulnerable' by IUCN Red List Criteria and as Category B (second priority) on the Molloy and Davis threat categories employed by the New Zealand DOC (Taylor 2000, p. 33). The Action Plan, while not a legally binding document, outlines actions and priorities intended to define the future direction of seabird work in New Zealand. High-priority future management actions identified are eradication of weka from Big Solander Island and development of a management plan for the Open Bay Islands to address the problem of weka predation on Fiordland crested penguins and other species. We do not have information to allow us to evaluate whether any of these proposed actions and priorities have been carried out and, therefore, have not relied on this information in our threat analysis.

New Zealand has in place The New Zealand Marine Oil Spill Response Strategy, which provides the overall framework to mount a response to marine oil spills that occur within New Zealand's area of responsibility. The aim of the strategy is to minimize the effects of oil on the environment and people's safety and health. The National Oil Spill Contingency Plan promotes a planned and nationally coordinated response to any marine oil spill that is beyond the capability of a local regional council or outside the region of any local council (Maritime New Zealand 2007, p. 1). As discussed below under Factor E, rapid containment of spills in remote areas and effective triage response under this plan has shown these to be effective regulatory mechanisms (New Zealand Wildlife Health Center 2007, p. 2; Taylor 2000, p. 94).

Major portions of the coastal and marine habitat of the Fiordland crested penguin are protected under a series of laws, and the species itself is covered under the New Zealand Wildlife Act. The National Parks Act specifically calls for controlling and eradicating introduced species. While there has been limited success in controlling some predators of Fiordland crested penguins at isolated island habitats comprising small portions of the overall range, the comprehensive legal protection of this species has not surmounted the logistical and resource constraints which stand in the way of limiting or eradicating predators on larger islands and in inaccessible mainland South Island habitats. Furthermore, we are not able to evaluate whether efforts to reduce the threats of human disturbance discussed in Factor B have been implemented or achieved results.

On the basis of this information, we find that inadequacy of existing regulatory mechanisms is a threat to the Fiordland crested penguin throughout all of its range now and in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Commercial fishing in much of the species' range is a comparatively recent development and is considered unlikely to have played a significant role in historic declines (Houston 2007a, p. 1). New Zealand's Seabird Action Plan noted that Fiordland crested penguins could potentially be caught in set nets near breeding colonies and that trawl nets are also a potential risk. Competition with squid fisheries is also noted as a potential threat (Taylor 2000, p. 59; Ellis *et al.* 1998, p. 70; Ellis *et al.* 2007, p. 7). The 1998 CAMP recommended research on foraging ecology to identify potential competition with commercial fisheries and effects of climatic variation (Ellis *et al.* 1998, pp. 70–71), but we are not aware of the results of any such studies. The New Zealand DOC (Houston 2007a, p. 1), in its comments on this petition, noted that the ''assessment of threats overstates the threat from fisheries'' to the Fiordland crested penguin. The distribution and behavior of this species may reduce the potential impact of bycatch. The Fiordland crested penguin is distributed widely along the highly convoluted, sparsely populated, and legally protected South Island coastline for a linear distance of over 155 mi (250 km), as well as along the coasts of several offshore islands. Significant feeding concentrations of the species, which might be susceptible to bycatch, have not been described. Given the absence of documentation of actual impacts of fisheries bycatch on the Fiordland crested penguin, we conclude that this is a not threat to the species in any portion of its range.

We have examined the possibility that oil and chemical spills may impact Fiordland crested penguins. Such spills, should they occur and not be effectively managed, can have direct effects on marine seabirds such as the Fiordland crested penguin. The range of the Fiordland crested penguin, on the southwest coast of the South Island of

New Zealand is remote from shipping activity and away from any major human population centers, and the consequent risk of oil or chemical spills is low. The Stewart Islands populations at the southern end of New Zealand are in closer proximity to vessel traffic and human industrial activities which may increase the possibility of oil or chemical spill impacts. Two spills have been recorded in this overall region. In March 2000, the fishing vessel *Seafresh 1* sank in Hanson Bay on the east coast of Chatham Island and released 66 T (60 t) of diesel fuel. Rapid containment of the oil at this remote location prevented any wildlife casualties (New Zealand Wildlife Health Center 2007, p. 2). The same source reports that in 1998 the fishing vessel *Don Wong 529* ran aground at Breaksea Islets off Stewart Island. Approximately 331 T (300 t) of marine diesel was spilled along with smaller amounts of lubricating and waste oils. With favorable weather conditions and establishment of triage response, no casualties of the pollution event were discovered (Taylor 2000, p. 94). There is no doubt that an oil spill near a breeding colony could have a major effect on this species (Taylor 2000, p. 94). However, based on the remote distribution of Fiordland penguins around the mainland South Island, and offshore islands at the southern tip of the South Island, the low number of previous incidents around New Zealand, and the fact that each was effectively contained under the New Zealand Marine Oil Spill Response Strategy and resulted in no mortality or evidence of impacts on the population, we find that oil and chemical spills are not a threat to the Fiordland crested penguin in any portion of its range.

In summary, while fisheries bycatch has been suggested as a potential source of mortality to the Fiordland crested penguin, the best available information leads us to conclude that this is not a threat to this species. There is a low-level potential for oil spill events to impact this species, but the wide dispersal of this species along inaccessible and protected coastlines lead us to conclude that this is not a threat to the Fiordland crested penguin. Therefore, we find that other natural or manmade factors are not a threat to the species in any portion of its range.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this proposed rule, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the Fiordland crested penguin, we considered the threats acting on the species, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends).

With respect to the Fiordland crested penguin, the available data indicate that historical declines have been linked to the invasion by introduced predators to the South Island of New Zealand, and recently documented declines have been attributed to introduced predators. Given the remote and widely dispersed range of the Fiordland crested penguin, especially on the mainland of the South Island, significant anti-predator efforts are largely impractical for this species, and we are unaware of any time-bound plan to implement anti-predator protection for Fiordland crested penguins or of any significant efforts to stem ongoing rates of predation. Therefore, we find that predation by introduced species is reasonably likely to continue in the foreseeable future. The threat of human disturbance could increase as tourism activities become more widespread in the region, and we have no information that indicates this threat will be alleviated for the Fiordland crested penguin in the foreseeable future.

Fiordland Penguin Finding

The primary documented threat to the Fiordland crested penguin is predation by introduced mammalian and avian predators within the species' breeding range. We are only aware of one small breeding location that is known to be predator free. Even though this species is poorly known, an exhaustive multi-year survey effort documented current low population numbers. The impact of predators is evidenced by the major historical decline of the Fiordland crested penguin during the period of invasion by these predators to the South Island of New Zealand. Historical data from about 1890 cites thousands of Fiordland crested penguins in areas where current surveys find colonies of only 100 or fewer. Recent declines at Open Bay and Solander Islands have been documented as resulting from weka predation. While the Fiordland crested penguin is a remote and hard-to-study species, the impact of predators on naïve endemic penguins, which have never before experienced mammalian predation, is well documented for similar species, such as the yellow-eyed penguin (Darby and Seddon 1990, p. 45) and the white-flippered penguin (Challies and Burleigh 2004, p. 4) that are more accessible to scientific observation.

New Zealand laws and the bylaws of the national parks, which encompass the majority of the range of the Fiordland crested penguin, institute provisions to ''as far as possible'' protect this species and to seek eradication of nonnative invasive species. Unfortunately, while complete eradication of predators, such as weka in isolated island habitats (e.g., Solander Island), may be possible, removal of the introduced mammalian predators now known to be widespread in mainland Fiordland National Park is an extremely difficult, if not impossible, task. Similarly, physical protection of some breeding groups from predation, as has been done for species such as the yellow-eyed and white-flippered penguins, is impractical for the Fiordland crested penguin. For other penguin species located in more accessible and more restricted ranges, the task of predator control has been undertaken at levels of effort meaningful to protection of those species. For this remote and widely dispersed species, predator control has only been undertaken on a limited basis, and we have no reason to believe this threat to the Fiordland crested penguin will be ameliorated in the foreseeable future.

The threat of human disturbance is present in those areas of the range most accessible to human habitation, but could increase as tourism activities become more widespread in the region. While efforts to control this threat have been undertaken, we have no information which allows us to conclude this threat will be alleviated for the Fiordland crested penguin in the foreseeable future.

The overall population of the Fiordland crested penguin is small (2,500–3,000 pairs) and reported to be declining (Ellis *et al.* 2007, p. 6). The ongoing pressure of predation by introduced mammalian and avian species on this endemic species over the next few decades, with little possibility of significant anti-predator intervention, and the potential for human disturbance to impact breeding populations, leads us to find that the Fiordland crested

penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

Having determined that the Fiordland crested penguin is likely to become in danger of extinction within the foreseeable future (threatened) throughout all of its range, we must next consider whether there are any significant portions of its range where the species is in danger of extinction. See our analysis for the yellow-eyed penguin for how we make this determination.

Fiordland crested penguins breed in widely dispersed small colonies along the convoluted and inaccessible southwest coast of the South Island of New Zealand and adjacent offshore islands. The Fiordland National Park Management Plan reported that nesting success of breeding pairs at island sites was greater than at mainland sites, 88 and 55 percent, respectively. This led us to consider whether the threats in the mainland portion of the range may be in danger of extinction. In our previous five-factor analyses, we found that threats from human disturbance and inadequacy of regulatory mechanisms have similar impacts on both island and mainland portions of the range. The primary threat to the Fiordland crested penguin is predation by introduced birds on islands and introduced mammals on the mainland. While the eradication of predators, such as weka, in isolated island habitats may be possible, removal of the widespread introduced mammalian predators on the mainland may be extremely difficult, if not impossible. While the threat of introduced predators is greater on the mainland, the overall population is buffered by the existence of some colonies on small islands just offshore of the mainland portions of the range and at Codfish Island which are free of predators. We find that the mainland portions of the range do not satisfy the two initial tests because there is not substantial information to conclude that the species in those portions may currently be in danger of extinction.

As a result, while the best scientific and commercial data available allows us to make a determination as to the rangewide status of the Fiordland crested penguin, we have determined that there are no significant portions of the range in which the species is currently in danger of extinction.

Therefore, we propose to list the Fiordland crested penguin as threatened throughout all of its range under the Act.

Humboldt Penguin (Spheniscus humboldti)

Background

The Humboldt penguin is endemic to the west coast of South America from Foca Island (5°12′0″S) in northern Peru to the Pinihuil Islands near Chiloe, Chile (42°S) (Araya *et al.* 2000, p. 1). It is a congener of the African penguin and has similar life history and ecological traits.

Humboldt penguins historically bred on guano islands off the coast of Peru and Chile (Araya *et al.* 2000, p.1). Prior to human mining of guano for fertilizer, the Humboldt penguin's primary nesting habitat was in burrows, tunneled into the deep guano substrate on offshore islands. While the guano is produced primarily by three other species (the Guanay cormorant (*Phalacrocorax bouganvillii*), the Peruvian booby (*Sula variegate*), and Peruvian pelican (*Pelecanus thagus*)), Humboldt penguins depended on these burrows for shelter from the heat and from predators. With the intensive harvest of guano over the last century and a half in both countries, Humboldt penguins are forced to nest out in the open or seek shelter in caves or under vegetation (Paredes and Zavalga 2001, pp. 199–205).

The distribution of the Humboldt penguin is very closely associated with the Humboldt (Peruvian) current. The upwelling of cold, highly productive waters off the coast of Peru provides a continuous food source to vast schools of fish and large seabird populations (Hays 1986, p. 170). In the Chilean system to the south, upwelling is lighter and occurs more seasonally compared to Peru (Simeone *et al.* 2002, p. 44). In all regions, Humboldt penguins feed primarily on schooling fish such as the anchovy (*Engraulis ringens*), Auracanian herring (*Strangomera bentincki*), silversides (*Odontesthes regia*), garfish (*Scomberesox saurus*) (Herling *et al.* 2005, p. 21), and Pacific sardine (Simeone *et al.* 2002, p. 47). Depending on the location and the year, the proportion of each of these species in the diet varies.

Periodic failure of the upwelling and its impact on schooling fish and fisheries off Peru and Ecuador were the first recorded and signature phenomena of El Niño Southern Oscillation events (ENSO). El Niño events occur irregularly every 2–7 years (National Oceanic and Atmospheric Administration (NOAA) 2007, p. 4). This periodic warming of sea surface temperatures and consequent upwelling failure affects primary productivity and the entire food web of the coastal ecosystem. Especially impacted are anchovy and sardine populations, which comprise the major diet of Humboldt penguins. During El Niño events, seabirds, fish, and marine mammals experience reduced survival and reproductive success, and population crashes (Hays 1986, p. 170).

Given the north-south distribution of the Humboldt penguin along the Peruvian and Chilean coasts, researchers have looked for variation in breeding and foraging along this climatic gradient (Simeone *et al.* 2002, pp. 43–50). In dry Peruvian breeding areas, where upwelling provides a constant food source, penguins nest throughout the year with two well-defined peaks in breeding in the autumn and spring. Adults remain near the colony all year. Further south, in northern and north-central Chile, the birds follow the same pattern, despite stronger seasonal differences in weather (Simeone *et al.* 2002, pp. 48–49). They also attempt to breed twice a year, but the autumn breeding event is regularly disrupted by the rains more typical at that latitude, and there is high reproductive failure. Adults in the southern extent of the range (south-central Chile) leave the colonies in winter, presumably after abandoning nesting efforts (Simeone *et al.* 2002, p. 47). Peruvian and northern Chilean colonies are only impacted by rains and flooding during El Niño years, and during those years, nesting attempts are reduced as food supplies shift and adults forage farther afield (Culik *et al.* 2000, p. 2317).

Similar to the African penguin, the distribution of colonies within the breeding range of the Humboldt penguin in Peru has shifted south in recent years. This shift may be in response to a number of factors: (1) El Niño events in which prey distribution has been shown to move to the south (Culik *et al.* 2000, p. 2311); (2) increasing human pressure in central coastal areas; (3) long-term changes in prey distribution (Paredes *et al.* 2003, p. 135); or (4) overall increases in sea surface temperature.

The Humboldt penguin has decreased historically from more than a million birds in the 19th century to 41,000 to 47,000 individual birds today (Ellis *et al.* 2007, p. 7). Nineteenth century reports indicate there were more than a million birds in the Humboldt Current area. By 1936, there was already evidence of major population declines and of breeding colonies made precarious by the harvest of guano from over 100 Peruvian islands (Araya *et al.* 2000, p. 1).

Estimates of the population in Peru have fluctuated in recent history, with

3,500 to 7,000 in 1981, with a subsequent reported decrease to 2,100 to 3,000 individuals after the 1982–83 El Niño event. In 1996, there were reported to be 5,500 individuals, and after the strong 1997–98 El Niño event, fewer than 5,000. Population surveys in the southern portion of the range in Peru in 2006 found 41 percent more penguins than in 2004, increasing estimates for that area from 3,101 individuals to 4,390 and supporting an overall population estimate for Peru of 5,000 individuals (Instituto Nacional de Recursos Naturales (INRENA) 2007, p. 1; IMARPE 2007, p. 1).

In 1995–96, it was estimated there were 7,500 breeding Humboldt penguins in Chile (Ellis *et al.* 1998, p. 99; Luna-Jorguera *et al.* 2000, p. 508). This estimate was significantly revised following surveys conducted in 2002 and 2003 (Mattern *et al.* 2004, p. 373) at Isla Chanaral, one of the most important breeding islands for the Humboldt penguin. Mattern *et al.* (2004, p. 373) counted 22,021 adult penguins, 3,600 chicks, and 117 juveniles at that island in 2003. While larger numbers (6,000 breeding birds) had been recorded in the 1980s, counts after 1985 had never exceeded 2,500 breeding birds (Ellis *et al.* 1998, p. 99). The authors speculated that rather than representing a sudden population increase, the discrepancy is a result of systematic underestimates in eight previous counts at Isla Chanaral, which were all conducted using a uniform methodology. Just to the south of this study area in the Coquimbo region, Luna-Jorguera *et al.* (2000, p. 506) counted a total of 10,300 penguins in on-land and at-sea counts conducted in 1999. That study also produced numbers higher than the most recent previous census, which had estimated only 1,050 individuals in the Coquimbo region (Luna-Jorguera *et al.* 2000, p. 508). Other than the overall rangewide figures for the species presented by Ellis *et al.* (2007, p. 7), there is not a comprehensive current estimate of the total number of penguins in Chile. The best available scientific information indicates that there are approximately 30,000 to 35,000 individuals in the Chilean population.

These updated Chilean counts have led to revision of overall population estimates for the species. As recently as 2007, BirdLife International (2007, p. 2) reported a total population of 3,000 to 12,000. Based on the new data, Ellis *et al.* (2007, p. 7) report a population of 41,000 to 47,000 individuals.

The 2007 IUCN Red List (BirdLife International 2007, p. 1) categorizes the Humboldt penguin as ''Vulnerable'' on the basis of 30 to 49 percent declines over the past 3 generations and predicted over 3 generations in the future.

Summary of Factors Affecting the Humboldt Penguin

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Humboldt Penguin's Habitat or Range

The habitat of the Humboldt penguin consists of terrestrial breeding and molting sites and the marine environment, which serves as a foraging range year-round.

Modification of their terrestrial breeding habitat is a continuing threat to Humboldt penguins. Humboldt penguin breeding islands were, and continue to be, a source of guano for the fertilizer industry and have been exploited since 1840 in both Peru and Chile. From 1840 to 1880, Peru exported an estimated 12.7 million T (11.5 t) of guano from its islands (Cushman 2007, p. 1). Throughout the past century, Peru has managed the industry through a variety of political and ecological conflicts, including the devastating impacts of El Niño on populations of guano-producing birds and the competition between the fishing industry and the seabird populations that are so valuable to guano production. After 1915, caretakers of the islands routinely hunted penguins for food even as their guano nesting substrate was removed; resulting in the birds being virtually eliminated from the guano islands (Cushman 2007, p. 11). Harvest of guano continues on a small scale today and is managed by Proyecto Especial de Promocion del Aprovechamiento de Abonos Provenientes de Aves (PROABONOS), a small government company producing fertilizer for organic farming (Cushman 2007, p. 24).

Reports from 1936 described completely denuded guano islands and indicated that by 1936 Humboldt penguin populations had undergone a vast decline throughout the range (Ellis *et al.* 1998, p. 97). Guano, which was initially many meters deep, was initially harvested down to the substrate level. Then, once the primary guano-producing birds had produced another ankle-deep layer, it was harvested again. The Humboldt penguins, which formerly burrowed into the abundant guano, were deprived of their primary nesting substrate and forced to nest in the open, where they are more susceptible to heat stress and their eggs and chicks are more vulnerable to predators, or they were forced to resort to more precarious nest sites (Ellis *et al.* 1998, p. 97).

Paredes and Zavalga (2001, pp. 199–205) investigated the importance of guano as a nesting substrate and found that Humboldt penguins at Punta San Juan, where guano harvest has ceased, preferred to nest in high-elevation sites where there was adequate guano available for burrow excavation. As guano depth increased in the absence of harvest, the number of penguins nesting in burrows increased. Penguins using burrows on cliff tops had higher breeding success than penguins breeding in the open, illustrating the impact of loss of guano substrate on the survival of Humboldt penguin populations.

Guano harvesting continues on Peruvian points and islands under government control. The fisheries agency, Instituto del Mar del Peru (IMARPE), is working with the parastatal guano extraction company, PROABONOS, to limit the impacts of guano extraction on penguins at certain colonies, with harvest conducted outside the breeding season and workers restricted from disturbing penguins (IMARPE 2007, p. 2). Two major colonies at Punta San Juan and Pchamacamac Island are in guano bird reserves and under the management and protection of the guano extraction agency, which has built walls to keep out people and predators (UNEP World Conservation Monitoring Center (UNEP WCMC) 2003, p. 9). However, guano extraction is still listed as a moderate threat to some island populations within the Reserva Nacional de Paracas (Lleellish *et al.* 2006, p. 4) and illegal guano extraction is listed by the Peruvian natural resource agency, Instituto Nacional de Recursos Naturales (INRENA), as one of three primary threats to the Humboldt penguin in Peru (INRENA 2007, p. 2). The penguin Conservation Assessment and Management Plan (CAMP) (Ellis *et al.* 1998, p. 101) recommended that the harvest of guano in Peru be regulated in order to preserve nesting habitat and reduce disturbance during the nesting seasons. Guano harvest is reported to have ceased in Chile (UNEP WCMC 2003, p. 6). We conclude, on the basis of the extent and severity of exploitation throughout the range of the Humboldt penguin in both countries over the past 170 years, and on the basis of limited ongoing guano extraction in Peru, that modification of the terrestrial breeding habitat is a threat to the survival of the Humboldt penguin throughout its range.

With respect to modification of the marine habitat of the Humboldt penguin, periodic El Niño events have

been shown to have significant effects on the marine environment on which Humboldt penguins depend and must be considered the main marine perturbation for the Humboldt penguin (Ellis *et al.* 1998, p. 101), impacting penguin colonies in Peru (Hays 1986, p. 169–180; INRENA 2007, p. 1) and Chile (Simeone *et al.* 2002, p. 43). The strength and duration of El Niño events has increased since the 1970s, with the 1997–98 event the largest on record (Trenberth *et al.* 2007, p. 288). The Humboldt Penguin Population and Habitat Viability Assessment (Araya *et al.* 2000, pp. 7–8) concluded that, even without El Niño and other impacts, documented rates of reproductive success and survival would cause declines in the Chilean populations. In the absence of other human impacts, annual declines from El Niño events in Chile alone were projected to lead to 2.3 to 4.4 percent annual declines. Peruvian population data found an overall population decline of 65 percent during the 1982–83 El Niño event (Hays 1986, p. 169). While we have not found comparable documentation of the impact of the 1997–98 event in Peru, few birds were recorded breeding at guano bird reserves in 1998 and, at one colony, Punta San Juan, the number of breeding individuals appears to have declined by as much as 75 percent between 1996 and 1999 before subsequent rebound (Paredes *et al.* 2003, p. 135). This suggests that a similar level of impact from a single El Niño event in the future could reduce current Peruvian populations from 5,000 birds to 1,250 to 1,750 birds. Cyclical El Niño events cause high mortality among seabirds, but there is also high selection pressure on Humboldt Current seabird populations to increase rapidly in numbers after each event (Ellis *et al.* 1998, p. 101). Nonetheless, with strengthening El Niño events, reduced Humboldt penguin population numbers, and the compounding influence of other threat factors, such as ongoing competition with commercial fisheries for food sources, which are discussed below under Factor E, the resiliency of Humboldt penguins to recover from cyclical El Niño events is highly likely to be reduced from historical times (Ellis *et al.* 1998, p. 101).

On the basis of this analysis, we find that the present and threatened destruction, modification, or curtailment of both its terrestrial and marine habitats is a threat to the Humboldt penguin throughout all of its range now and in the foreseeable future.

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

Hunting of Humboldt penguins for food and bait and harvesting of their eggs have been long established on the coasts of Chile and Peru; it is not clear how much hunting persists today. At Pajaros Island in Chile, Humboldt penguins are sometimes hunted for human consumption or for use as bait in the crab fishery. At the Punihuil Islands farther south, they are also hunted on occasion for use as crab bait (Simeone *et al.* 2003, p. 328; Simeone and Schlatter 1998, p. 420). Paredes *et al.* (2003, p. 136) reported that as fishing occurs more frequently in the proximity of penguin rookeries this has attracted fishermen to take penguins for food in Peru. Cheney (UNEP WCMC 2003, p. 6) reported an observation of a fisherman taking 150 penguins to feed a party. In 1995, egg harvest was listed as the primary threat to Chilean populations (UNEP WCMC 2003, p. 6), but recent information does not indicate whether that practice continues today. Paredes *et al.* (2003, p. 136) also reported that guano harvesters supplement their meager incomes and diets through collecting eggs and chicks, although the fisheries agency, IMARPE, is working with PROABONOS to restrict workers from disturbing penguins (IMARPE 2007, p. 2). On the basis of this information, we conclude that localized intentional harvest may be ongoing. We have no basis to evaluate the effectiveness of reported efforts to control this harvest. Therefore, we conclude that intentional take is a threat to the Humboldt penguin throughout all of its range.

It was estimated in 1985 that 9,264 Humboldt penguins had been exported to several zoos around the world within a period of 32 years. Exportation of Humboldt penguins from Peru or Chile is now prohibited (Ellis *et al.* 1998, p. 101) and, as discussed under Factor D, the species is listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Tourism has been identified as a potential threat to the Humboldt penguin. Since the 1990 designation of the Humboldt National Reserve, which includes the islands of Damas, Choros, and Chanaral in Chile, tourism has increased rapidly but with little regulation (Ellenberg *et al.* 2006, p. 97). Ellenberg *et al.* (2006, p. 99) found that Humboldt penguin breeding success varied with levels of tourism at these three islands. Breeding success was very low at Damas Island, the most tourist accessible island that saw over 10,000 visitors. Better breeding success was observed at Choros Island, a less accessible island that saw less than 1,000 visitors. The highest breeding success was observed at the remote and largest Chanaral Island colony, where tourist access was negligible. Unlike their congeners, the Magellanic penguins (*Spheniscus magellanicus*), Humboldt penguins were found to be extremely sensitive to human presence and to display little habituation potential, suggesting a strong need for tourism guidelines for this species (Ellenberg *et al.* 2006, p. 103). Simeone and Schlatter (1998, p. 420) described nest destruction by unregulated tourists at Punihuil Island, a popular tourist destination in southern Chile. Both the attractiveness of the penguins for tourism and the potential for increased impacts from human disturbance stem from the coincidence of the prime tourist season with the Humboldt penguin's spring and summer breeding season. In Peru, the impact of tourism is listed as a minimal to mid-level threat at the Reserva Nacional de Paracas (Lleellish *et al.* 2006, p. 4).

In the areas described in the literature, tourism has increased rapidly and with little regulation in the Humboldt National Reserve, has caused nest destruction at Punihuil Island in Chile, and is reported to be a minimal to mid-level threat at Reserva Nacional de Paracas in Peru. Because Humboldt penguins are extremely sensitive to the presence of humans, the species' breeding success is impacted with the increased levels of tourism, and the prime tourist season coincides with the species' spring and summer breeding season, we conclude that tourism is a threat to the species in portions of its range where it is unregulated.

Other human activities may disturb penguins. For example, fishermen hunting European rabbits (*Oryctolagus cuniculus*) disturbed penguins at Choros Island (Simeone *et al.* 2003, p. 328), but we do not conclude that this activity has occurred at a scale that represents a threat to the Humboldt penguin.

We have identified intentional take and unregulated tourism as a threat to Humboldt penguins. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is a threat to the Humboldt penguin throughout all of its range now and in the foreseeable future.

Factor C. Disease or Predation

There is no information to indicate that disease is a threat to the Humboldt penguin.

Simeone *et al.* (2003, p. 331) reported that the presence of rats, rabbits, and cats has been documented on islands along the Chilean coast, but their impacts on Humboldt penguins are not known. In Peru, ''rats were observed at Pajaros Island, Chachagua, and Pajaro Nido. At Pajaros Islands, rats were present in large numbers and were observed to predate on penguin eggs and chicks'' (Simeone *et al.* 2003, p. 328). However, on the basis of the best available information, we do not conclude that predation is exerting a significant impact on Humboldt penguin populations. Therefore, on the basis of the best available information, we conclude that disease and predation are not a threat to the Humboldt penguin in any portion of its range.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Humboldt penguin is listed as 'endangered' in Peru, the highest threat category under Peruvian legislation, and take, capture, transport, trade and export are prohibited except for scientific or cultural purposes (IMARPE 2007, p. 1; UNEP WCMC 2003, p. 8). Most breeding sites are protected by designated areas. The principal breeding colonies are legally protected by PROABONOS, the institute managing guano extraction. The Reserva Nacional de Paracas protects an area of 1,293 mi^2 (3,350 km^2) of the coastal marine ecosystem. In 2006, 1,375 penguins were observed in this reserve (Lleellish *et al.* 2006, pp. 5–6). However, patrols of this area are inadequate to police illegal activities such as dynamite fishing (Lleellish *et al.* 2006, p. 4).

In Chile, there is a 30-year moratorium on hunting and capture of Humboldt penguins and at least four major colonies are protected. Most terrestrial sites where the species occurs are within the national system of protected areas (UNEP WCMC 2003, p. 8).

The species is listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and in Appendix I of the Convention on Migratory Species. Exportation of Humboldt penguins from Peru or Chile is now prohibited (Ellis *et al.* 1998, p. 101), removing this as a potential threat to the species.

While legal protections are in place for the Humboldt penguin in both Chile and Peru, in general it is reported that enforcement of such laws are limited due to limited resources and the remote location of penguin colonies (UNEP WCMC 2003, p. 8). The UNEP WCMC Report on the Status of Humboldt Penguins concluded that little has been done to establish particular fishing-free zones and there is little progress in preventing penguins from being caught in fishing nets.

Majluf *et al.* (2002, p. 1342) stated, ''There is currently no management of artesanal [sic] gill-net fisheries in Peru, except for restrictions on retaining cetaceans and penguins. Even these regulations are difficult to enforce in remote and isolated ports such as San Juan.''

Both countries have national authorities and national contingency plans for oil spill response. Chile has the capability to respond to Tier One (small spills with no outside intervention) and Tier Two (larger spills requiring additional outside resources and manpower) oil spill events (International Tankers Owners Pollution Federation Limited (ITOPF) 2003, p. 2). As of July 2003, Peru was not listed as having significant capability to respond to oil spill events (ITOPF 2000b, p. 1).

We find that inadequacy of existing regulatory mechanisms, particularly in the area of enforcement of existing prohibitions related to fishing methods and management of fisheries bycatch, is a threat to the Humboldt penguin throughout all of its range now and in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Both large-scale commercial fisheries extraction and artesanal fisheries compete for the primary food of the Humboldt penguin throughout its range (BirdLife International 2007, p. 4; Ellis *et al.* 1998, p. 100; Herling *et al.* 2005, p. 23; Hennicke and Culik 2005, p. 178). While El Niño events cause severe fluctuations in Humboldt penguin numbers, over-fishing and entanglement (discussed below) are identified as a steady contributor to underlying long-term declines (BirdLife International 2007, p. 4). The anchovy fishery in Peru collapsed in the 1970s due to high catches and overcapacity of fishing fleets, exacerbated by the effects of the 1972–73 El Niño event. Twenty years passed before it became clear that this fishery had recovered (Food and Agriculture Organization (FAO) 2007, p. 2). These recovered stocks continue to be significantly impacted by major El Niño events, but have rebounded more quickly after recent events, with Peru reporting anchovy catches of 8.64 million T (9.6 million t) in 2000 and 5.76 million T (6.4 million t) in 2001 (FAO 2007, p. 2), and Chile reporting catches of 1.25 million T (1.4 million t) in 2004 (FAO 2006, p. 4). In Chile, local-level commercial extraction of specific fish species has reduced those species in the diet of penguins, and it has been noted that fisheries extraction has the potential of harming Humboldt penguins if overfishing occurs (Herling *et al.* 2005, p. 23). Culik and Luna-Jorquera (1997, p. 555) and Hennicke and Culik (2005, p.178), tracking foraging effort of penguins in northern Chile, concluded that even small variations in food supply, related to small changes in sea-surface temperature, led to increased foraging time. They concluded that Humboldt penguins have high energetic costs to obtain food even in non-El Niño years. They recommended the establishment of no-fishing zones, for example, encompassing the foraging range around the breeding area at Pan de Azucar Island to buffer the species from possible catastrophic effects of future El Niño events. While commercial fishing in combination with El Niño events has contributed to the historic declines of Humboldt penguin, and the identified threat of El Niño will interact with fisheries extraction during future El Niño episodes, on the basis of the best available information we conclude that overfishing or competition for prey from commercial or artesanal fisheries is not a threat to the Humboldt penguin in any portion of its range.

Incidental take by fishing operations is the most significant threat to Humboldt penguins. The Government of Peru lists incidental take by fisheries in fishing nets as one of the major sources of penguin mortality (IMARPE 2007, p. 2). Reports from Chile indicated a similar level of impact on the species (Majluf *et al.* 2002, pp. 1338–1343). In Peru, the expansion of local-scale fisheries and the switching to new areas and species as local fisheries are unable to compete with larger commercial operations has brought humans and penguins into increasing contact, with increased penguin mortality due to entanglement in fishing nets (Paredes *et al.* 2003, p. 135). Paredes *et al.* (2003, p. 135) attribute the changes in distribution of penguin colonies southward in Peru to this increased human disturbance—there are now fewer penguins on the central coastal area and more to the south.

Between 1991 and 1998, Majluf *et al.* (2002, pp. 1338–1343) recorded 922 deaths in fishing nets out of a population of approximately 4,000 breeding Humboldt penguins at Punta San Juan, Peru. This level of incidental take was found to be unsustainable even without factoring in periodic El Niño impacts. Take was highly variable between years, with the greatest incidental mortality when surface set

drift gill nets were being used to catch cojinovas (*Seriolella violace*), a species that declined during the course of the study. A subsequent study found that the risk of entanglement is highest when surface nets are set at night (Taylor *et al.* 2002, p. 706).

In Chile, Simeone *et al.* (1999, pp. 157–161) recorded 605 Humboldt penguins drowned in drift gill nets set for corvina (*Cilus gilberti*) in the Valparaiso region of central Chile between 1991 and 1996. Birds pursuing anchovies and sardines were apparently unable to see the transparent nets in their path and were entangled and drowned. These mortalities occurred outside of the breeding season when penguins forage in large aggregations and probably involved birds originating from beyond small local colonies. The deaths recorded represent underestimates of rangewide mortality—the authors only studied one of four major regions where corvina fishing occurred. Incidental mortality from such fishing operations is thought to affect Humboldt penguins throughout the species' range (Wallace *et al.* 1999, p. 442). Therefore we conclude that fisheries bycatch is a threat to the Humboldt penguin.

In addition, fishing with explosives, such as dynamite, is listed by INRENA as one of three major threats to Humboldt penguins in Peru (INRENA 2007, p. 2). The use of explosives is recurrent in the Reserva Nacional de Paracas, the primary center of population for penguins in Peru. Explosives use is especially prevalent in the southern zone, an area that contains more than 73 percent of the population, but does not receive as thorough patrolling as the north (Lleellish *et al.* 2006, p. 4).

Oil and chemical spills can have direct effects on the Humboldt penguin. The range of the species encompasses major industrial ports along the coast of both Chile and Peru. Approximately 100,000 barrels per day of crude oil transit the coastal waters from the tip of South America to Panama (ITOPF 2003, p. 1) with over 1,000 tankers calling annually at ports in that entire region. Major spill events in Chile have been limited to the Straits of Magellan to the south of the range of the Humboldt penguin, and no major events have been recorded for Peru (ITOPF 2000a, p. 2; ITOPF 2000b, p. 2). However, lesser spills have occurred. On May 25, 2007, about 92,400 gallons (350,000 liters) of crude oil leaked into San Vicente Bay in Talcuhuano, near Concepcion, Chile, during offloading of fuel by the vessel *New Constellation,* with impacts on sea lions and seabirds, including Humboldt penguins (Equipo Ciudano 2007, p. 1). A similar spill of 2,206 T (2,000 t) of crude oil occurred at an oil terminal off Lima in 1984, severely polluting beaches there (ITOPF 2000b, p. 3). As noted in Factor D, Chile and Peru have limited ability to handle spill cleanup.

However, while there is a possibility of oil spill impacts as a result of incidents along the Peruvian or Chilean coast, we find that a number of elements mitigate against our finding this a threat to the species. There is little history of spill events in the region and the breeding colonies of Humboldt penguin are widely dispersed along a very long coastline. In addition, the Humboldt penguin distribution does not encompass the southern tip of South America where the risk of oil spill is greatest. On this basis, we conclude that oil spill impacts are not a threat to the survival of the Humboldt penguin in any portion of its range.

In summary, we find that fisheries bycatch is a threat to the survival of the Humboldt penguin throughout all of its range now and in the foreseeable future.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this proposed rule, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the Humboldt penguin, we considered the threats acting on the species, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends).

With respect to the Humboldt penguin, the available data indicate that historical declines have resulted from the destruction of Humboldt penguin nesting substrate by guano collection, and this loss of nesting habitat continues to impact the breeding success of the species. We have no reason to believe this will change in the future. El Niño events have caused periodic crashes of the food supply of Humboldt penguins in Peru and Chile in the historic and recent past. Such events, which occur irregularly every 2–7 years, have increased in frequency and intensity in recent years and are likely to impact Humboldt penguins more frequently and more severely in the foreseeable future. The harvest of Humboldt penguins for food, eggs, and bait is a threat to the survival of the Humboldt penguin, and we have no reason to believe this threat will be ameliorated in the future. Incidental take by fisheries operations has emerged as the most significant human-induced threat to Humboldt penguins in both Chile and Peru, causing significant mortality of Humboldt penguins in both countries in the 1990s. There currently appears to be a lack of enforcement and a lack of significant measures to reduce the impacts. Based on our analysis of the best available information, we have no reason to believe that population trends will change in the future, nor that the effects of current threats acting on the species will be ameliorated in the foreseeable future.

Humboldt Penguin Finding

The Humboldt penguin has decreased historically from more than a million birds in the 19th century to 41,000 to 47,000 individual birds today. Since 1981, the Peruvian population has fluctuated between 3,500 and 7,000 individuals, with the most recent estimate at 5,000 individuals. Estimates of the population in Chile (30,000 to 35,000 individuals) have been recently updated with improved documentation of a colony at Isla Chanaral. The increase in the population estimate is a correction of systematic undercounting for 20 years, and cannot be concluded to signify recent population increases in Chile.

Historical threats to terrestrial habitat, in particular the destruction of Humboldt penguin nesting substrate by guano collection, have been responsible for the massive historical decline of the species, and this loss of nesting habitat continues to impact the breeding success of the species. Effects of guano extraction on the current populations appear to have been reduced by designation of protected areas and management of the limited guano harvesting that still occurs. However, at guano islands the availability and quality of nesting habitat is still impacted by both historical and ongoing harvest.

The impact of El Niño events, which have caused periodic crashes of the food sources of Humboldt penguins in Peru and Chile in the historic and recent past, is a threat factor leading to declines of this species. Such events,

which occur irregularly every 2–7 years, have increased in frequency and intensity in recent years and are likely to impact Humboldt penguins more and more severely in the foreseeable future. Given reduced population sizes and the existence of other significant threats, the resiliency of the Humboldt penguin to respond to these cyclical El Niño events is greatly reduced.

We find that harvest of Humboldt penguins for food, eggs and bait is a threat to the survival of the Humboldt penguin throughout all of its range. Tourism, if not properly managed, has the potential to impact individual colonies; however, we do not conclude this is a threat to the species.

Unlike the African penguin which breeds directly on a major shipping route for petroleum and at major ports of call for tanker traffic, the range of the Humboldt penguin along the coast of Chile and Peru does not have the same history of major spills or the same level of shipping traffic. Therefore we conclude that oil spill impacts are not a threat to the survival of the Humboldt penguin in any portion of its range.

Industrial fisheries extraction, which in conjunction with El Niño caused collapse of anchovy stocks in the 1970s, has had a historical influence on the species and contributed to its long-term decline. The recovery of fish stocks since the 1970s, however, has improved the food base of this species. Although large-scale commercial fisheries and local-scale fisheries extraction is targeting the same prey as the Humboldt penguin, we do not identify this as a current threat to the species. More importantly, incidental take by fisheries operations has emerged as the most significant human-induced threat to Humboldt penguins in both Chile and Peru. Entanglement in gill nets caused significant documented mortality of Humboldt penguins in both countries in the 1990s. There is evidence of lack of enforcement and lack of significant measures to reduce the impacts of bycatch. Therefore, we find that fisheries bycatch is a threat to the Humboldt penguin throughout all of its range.

On the basis of: (1) Destruction of its habitat by guano extraction; (2) high likelihood of El Niño events catastrophically impacting the prey of Humboldt penguins in cyclical 2-to 7-year timeframes; (3) intentional harvest of this species for meat, eggs, and bait; (4) inadequacy of regulatory mechanisms, especially with respect to controlling fisheries bycatch; and (5) ongoing threat of incidental take from fisheries bycatch, we find that the Humboldt penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Distinct Population Segment (DPS)

Section 3(16) of the Act defines ''species'' to include ''any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' To interpret and implement the DPS provisions of the Act and Congressional guidance, the Service and National Marine Fisheries Service published a Policy regarding the recognition of Distinct Vertebrate Population Segments in the **Federal Register** (DPS Policy) on February 7, 1996 (61 FR 4722). Under the DPS policy, three factors are considered in a decision concerning the establishment and classification of a possible DPS. These are applied similarly to the list of endangered and threatened species. The first two factors—discreteness of the population segment in relation to the remainder of the taxon and the significance of the population segment to the taxon to which it belongs—bear on whether the population segment is a valid DPS. If a population meets both tests, it is a DPS and then the third factor is applied—the population segment's conservation status in relation to the standards for listing, delisting, or reclassification under the Act.

Discreteness Analysis

Under the DPS policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors, or (2) it is delimited by international boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Humboldt penguins have a continuous range from northern Peru to mid-southern Chile. With respect to discreteness criterion 1, we have not identified any marked biological boundaries between populations within that range or of differences in physical, physiological, ecological, or behavioral factors among any groups within that range. We have found no reports of genetic or morphological discontinuity between any discrete elements of the population. The range of the Humboldt penguin crosses the international boundary between Peru and Chile, which leads to evaluation of the second discreteness factor. However, in our analysis of differences between Peru and Chile in conservation status, habitat management, and regulatory mechanisms, we have found no significant differences between the two countries. In both countries, take of penguins is prohibited, but some illegal take occurs, and measures to address fisheries bycatch are similar, but fisheries bycatch remains widespread. Both countries provide protection to major breeding colonies of the species. The Chilean population is more numerous, but the extent of their range is greater. Given the fact that problems in census data have only recently been corrected, we cannot conclude that Chilean Humboldt penguin population trends are different from the Peruvian or that conservation concerns are different. In fact, the impacts of habitat loss, the effects of El Niño, intentional take, inadequacy of regulatory mechanisms, and fisheries bycatch are concerns throughout the range.

Based on our analysis, we do not find that differences in conservation status or management for Humboldt penguins across the range countries are sufficient to justify the use of international boundaries to satisfy the discreteness criterion of the DPS Policy. Therefore, we have concluded that there are no population segments that satisfy the discreteness criterion of the DPS Policy. As a consequence, we could not identify any geographic areas or populations that would qualify as a DPS under our 1996 DPS Policy (61 FR 4722).

Significant Portion of the Range Analysis

Having determined that the Humboldt penguin is likely to become in danger of extinction within the foreseeable future throughout all of its range, we also considered whether there are any significant portions of its range where the species is currently in danger of extinction. See our analysis for the yellow-eyed penguin for how we make this determination.

Given the continuous linear range of the Humboldt penguin which breeds from northern Peru to south-central Chile and the distribution of colonies along that coast, no specific geographic portions of concern were immediately apparent. Therefore, we considered the occurrence of threat factors and to what extent their occurrence was uneven throughout the range or concentrated in any particular portion of the range, or whether there were any portions of the range where the threats were different.

Overall, for each factor identified as a threat, we found that these were threats throughout the range. Terrestrial and marine habitat loss, which included the impacts of guano extraction, the effects

of El Niño, intentional harvest, the inadequacy of regulatory mechanisms, and fisheries bycatch were determined to be threats throughout Humboldt penguin's range.

In reviewing our findings, one difference within threat Factor A relates to the ongoing limited harvest of guano in Peru, while such harvest has stopped in Chile. In our finding, we indicated that both the historic and present impacts of guano extraction were a threat to the Humboldt penguin. On the basis of this difference, we considered whether the Peruvian population of Humboldt penguin may be in danger of extinction in a significant portion of its range. The information available on local harvest patterns or population trends in specific areas where guano harvest is documented do not allow us to divide the range further. The most recent 2006 estimate of the Peruvian population of the Humboldt penguin is approximately 5,000 individuals. This count includes an increase of 41 percent since 2004 in the southern portion of the range where 80 percent of the birds are found. The overall population has fluctuated between 2,100 and 7,000 individuals since 1981with fluctuations attributed to response to El Niño events. While the population of Humboldt penguins in Peru has fluctuated at low numbers for many years, current evidence of increases over the last few years reflects continued reproduction and resiliency of this population. Therefore, we find that the Humboldt penguin is not currently in danger of extinction in the Peruvian portion of the range.

As a result, while the best available scientific and commercial data allows us to make a determination as to the rangewide status of the Humboldt penguin, we have determined that there are no significant portions of the range in which the species is currently in immediate danger of extinction.

Therefore, we propose to list the Humboldt penguin as a threatened species throughout its range under the Act.

Erect-Crested Penguin (Eudyptes sclateri)

Background

The erect-crested penguin, a New Zealand endemic, breeds primarily on the Bounty Islands and Antipodes Islands, located respectively, approximately 437 mi (700 km) and 543 mi (870 km) southeast of the South Island of New Zealand (NZ DODC 2006, pp. 27, 30). The Bounty Islands consist of eight islands with a total area of 0.5 mi^2 (1.3 km^2). The Antipodes Islands have two main islands and some minor islands. The largest is Antipodes Island, consisting of 23 mi^2 (60 km^2), and the second island, Bollons, consists of 0.77 mi^2 (2 km^2). Erect-crested penguins nest in large, dense, conspicuous colonies, numbering thousands of pairs, on rocky terrain (BirdLife International 2007, p. 3). Winter distribution at sea is largely unknown.

The Action Plan for Seabird Conservation of New Zealand lists the total world breeding population of erect-crested penguin at 81,000 pairs +/−4,000 pairs (Taylor 2000, p. 65).

Counts of erect-crested penguins at Bounty Islands in 1978 estimated 115,000 breeding pairs (Robertson and van Tets 1982, p. 315) although these counts are considered overestimations (Houston 2007, p. 3). While the data were not directly comparable, 1997 counts found 27,956 pairs (Taylor 2000, p. 65), suggesting that a large decline in numbers may have occurred at the Bounty Islands (BirdLife International 2007, p. 2). There have been no further surveys since 1997–98.

In 1978, the population on the Antipodes was thought to be similar in size to Bounty Islands (about 115,000 breeding pairs). More recent surveys in 1995 indicate a population of 49,000 to 57,000 pairs in the Antipodes. Comparisons of photographs of nesting areas from the Antipodes show a constriction of colonies at some sites from 1978–1995. There have been no subsequent formal counts of erect-crested penguins at either the Bounty Islands or the Antipodes, and visits to the islands are rare. Both observations and photographs taken by researchers visiting these islands for other purposes have provided anecdotal information that erect-crested penguin colony sizes continue to decrease (Davis, 2001, p. 8; D. Houston 2008, pers. comm.).

A few hundred birds formerly bred at Campbell Island farther to the southwest in the 1940s; in 1986–87, a small number of birds (20 to 30 pairs) were observed there, but no breeding was seen (Taylor 2000, p. 65). Breeding on the Auckland islands, also to the southwest, was considered a possibility, with one pair found breeding there in 1976 (Taylor 2000, p. 65). The most recent penguin conservation assessment (Ellis *et al.* 2007, p. 6) reported erect-crested penguins are no longer present at Campbell or Auckland Islands. There is one record of breeding on the mainland of the South Island of New Zealand at Otago Peninsula, but it is unlikely there was ever widespread breeding there (Houston 2007, p. 3). Based on this information, we do not consider these areas as being part of the erect-crested penguin's current range, and have not included them in our analysis of the status of this species.

On the basis of declines of at least 50 percent in the past 45 years and a breeding range constricted to two locations, the IUCN has listed the species as 'Endangered' on the IUCN Red List (BirdLife International 2007, p. 1). It is ranked as Category B (second priority) on the Molloy and Davis threat categories used by the New Zealand DOC (Taylor 2000, p. 33) and, on that basis, placed in the second category of highest priority in the New Zealand Action Plan for Seabird Conservation (Taylor 2000, p. 33). The species is listed as 'acutely threatened—nationally endangered' on the New Zealand Threat Classification System list (Hitchmough *et al.* 2007, p. 38; Molloy *et al.* 2002, pp. 13–23). Under this classification system, which is non-regulatory, species experts assess the placement of species into threat categories according to both status criteria and threat criteria.

Summary of Factors Affecting the Erect-Crested Penguin

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Erect-Crested Penguin Habitat or Range

There is little evidence of destruction, modification, or curtailment of erect-crested penguin breeding habitat on land at the Bounty and Antipodes Islands. Feral animals, such as sheep and cattle, which could trample nesting habitat, are absent. Competition for breeding habitat with fur seals is reported to be minimal (Houston 2007, p. 1).

The New Zealand sub-Antarctic islands have been inscribed on the World Heritage List (World Heritage List 2008, p. 16). All islands are protected as National Nature Reserves and are State-owned (World Heritage Committee Report 1998, p. 21). We find that the present or threatened destruction, modification, or curtailment of the terrestrial habitat or range of the erect-crested penguin is not a threat of the species in any portion of its range.

Given the lack of terrestrial predators at the majority of erect-crested penguin colony sites, the absence of direct competition with other species, and the lack of physical habitat destruction at these sites, recent declines in erect-crested populations have been attributed to changes in the marine habitat. Penguins are susceptible to local ecosystem perturbations because they are constrained by how far they can swim from the colony in search of food (Davis 2001, p. 9). It has been

hypothesized that slight warming of sea temperatures and change in distribution of prey species may be having an impact on erect-crested penguin colonies (Taylor 2000, p. 66; Ellis *et al.* 2007, p. 6). The primary basis for this inference comes from studies of a closely-related species, the southern rockhopper penguin at Campbell Island (Cunningham and Moors 1994, p. 27), where the population declined by 94 percent between the early 1940s and 1985 from an estimated 800,000 breeding pairs to 51,500 (Cunningham and Moors 1994, p. 34). The majority of this decline appears to have coincided with a period of warmed sea surface temperatures between 1946 and 1956. It is widely inferred that warmer waters most likely affected southern rockhopper penguins through changes in the abundance, availability, and distribution of their food supply (Cunningham and Moors 1994, p. 34); recent research suggested they may have had to work harder to find the same food (Thompson and Sagar 2002, p. 11).

The suggestion that erect-crested penguins may have been similarly impacted by changes in the marine habitat during this time period is strengthened by the fact that erect-crested penguin breeding colonies are now absent from Campbell Island (Ellis *et al.* 2007, p. 6); they disappeared from the island during the same time period (1940s to 1987) as the southern rockhopper decline. In the 1940s, a few hundred erect-crested penguins bred on the island (Taylor 2000, p. 65). The latest IUCN assessment of the erect-crested penguin found that oceanic warming is a continuing threat that is resulting in a ''very rapid decline'' in greater than 90 percent of the population, and is therefore a threat of high impact to the erect-crested penguin (BirdLife International 2007, p. 2 of 'additional data'). Therefore, based on the best available information, we find that the present or threatened destruction, modification, or curtailment of the erect-crested penguin's marine habitat is a threat to the species throughout all its range now and in the foreseeable future.

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

Aside from periodic surveys and the possibility of a future research program focused on the diet and foraging of the species, we are unaware of any purpose for which the erect-crested penguin is currently being utilized. Therefore, we conclude that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to this species in any portion of its range.

Factor C. Disease or Predation

Avian disease has not been recorded in erect-crested penguins, although disease vectors of ticks and bird fleas are found in colonies (Taylor 2000, p. 66).

The only known mammalian predators within the current range of the erect-crested penguin are mice, which are present only on the main Antipodes Island. Although their eradication from this island is recommended as a future management action in the Action Plan for Seabird Conservation in New Zealand, we have found no reference to these mice being a threat to the erect-crested penguins on this one island in their range (Taylor 2000, p. 67). At the other islands in the Antipodes group (Bollons, Archway, and Disappointment) and at the Bounty Islands, mammalian predators are not present. Feral cats, sheep, and cattle are also no longer present (Taylor 2000, p. 66). The threat of future introduction of invasive species is being managed by the New Zealand DOC, which has measures in place for quarantine of researchers working on sub-Antarctic islands (West 2005, p. 36). These quarantine measures are an important step toward controlling the introduction of invasive species. At this time, however, we have no means to measure their effectiveness.

On the basis of this information, we find that neither disease nor predation is a threat to the erect-crested penguin in any portion of its range.

Factor D. Inadequacy of Existing Regulatory Mechanisms

All breeding islands of the erect-crested penguin are protected by New Zealand as National Nature Reserves. The marine areas are managed under fisheries legislation (World Heritage Committee Report 1998, p. 21).

The Action Plan for Seabird Conservation in New Zealand is in place and outlines previous conservation actions, future management actions needed, future survey and monitoring needs, and research priorities. Among the most relevant recommendations are pest quarantine measures to keep new animal and plant pest species from reaching offshore islands and eradication of mice from the main Antipodes Island (Taylor 2000, p. 67). At least one of these recommendations has been put into place; as mentioned under Factor C, strict required quarantine measures are now in place for researchers and expeditions to all New Zealand sub-Antarctic islands to prevent the introduction or re-introduction of animal and plant pest species (West 2005, p. 36). At this time, we have no means to measure the effectiveness of these quarantine measures.

In addition to national protection, all of New Zealand sub-Antarctic islands are inscribed on the World Heritage List (World Heritage List 2008, p. 16). World Heritage designation places an obligation on New Zealand to ''take appropriate legal, scientific, technical, administrative and financial measures, necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'' (World Heritage Convention 1972, p. 3). At the time of inscription of this site onto the World Heritage List in 1998, human impacts were described as ''limited to the effects of introduced species at Auckland and Campbell Islands'' (World Heritage Convention Nomination Documentation 1998, p. 1).

New Zealand has in place The New Zealand Marine Oil Spill Response Strategy, which provides the overall framework to mount a response to marine oil spills that occur within New Zealand's area of responsibility. The aim of the strategy is to minimize the effects of oil on the environment and people's safety and health. The National Oil Spill Contingency Plan promotes a planned and nationally coordinated response to any marine oil spill that is beyond the capability of a local regional council or outside the region of any local council (Maritime New Zealand 2007, p. 1). As discussed below under Factor E, rapid containment of spills in remote areas and effective triage response under this plan have shown these to be effective regulatory mechanisms (New Zealand Wildlife Health Center 2007, p. 2; Taylor 2000, p. 94).

On the basis of national and international protections in place, we find that inadequacy of existing regulatory mechanisms is not a threat to the erect-crested penguin in any portion of its range.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

New Zealand's Action Plan for Conservation of Seabirds notes that, while there is a possibility that erect-crested penguins could be caught in trawl nets or by other fishing activity, there are no records of such (Taylor 2000, p. 66). The IUCN noted that the New Zealand DOC has limited legal powers to control commercial harvesting in waters around the sub-Antarctic islands and recommended

that the New Zealand Ministry of Fisheries should be encouraged to address fisheries bycatch and squid fishery impacts (World Heritage Nomination—IUCN Technical Evaluation 1998, p. 25). As noted in the discussion under Factor A, the Action Plan for Conservation of New Zealand Seabirds outlines research efforts that would provide more data on the diet and activities and distribution of erect-crested penguins at sea. Such research will assist in evaluating whether competition for prey with fisheries or bycatch from fisheries activities is a factor in declines of the erect-crested penguin. However, in the absence of such research results, we have found no evidence that erect-crested penguins are subject to fisheries bycatch.

A large proportion of erect-crested penguin populations are found on two isolated, but widely separated, island archipelagos during the breeding season. We have examined the possibility that oil and chemical spills may impact erect-crested penguins. Such spills, should they occur and not be effectively managed, can have direct effects on marine seabirds. As a gregarious colonial nesting species, erect-crested penguins are potentially susceptible to mortality from local oil spill events during the breeding season. A significant spill at either the Antipodes or Bounty Islands could jeopardize more than one-third of the population of this species. The non-breeding season distribution of erect-crested penguins is not well-documented, but there is the potential for birds to encounter spills within the immediate region of colonies or, if they disperse more widely, elsewhere in the marine environment.

Based on previous incidents of oil and chemical spills around New Zealand, we evaluated this as a potential threat to this species. For example, in March 2000, the fishing vessel *Seafresh 1* sank in Hanson Bay on the east coast of Chatham Island and released 66 T (60 t) of diesel fuel. Rapid containment of the oil at this very remote location prevented any wildlife casualties (New Zealand Wildlife Health Center 2007, p. 2). The same source reported that in 1998 the fishing vessel *Don Wong 529* ran aground at Breaksea Islets, off Stewart Island, outside the range of the erect-crested penguin. Approximately 331 T (300 t) of marine diesel was spilled along with smaller amounts of lubricating and waste oils. With favorable weather conditions and establishment of triage response, no casualties of the pollution event were discovered (Taylor 2000, p. 94). However, the potential threat of oil or chemical spills to the erect-crested penguin is mitigated by New Zealand's oil spill response and contingency plans, which have been shown to be effective in previous events even at remote locations, and by the remoteness of Antipodes and Bounty Islands from major shipping routes or shipping activity. While the 138 mi (221 km) distance between the two primary breeding areas reduces the likelihood of impacts affecting the entire population, the limited number of breeding areas is a concern relative to the potential of oil spills or other catastrophic events. On the basis of the best available information we find that oil and chemical spills are not a threat to the erect-crested penguin in any portion of its range.

On the basis of our analysis, we find that other natural or manmade factors are not a threat to the erect-crested penguin in any portion of its range.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this proposed rule, we define the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the erect-crested penguin, we considered the threats acting on the species, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends).

With respect to the erect-crested penguin, the most recent detailed information, from a decade ago, indicated populations were in decline, with more recent qualitative information suggesting that declines continue. Although this qualitative data is currently the best information available, its use in establishing a reliable population trend is limited. Therefore, we are specifically requesting the public to provide any updated information available on current population numbers or trends for this species. This will help ensure that any final Service action related to this species will be as accurate as possible.

As characterized in our analysis of threat factors above, the erect-crested penguin is at risk throughout its range by ongoing changes to its marine habitat. At this time, managers can monitor impacts of this threat but have no management tools to reduce the threat. Therefore, it is reasonably likely that this threat will continue in the future. Based on our analysis of the best available information, we have no reason to believe that population trends will change in the future, nor that the effects of current threats acting on the species will be ameliorated in the foreseeable future.

Erect-Crested Penguin Finding

Significant declines in numbers have been documented for the erect-crested penguin between 1978 and 1997 at their two primary breeding grounds on the Bounty and Antipodes Islands. The latest population estimates from the late 1990s indicated there were approximately 81,000 pairs of erect-crested penguins in these two primary breeding grounds. The declines are reported to be largest at Bounty Island, although the extent of the decline is uncertain due to the differing methodologies between the surveys conducted there in 1978 and those conducted in 1997–98. At the Antipodes Islands, declines of from 50 to 58 percent have been estimated between 1978 and 1995, with photographic evidence from those two years showing obvious contraction in colony areas at some sites (Taylor 2000, p.65). Formal surveys have not been conducted since the 1995 and 1997–98 surveys referenced above, for the Antipodes and Bounty Islands, respectively. The only further information for this primary portion of the range is qualitative photographic evidence and observations suggesting that declines continue.

We have no recent population assessments for the erect-crested penguin. The most recent detailed information, from a decade ago, indicated populations were in decline with more recent qualitative information suggesting declines continue. Despite the relatively high population numbers of this species estimated in 1998, the population numbers at the time showed a very high rate of decline. This species' breeding colonies have been reduced to only two breeding island groups, separated from one another by 138 mi (221 km). Lower population numbers reasonably likely to occur in the foreseeable future, combined with the limited number of breeding areas, would make this species

even more vulnerable to the threats from changes in the marine habitat, and would make the species vulnerable to potential impacts from oil spills and random catastrophic events. Therefore, on the basis of our analysis of the best available scientific and commercial information, we conclude that the erect-crested penguin is likely to become endangered with extinction throughout all of its range in the foreseeable future.

Significant Portion of the Range Analysis

Having determined that the erect-crested penguin is likely to become endangered with extinction in the foreseeable future throughout all of its range, we must next consider whether there are any significant portions of its range which warrant further consideration as to whether the species is endangered. See our analysis for the yellow-eyed penguin for how we make this determination.

Erect-crested penguins breed on two primary island groups, Bounty and Antipodes Islands, which lie about 138 mi (221 km) from one another in the South Pacific Ocean to the southwest of the South Island of New Zealand. The erect-crested penguin is documented as in decline at these two islands. Our rangewide threats analysis found that changes in the marine habitat—slight warming of sea surface temperatures and their possible impact on prey availability—have the same impact on the two areas. No information is available that suggests this threat is disproportionate between these two areas. The overall population number of the erect-crested penguins is not low—27,956 pairs at Bounty Island and 49,000 to 57,000 pairs at the Antipodes Islands. Although the population numbers have declined at a very high rate and appear to be continuing to decline, the most recent population estimates indicate that the populations of both island groups are not currently in danger of extinction.

As a result, while the best scientific and commercial data allows us to make a determination as to the rangewide status of the erect-crested penguin, we have determined that there are no significant portions of the range in which the species is currently in danger of extinction. Because we find that the erect-crested penguin is not currently in danger of extinction in these two portions of its range, we need not address the question of significance for these populations.

Therefore, we propose to list the erect-crested penguin as a threatened species throughout all of its range under the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by Federal governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the yellow-eyed penguin, white-flippered penguin, Fiordland crested penguin, Humboldt penguin, and erect-crested penguin are not native to the United States, critical habitat is not being designated for these species under section 4 of the Act.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to yellow-eyed penguin, white-flippered penguin, Fiordland crested penguin, Humboldt penguin, and erect-crested penguin. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

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

Peer Review

In accordance with our joint policy with National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period, on our specific assumptions and conclusions regarding this proposed rule.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see **DATES**). Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

National Environmental Policy Act (NEPA)

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

Clarity of the Rule

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The authors of this proposed rule are staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by adding new entries for ''Penguin, Erect-crested,'' ''Penguin, Fiordland crested,'' ''Penguin, Humboldt,'' ''Penguin, White-flippered,'' and ''Penguin, Yellow-eyed'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Penguin, erect-crested.	*Eudyptes sclateri* ...	New Zealand, Bounty Islands and Antipodes Islands.	Entire	T	.....	NA	NA
Penguin, Fiordland crested.	*Eudyptes pachyrhynchus*.	New Zealand, South Island and offshore islands.	Entire	T	.....	NA	NA
*	*	*	*	*	*	*	
Penguin, Humboldt ..	*Spheniscus humboldti*.	Eastern Pacific Ocean—Chile, Peru.	Entire	T	.....	NA	NA
Penguin, white-flippered.	*Eudyptula minor albosignata*.	New Zealand, South Island.	Entire	T	.....	NA	NA
Penguin, yellow-eyed	*Megadyptes antipodes*.	New Zealand, South Island and offshore islands.	Entire	T	.....	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: December 2, 2008.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–29670 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–IA–2008–0068; 96000–1671–0000–B6]

RIN 1018–AV60

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the African Penguin (Spheniscus demersus) Under the Endangered Species Act, and Proposed Rule To List the African Penguin as Endangered Throughout Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the African penguin (*Spheniscus demersus*) as an endangered species under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. This proposal also constitutes our 12-month finding on the petition to list this species. The Service seeks data and comments from the public on this proposed rule.

DATES: We will accept comments and information received or postmarked on or before February 17, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 2, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS–R9–IA–2008–0068]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Pamela Hall, Branch Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial, trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533 (b)(3)(A)) requires the Service to make a finding known as a ''90-day finding,'' on whether a petition to add, remove, or reclassify a species from the list of endangered or threatened species has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If the Service finds that the petition has presented substantial information indicating that the requested action may be warranted (referred to as a positive finding), section 4(b)(3)(A) of the Act requires the Service to commence a status review of the species if one has not already been initiated under the Service's internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires the Service to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher-priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

In this notice, we announce a warranted 12-month finding and proposed rule to list one penguin taxon, the African penguin, as an endangered species under the Act. We will announce the 12-month findings for the emperor penguin (*Aptenodytes forsteri*), southern rockhopper penguin (*Eudyptes chrysocome*), northern rockhopper penguin (*Eudyptes chrysolophus*), Fiordland crested penguin (*Eudyptes pachyrhynchus*), erect-crested penguin (*Eudyptes sclateri*), macaroni penguin (*Eudyptes chrysolophus*), white-flippered penguin (*Eudyptula minor albosignata*), yellow-eyed penguin (*Megadyptes antipodes*), and Humboldt penguin (*Spheniscus humboldti*) in one or more subsequent **Federal Register** notice(s).

Previous Federal Actions

On November 29, 2006, the Service received a petition from the Center for Biological Diversity to list 12 penguin species under the Act: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, snares crested penguin (*Eudyptes robustus*), erect-crested penguin, macaroni penguin, royal penguin (*Eudyptes schlegeli*), white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Among them, the ranges of the 12 penguin species include Antarctica, Argentina, Australian Territory Islands, Chile, French Territory Islands, Namibia, New Zealand, Peru, South Africa, and United Kingdom Territory Islands. The petition is clearly identified as such, and contains detailed information on the natural history, biology, status, and distribution of each of the 12 species. It also contains information on what the petitioner reported as potential threats to the species from climate change and changes to the marine environment, commercial fishing activities, contaminants and pollution, guano extraction, habitat loss, hunting, nonnative predator species, and other factors. The petition also discusses existing regulatory mechanisms and the perceived inadequacies to protect these species.

In the **Federal Register** of July 11, 2007 (72 FR 37695), we published a 90-day finding in which we determined that the petition presented substantial scientific or commercial information to indicate that listing 10 species of penguins as endangered or threatened may be warranted: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, erect-crested penguin, macaronis penguin, white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Furthermore, we determined that the petition did not provide substantial scientific or commercial information indicating that listing the snares crested penguin and the royal penguin as threatened or endangered species may be warranted.

Following the publication of our 90-day finding on this petition, we initiated a status review to determine if listing each of the 10 species is warranted, and opened a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the 10 species of penguins. The public comment period closed on September 10, 2007. In addition, we attended the International Penguin Conference in Hobart, Tasmania, Australia, a quadrennial meeting of penguin scientists from September 3–7, 2007 (during the open public comment period), to gather information and to ensure that experts were aware of the status review and the open comment period. We also consulted with other agencies and range countries in an effort to gather the best available scientific and commercial information on these species.

During the public comment period, we received over 4,450 submissions from the public, concerned governmental agencies, the scientific community, industry, and other interested parties. Approximately 4,324 e-mails and 31 letters received by U.S. mail or facsimile were part of one letter-writing campaign and were substantively identical. Each letter supported listing under the Act, included a statement identifying ''the threat to penguins from global warming, industrial fishing, oil spills and other factors,'' and listed the 10 species included in the Service's 90-day finding. A further group of 73 letters included the same information plus information concerning the impact of ''abnormally warm ocean temperatures and diminished sea ice'' on penguin food availability and stated that this has led to population declines in southern rockhopper, Humboldt, African, and emperor penguins. These letters stated that the emperor penguin colony at Point Geologie has declined more than 50 percent due to global warming and provided information on krill declines in large areas of the Southern Ocean. They stated that continued warming over the coming decades will dramatically affect Antarctica, the sub-Antarctic islands, the Southern Ocean and the penguins dependent on these ecosystems for survival. A small number of general letters and e-mails drew particular attention to the conservation status of the southern rockhopper penguin in the Falkland Islands.

Twenty submissions provided detailed, substantive information on one or more of the 10 species. These included information from the governments, or government-affiliated scientists, of Argentina, Australia, Namibia, New Zealand, Peru, South Africa, and the United Kingdom, from scientists, from 18 members of the U.S. Congress, and from one non-governmental organization (the original petitioner).

On December 3, 2007, the Service received a 60-day Notice of Intent to Sue from the Center for Biological Diversity (CBD). CBD filed a complaint against the Department of the Interior on February 27, 2008, for failure to make a 12-month finding on the petition. On September 8, 2008, the Service entered into a Settlement Agreement with CBD, in which we agreed to submit to the **Federal Register** 12-month findings for the 10 species of penguins, including the African penguin, on or before December 19, 2008.

We base our findings on a review of the best scientific and commercial information available, including all information received during the public comment period. Under section 4(b)(3)(B) of the Act, we are required to make a finding as to whether listing each of the 10 species of penguins is warranted, not warranted, or warranted but precluded by higher priority listing actions.

African Penguin (Spheniscus demersus)

Background

The African penguin is known by three other common names: Jackass penguin, cape penguin, and black-footed penguin. The ancestry of the genus *Spheniscus* is estimated at 25 million years ago, following a split between *Spheniscus* and *Eudyptula* from the basal lineage *Aptenodytes* (the ''great penguins,'' emperor and king). Speciation within *Spheniscus* is recent, with the two species pairs originating almost contemporaneously in the Pacific and Atlantic Oceans in approximately the last 4 million years (Baker *et al.* 2006, p. 15).

African penguins are the only nesting penguins found on the African continent. Their breeding range is from Hollamsbird Island, Namibia, to Bird Island, Algoa Bay, South Africa (Whittington *et al.* 2000a, p. 8), where penguins form colonies (rookeries) for breeding and molting. Outside the breeding season, African penguins occupy areas throughout the breeding range and farther to the north and east. Vagrants have occurred north to Sette Cama (2 degrees and 32 minutes South (2°32′S)), Gabon, on Africa's west coast and to Inhaca Island (26°58′S) and the Limpopo River mouth (24°45′S), Mozambique, on the east coast of Africa (Shelton *et al.* 1984, p. 219; Hockey *et al.* 2005, p. 632). A coastal species, they are generally spotted within 7.5 miles (mi) (12 kilometers (km)) of the shore.

There has been abandonment of breeding colonies and establishment of new colonies within the range of the species. Within the Western Cape region in southwestern South Africa, for example, penguin numbers at the two easternmost colonies (on Dyer and Geyser Islands) and three northernmost colonies (on Lambert's Bay and Malgas

and Marcus Islands) decreased, while the population more than doubled over the 1992–2003 period at five colonies, including the two largest (Dassen and Robben Islands) (du Toit *et al.* 2003, p. 1). The most significant development between 1978 and the 1990s was the establishment of three colonies that did not exist earlier in the 20th century—Stony Point, Boulder's Beach in False Bay, and Robben Island, which now supports the third largest colony for the species (du Toit *et al.* 2003, p. 1; Kemper *et al.* 2007, p. 326).

African penguins are colonial breeders. They breed mainly on rocky offshore islands, either nesting in burrows they excavate themselves or in depressions under boulders or bushes, manmade structures, or large items of jetsam. Historically, they dug nests in the layers of sun-hardened guano (bird excrement) that existed on most islands. However, in the 19th century, European and North American traders exploited guano as a source of nitrogen, denuding islands of their layers of guano (Hockey *et al.* 2005, p. 633; du Toit *et al.* 2003, p. 3).

African penguins have an extended breeding season; colonies are observed to breed year-round on offshore islands (Brown *et al.* 1982, p. 77). Broad regional differences do exist, though, and the peak of the breeding season in Namibia (November and December) tends to be earlier than the peak for South Africa (March to May). Breeding pairs are considered monogamous; about 80 to 90 percent of pairs remain together in consecutive breeding seasons. The same pair will generally return to the same colony, and often the same nest site each year. The male carries out nest site selection, while nest building is by both sexes.

Although population statistics vary from year to year, studies at a number of breeding islands revealed mean reported adult survival values per year of 0.81 (Crawford *et al.* 2006, p. 121). African penguins have an average lifespan of 10–11 years in the wild, the females reaching sexual maturity at the age of 4 years and the males at the age of 5 years. The highest recorded age in the wild is greater than 27 years (Whittington *et al.* 2000b, p. 81); however, several individual birds have lived to be up to 40 years of age in captivity.

Feeding habitats of the African penguin are dictated by the unique marine ecosystem of the coast of South Africa and Namibia. The Benguela ecosystem, encompassing one of the four major coastal upwelling ecosystems in the world, is situated along the coast of southwestern Africa. It stretches from east of the Cape of Good Hope in the south to the Angola Front to the north, where the Angola Front separates the warm water of the Angola current from the cold Benguela water (Fennel 1999, p. 177). The Benguela ecosystem is an important center of marine biodiversity and marine food production, and is one of the most productive ocean areas in the world, with a mean annual primary productivity about six times higher than that of the North Sea ecosystem. The rise of cold, nutrient-rich waters from the ocean depths to the warmer, sunlit zone at the surface in the Benguela produces rich feeding grounds for a variety of marine and avian species. The Benguela ecosystem historically supports a globally significant biomass of zooplankton, fish, sea birds, and marine mammals, including the African penguin's main diet of anchovy (*Engraulius encrasicolus*) and Pacific sardine (*Sardinops sagax*) (Berruti *et al.* 1989, pp. 273–335).

The principal upwelling center in the Benguela ecosystem is historically situated in southern Namibia, and is the most concentrated and intense found in any upwelling regime. It is unique in that it is bounded at both northern and southern ends by warm water systems, in the eastern Atlantic and the Indian Ocean's Agulhas current, respectively. Sharp horizontal gradients (fronts) exist at these boundaries with adjacent ocean systems (Berruti *et al.* 1989, p. 276).

African penguins prey upon small fish, as well as squid and krill. Studies conducted between 1953 and 1992 showed that anchovies and sardines contributed 50 to 90 percent by mass of the African penguin's diet (Crawford *et al.* 2006, p. 120). Trends in regional populations of the African penguin have been shown to be related to long-term changes in the abundance and distribution of these two fish species (Crawford 1998, p. 355; Crawford *et al.* 2006, p. 122).

Most spawning by anchovy and sardine takes place on the Agulhas Bank, which is to the southeast of Robben Island, from August to February (Hampton 1987, p. 908). Young-of-the-year migrate southward along the west coast of South Africa from March until September, past Robben Island to join shoals of mature fish over the Agulhas Bank (Crawford 1980, p. 651). The southern Benguela upwelling system off the west coast of South Africa is characterized by strong seasonal patterns in prevailing wind direction, which result in seasonal changes in upwelling intensity. To produce adequate survival of their young, fish reproductive strategies are generally well-tuned to the seasonal variability of their environment (Lehodey *et al.* 2006, p. 5011). In the southern Benguela, intense wind-mixing transport of surface waters creates an unfavorable environment for fish to breed. As a result, both anchovy and sardine populations have developed a novel reproductive strategy that is tightly linked to the seasonal dynamics of major local environmental processes—spatial separation between spawning and nursery grounds. For both species, eggs spawned over the western Agulhas Bank (WAB) are transported to the productive west coast nursery grounds via a coastal jet, which acts like a ''conveyor belt'' to transport early life stages from the WAB spawning area to the nursery grounds (Lehodey *et al.* 2006, p. 5011).

The distance that African penguins have to travel to find food varies both temporally and spatially according to the season. Off western South Africa, the mean foraging range of penguins that are feeding chicks has been recorded to be 5.7 to 12.7 mi (9 to 20 km) (Petersen *et al.* 2006, p. 14), mostly within 1.9 mi (3 km) of the coast (Berruti *et al.* 1989, p. 307). Foraging duration during chick provisioning may last anywhere from 8 hours to 3 days, the average duration being around 10–13 hours (Petersen *et al.* 2006, p. 14). Travel distance from the breeding colony is more limited when feeding young. Outside the breeding season, adults generally remain within 248 mi (400 km) of their breeding locality, while juveniles regularly move in excess of 621 mi (1,000 km) from their natal island (Randall 1989, p. 250).

During the non-breeding season, African penguins forage on the Agulhas Bank. Underhill *et al.* (2007, p. 65) suggested that the molt period of African penguins is closely tied to the spawning period of sardine and anchovy at the Agulhas Bank. Pre-molt birds travel long distances to the bank to fatten up during this time of the most predictable food supply of the year. This reliable food source, and the need to gain energy prior to molting, is hypothesized to be the most important factor dictating the annual cycle of penguins. In fact, adult birds are often observed to abandon large chicks in order to move into this critical pre-molt foraging mode. The South African National Foundation for the Conservation of Coastal Birds (SANCCOB) rescue facility took in over 700 orphaned penguin chicks from Dyer Island in 2005–06. Parents abandoned chicks as they began to molt (SANCCOB 2006, p. 1; SANCCOB 2007a, p. 1). The increasing observation of abandonment is perhaps related to a slight trend

toward earlier molting seasons (Underhill *et al.* 2007, p. 65).

There has been a severe historical decline in African penguin numbers in both the South African and Namibian populations. This decline is accelerating at the present time. The species declined from millions of birds in the early 1900s (1.4 million adult birds at Dassen Island alone in 1910) (Ellis *et al.* 1998, p. 116) to 141,000 pairs in 1956–57 to 69,000 pairs in 1979–80 to 57,000 pairs in 2004–05, and to about 36,188 pairs in 2006 (Kemper *et al.* 2007, p. 327). Crawford (2007, in litt.) reported that from 2006–2007, the overall population declined by 12 percent to 31,000 to 32,000 pairs.

The species is distributed in about 32 colonies in three major clusters. In South Africa in 2006, there were 11,000 pairs in the first cluster at the Eastern Cape, and about 21,000 in the second cluster at the Western Cape colonies, with 13,283 of these pairs at Dassen Island and 3,697 at Robben Island. South African totals were down from 32,786 pairs in 2006 to 28,000 pairs in 2007. There were about 3,402 pairs in the third major cluster in Namibia. The Namibian population has declined by more than 75 percent since the mid-20th century (from 42,000 pairs in 1956–57) and has been decreasing 2.5 percent per year between 1990 (when there were 7,000 to 8,000 pairs) and 2005 (Kemper *et al.* 2007, p. 327; Underhill *et al.* 2007, p. 65; Roux *et al.* 2007a, p. 55).

The African penguin is listed as 'Vulnerable' on the 2007 International Union for Conservation of Nature (IUCN) Red List on the basis of steep population declines (Birdlife International 2007, p. 1), but given the 56 percent decline observed over 3 generations, there is discussion in the most recent revision of the conservation status of the species of changing that Red List status to 'Endangered' if the declines continue (Kemper *et al.* 2007, p. 327). That same assessment, based on 2006 data, concluded that the Namibian population should already be regarded as Red List 'Endangered' by IUCN criteria with the probability of extinction of the African penguin from this northern cluster during the 21st century rated as high (Kemper *et al.* 2007, p. 327).

There are about 32 breeding colonies (Kemper *et al.* 2007, p. 327). Breeding no longer occurs at eight localities where it formerly occurred or has been suspected to occur—Seal, Penguin, North Long, North Reef, and Albatross Islands in Namibia, and Jacobs Reef, Quoin, and Seal (Mossel Bay) Islands in South Africa (Crawford *et al.* 1995a, p. 269). In the 1980s, breeding started at two mainland sites in South Africa (Boulder's Beach and Stony Point) for which no earlier records of breeding exist. There is no breeding along the coast of South Africa's Northern Cape Province, which lies between Namibia and Western Cape Province (Ellis *et al.* 1998, p. 115).

Summary of Factors Affecting the Species

Section 4(a)(1) of the Act (16 U.S.C. 1533(a)(1)) and regulations issued to implement the listing provisions of the Act (50 CFR part 424) establish the procedures for adding species to the Federal lists of endangered and threatened wildlife and plants. We may determine a species to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to the African penguin are discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of African Penguin's Habitat or Range

The habitat of the African penguin consists of terrestrial breeding and molting sites and the marine environment, which serves as a foraging range both during and outside of the breeding season.

Modification of their terrestrial habitat is a continuing threat to African penguins. This began in the mid-1880s with the mining of seabird guano at islands colonized by the African penguin and other seabirds in both South Africa and Namibia. Harvesting of the guano cap began in 1845 (du Toit *et al.* 2003, p. 3; Griffin 2005, p. 16) and continued over decades, denuding the islands of guano. Deprived of their primary nest-building material, the penguins were forced to nest in the open, where their eggs and chicks are more vulnerable to predators such as kelp gulls (*Larus dominicanus*) (Griffin 2005, p. 16). Additionally, instead of being able to burrow into the guano, where temperature extremes are ameliorated, penguins nesting in the open are subjected to heat stress (Shannon and Crawford 1999, p. 119). Adapted for life in cold temperate waters, they have insulating fatty deposits to prevent hypothermia and black-and-white coloring that provides camouflage from predators at sea. These adaptations cause problems of overheating while they are on land incubating eggs and brooding chicks during the breeding season. Although guano harvesting is now prohibited in penguin colonies, many penguins continue to suffer from the lack of protection and heat stress due to the loss of this optimal breeding habitat substrate. We have not identified information on how quickly guano deposits may build up again to depths which provide suitable burrowing substrate, but hypothesize it is a matter of decades.

In Namibia, low-lying African penguin breeding habitat is being lost due to flooding from increased coastal rainfall and sea level rise of 0.07 inches (1.8 millimeters) a year over the past 30 years (Roux *et al.* 2007b, p. 6). Almost 11 percent of the nests on the four major breeding islands (which contain 96 percent of the Namibian population) are experiencing a moderate to high risk of flooding (Roux *et al.* 2007b, p. 6). Continued increases in coastal flooding from rising sea levels predicted by global and regional climate change models (Bindoff *et al.* 2007, pp. 409, 412) are predicted to increase the number and proportion of breeding sites at risk and lead to continued trends of decreased survival and decreased breeding success (Roux *et al.* 2007b, p. 6).

Competition for breeding habitat with Cape fur seals (*Arctocephalus pusillus pusillus*) has been cited as a reason for abandonment of breeding at five former breeding colonies in Namibia and South Africa, and expanding seal herds have displaced substantial numbers of breeding penguins at other colonies (Ellis *et al.* 1998, p. 120; Crawford *et al.* 1995a, p. 271).

Changes to the marine habitat present a significant threat to populations of African penguins. African penguins have a long history of shifting colonies and fluctuations in numbers at individual colonies in the face of shifting food supplies (Crawford 1998, p. 362). These shifts are related to the dynamics between prey species and to ecosystem changes, such as reduced or enhanced upwelling (sometimes associated with El Niño events), changes in sea surface temperature, or movement of system boundaries. In addition to such continuing cyclical events, the marine habitats of the Western Cape and Namibian populations of African Penguin are currently experiencing directional ecosystem changes attributable to global climate change; overall sea surface temperature increases have occurred during the 1900s and, as detailed above, sea level has been rising steadily in the region over the past 30 years (Bindoff *et al.* 2007, p. 391; Fidel and O'Toole 2007, pp. 22, 27; Roux *et al.* 2007a, p. 55).

At the Western Cape of South Africa, a shift in sardine distribution to an area outside the current breeding range of the

African penguin has led to a decrease of 45 percent between 2004 and 2006 in the number of penguins breeding in the Western Cape and increased adult mortality as the availability of sardine decreased for the major portion of the African penguin population located in that region (Crawford *et al.* 2007a, p. 8). From 1997 to the present, the distribution of sardine concentrations off South Africa has steadily shifted to the south and east, from its long-term location off colonies at Robben Island to east of Cape Infanta on the southern coast of South Africa east of Cape Agulhas, 248 mi (400 km) from the former center of abundance (Crawford *et al.* 2007a, p. 1).

This shift is having severe consequences for penguin populations. Off western South Africa, the foraging range of penguins that are feeding chicks is estimated to be 5.7 to 12.7 mi (9 to 20 km) (Petersen *et al.* 2006, p. 14), and while foraging they generally stay within 1.9 mi (3 km) of the coast (Berruti *et al.* 1989, p. 307). The southeastern most Western Cape Colonies occur at Dyer Island, which is southeast of Cape Town and about 47 mi (75 km) northwest of Cape Agulhas. Therefore, the current sardine concentrations are out of the foraging range of breeding adults at the Western Cape breeding colonies (Crawford *et al.* 2007a, p. 8), which between 2004 and 2006 made up between 79 and 68 percent of the rapidly declining South African population (Crawford *et al.* 2007a, p. 7).

Further, as described in Crawford (1998, p. 360), penguin abundances at these Western Cape colonies have historically shifted north and south according to sardine and anchovy abundance and accessibility from breeding colonies, but the current prey shift is to a new center of abundance outside the historic breeding range of this penguin species. While one new colony has appeared east of existing Western Cape colonies, more significantly, there has been a 45 percent decrease in breeding pairs in the Western Cape Province and a significant decrease in annual survival rate for adult penguins from 0.82 to 0.68 (Crawford *et al.* 2007a, p. 8). Exacerbating the problem of shifting prey, the authors reported that the fishing industry, which is tied to local processing capacity in the Western Cape, is competing with the penguins for the fish that remain in the west, rather than following the larger sardine concentrations to the east (Crawford *et al.* 2007a, pp. 9–10).

Changes in the northern Benguela ecosystem are also affecting the less numerous Namibian population of the African penguin. Over the past 3 decades, sea surface temperatures have steadily increased and upwelling intensity has decreased in the northern Benguela region. These long-term changes have been linked to declines in penguin recruitment at the four main breeding islands from 1993–2004 (Roux *et al.* 2007a, p. 55). Weakened upwelling conditions have a particular impact on post-fledge young penguins during their first year at sea, explaining 65 percent of the variance in recruitment during that period (Roux *et al.* 2007b, p. 9). These naïve birds are particularly impacted by increasingly scarce or hard-to-find prey. Even after heavy fishing pressure has been eased in this region in the 1990s, sardine stocks in Namibia have failed to recover, causing economic shifts for humans and foraging difficulties for penguins. This failure to recover has been attributed to the continuing warming trend and to increased horse mackerel (*Trachurus trachurus*) stocks, which have replaced sardines and anchovies (Benguela Current Large Marine Ecosystem (BCLME) 2007, pp. 2–3).

El Niño events also impact the Benguela marine ecosystem on a decadal frequency. These occur when warm seawater from the equator moves along the southwest coast of Africa towards the pole and penetrates the cold up-welled Benguela current. During the 1995 event, for example, the entire coast from Angola's Cabinda province to central Namibia was covered by abnormally warm water—in places up to 46 degrees Fahrenheit (°F) (8 degrees Celsius (°C)) above average—to a distance up to 186 mi (300 km) offshore (Science in Africa 2004, p. 2). During the last two documented events there have been mass mortalities of penguin prey species, prey species recruitment failures, and mass mortalities of predator populations, including starvation of over half of the seal population. The penguin data sets are not adequate to estimate the effects of Benguela El Niño events at present, but based on previous observations of impact on the entire food web of the northern Benguela, they are most likely to be negative (Roux *et al.* 2007b, p. 12). With increasing temperatures associated with climate change in the northern Benguela ecosystem, the frequency and intensity of Benguela El Niño events and their concomitant effects on the habitat of the African penguin are predicted to increase in the immediate upcoming years as new El Niño events emerge (Roux *et al.* 2007b, p. 5).

A third factor in the marine habitat of the Namibian populations is the extent of sulfide eruptions during different oceanographic conditions. Hydrogen sulfide accumulates in bottom sediments and erupts to create hypoxic (a reduced concentration of dissolved oxygen in a water body leading to stress and death in aquatic organisms) or even anoxic conditions over large volumes of the water column (Ludynia *et al.* 2007, p. 43; Fidel and O'Toole 2007 p. 9). Penguins, whose foraging range is restricted by the central place of their breeding colony location (Petersen *et al.* 2006, p. 24), are forced to forage in these areas, but their preferred prey of sardines and anchovies is unable to survive in these conditions. African penguins foraging in areas of sulfide eruptions expend greater amounts of energy in pursuit of available food, primarily the pelagic goby (*Sufflogobius bibarbatus*), which has lower energy content than their preferred prey. These sulphide eruptions, like the El Niño anomalies, are predicted to increase with continuing climate change (Bakun and Weeks 2004, pp. 1021–1022; Ludynia *et al.* 2007, p. 43). The Namibian population of African penguins, restricted in their breeding locations, will continue to be negatively impacted by this ongoing regime shift away from sardines and anchovies to pelagic goby and jellyfish.

We have identified a number of threats to the coastal and marine habitat of the African penguin which have operated in the past, are impacting the species now and will continue to impact the species in the immediate coming years and into the future. On the basis of this analysis, we find that the present and threatened destruction, modification, or curtailment of both its terrestrial and marine habitats is a threat to the African penguin throughout all of its range.

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

The current use of African penguins for commercial, recreational, scientific, or educational purposes is generally low. Prior estimates of commercial collection of eggs for food from Dassen Island alone were 500,000 in 1925, and more than 700,000 were collected from a number of localities in 1897 (Shelton *et al.* 1984, p. 256). Since 1968, however, commercial collection of penguin eggs for food has ceased.

There are unconfirmed reports of penguins being killed as use for bait in rock-lobster traps. Apparently they are attractive as bait because their flesh and skin is relatively tough compared to that of fish and other baits. The extent of this practice is unknown, and most reports

emanate from the Namibian islands (Ellis *et al.* 1998, p. 121). Use for non-lethal, scientific purposes is highly regulated and does not pose a threat to populations (See analysis under Factor D).

On the basis of this analysis, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the African penguin in any portion of its range now or in the foreseeable future.

Factor C. Disease or Predation

African penguins are hosts to a variety of parasites and diseases (Ellis 1998, pp. 119–120), but we find that disease is not a threat to the African penguin in any portion of its range. The primary concern is preventing the transmission of disease from the large numbers of African penguins rehabilitated after oiling to wild populations (Graczyk *et al.* 1995, p. 706).

Predation by Cape fur seals of protected avian species has become an issue of concern to marine and coastal managers in the Benguela ecosystem as these protected seals have rebounded to become abundant (1.5 to 2 million animals) (David *et al.* 2003, pp. 289–292). The seals are killing substantial numbers of seabirds, including African penguins and threatening the survival of individual colonies. At Dyer Island, 842 penguins in a colony of 9,690 individuals were killed in 1995–96 (Marks *et al.* 1997, p. 11). At Lambert's Bay, seals kill 4 percent of adult African penguins annually (Crawford *et al.* 2006, p. 124). In one instance, South Africa's Marine and Coastal Management Department within the Department of Environmental Affairs and Tourism instigated culling of the fur seals where they threatened the Cape Gannet (*Morus capensis*) (David *et al.* 2003, p. 290), but we are not aware of a similar program related to reducing the ongoing threat of predation by Cape fur seals on African penguins. Abandoned eggs and chicks are often lost to predators such as the kelp gull and other species. Additionally, without protection of burrows, penguin eggs and chicks are more vulnerable to predators (Griffin 2005, p. 16).

On the basis of this information, we find that predation, in particular by Cape Fur Seals that prey on significant numbers of African penguins at their breeding colonies, is a threat to the African penguin throughout all of its range, and we have no reason to believe the threat will be ameliorated in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Under South Africa's Biodiversity Act of 2004, the African penguin is classified as a protected species, defined as an indigenous species of ''high conservation value or national importance'' that requires national protection (Republic of South Africa 2004, p. 52; Republic of South Africa 2007, p. 10). Activities which may be carried out with respect to such species are restricted and cannot be undertaken without a permit (Republic of South Africa 2004, p. 50). Restricted activities include among other things, hunting, capturing, or killing living specimens of listed species by any means, collecting specimens of such species (including the animals themselves, eggs, or derivatives or products of such species), importing, exporting or re-exporting, having such specimens within one's physical control, or selling or otherwise trading in such specimens (Republic of South Africa 2004, p. 18).

The species is classified as 'endangered' in Nature and Environmental Conservation Ordinance, No. 19 of the Province of the Cape of Good Hope (Western Cape Nature Conservation Laws Amendment Act 2000, p. 88), providing protection from hunting or possessing this species without a permit. According to Ellis *et al.* (1998, p. 115), this status applies to the Northern Cape, Western Cape, and Eastern Cape Provinces as well. Kemper *et al.* (2007, p. 326) reported that African penguin colonies in South Africa are all protected under authorities ranging from local, to provincial, to national park status. While Ellis *et al.* (1998, p. 115) reported that in Namibia there is no official legal status for African penguins, Kemper *et al.* (2007, p. 326) reported in a more recent review that all Namibian breeding colonies are under some protection, from restricted access to national park status. While we have no information that allows us to evaluate their overall effectiveness, these national, regional, and local measures to prohibit activities involving African penguins without permits issued by government authorities and to control or restrict access to African penguin colonies are appropriate to protecting African penguins from land-based threats, such as harvest of penguins or their eggs, disturbance from tourism activities, and impacts from unregulated, scientific research activities.

The South African Marine Pollution (Control and Civil Liability) Act (No. 6 of 1981) (SAMPA) provides for the protection of the marine environment (the internal waters, territorial waters, and exclusive economic zone) from pollution by oil and other harmful substances, and is focused on preventing pollution and determining liability for loss or damage caused by the discharge of oil from ships, tankers, and offshore installations. The SAMPA prohibits the discharge of oil into the marine environment, sets requirements for reporting discharge or likely discharge and damage, and designates the South African Maritime Safety Authority the powers of authority to take steps to prevent pollution in the case of actual or likely discharge and to remove pollution should it occur, including powers of authority to direct ship masters and owners in such situations. The SAMPA also contains liability provisions related to the costs of any measures taken by the authority to reduce damage resulting from discharge (Marine Pollution (Control and Civil Liability) Act of 1981 2000, pp. 1–22).

South Africa is a signatory to the 1992 International Convention on Civil Liability for Oil Pollution Damages and its Associate Fund Convention (International Fund for Animal Welfare (IFAW) 2005, p. 1), and southern South African waters have been designated as a Special Area by the International Maritime Organization, providing measures to protect wildlife and the marine environment in an ecologically important region used intensively by shipping (International Convention for the Prevention of Pollution from Ships (MARPOL) 2006, p. 1). One of the prohibitions in such areas is on oil tankers washing their cargo tanks.

Despite these existing regulatory mechanisms, the African penguin continues to decline due to the effects of habitat destruction, predation, fisheries competition, and oil pollution. We find that these regulatory and conservation measures have been insufficient to significantly reduce or remove the threats to the African penguin and, therefore, that the inadequacy of existing regulatory mechanisms is a threat to this species throughout all of its range.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Over the period from 1930 to the present, fisheries harvest by man and more recently fisheries competition with increasingly abundant seal populations have hindered the African penguin's historical ability to rebound from oceanographic changes and prey regime shifts. The reduced carrying

capacity of the Benguela ecosystem, presents a significant threat to survival of African penguins (Crawford *et al.* 2007b, p. 574).

Crawford (1998, pp. 355–364) described the historical response of African penguins to regime shifts between their two primary prey species, sardines and anchovies, both in terms of numbers and colony distribution from the 1950s through the 1990s. There was a repeated pattern of individual colony collapse in some areas and, as the new food source became dominant, new colony establishment and population increase in other areas. Crawford (1998, p. 362) hypothesized that African penguins have coped successfully with many previous sardine-anchovy shifts. Specific mechanisms, such as the emigration of first-time breeders from natal colonies to areas of greater forage abundance may have historically helped them successfully adapt to changing prey location and abundance. However, over the period from the 1930s to the 1990s, competition for food from increased commercial fish harvest and from burgeoning fish take by recovering populations of the Cape fur seal appears to have overwhelmed the ability of African penguins to compete; the take of fish and cephalopods by man and seals increased by 2 million tons (T) (1.8 million tonnes (t)) per year from the 1930s to the 1980s (Crawford 1998, p. 362). Crawford *et al.* (2007b, p. 574) conclude that due to the increased competition with purse-seine (net) fisheries and burgeoning fur seal populations, the carrying capacity of the Benguela ecosystem for African penguins has declined by 80 to 90 percent from the 1920s to the present day. In the face of increased competition and reduced prey resources, African penguin populations are no longer rebounding successfully from underlying prey shifts, and they have experienced sharply decreased reproductive success.

These negative effects of decreased prey availability on reproductive success and on population size have been documented. Breeding success of African penguins was measured at Robbin Island from 1989–2004 (Crawford *et al.* 2006, p. 119) in concert with hydro-acoustic surveys to estimate the spawner biomass of anchovy and sardine off South Africa. When the combined spawner biomass of fish prey was less than 2 million T (1.8 million t), pairs of African penguins fledged an average of only 0.46 chicks annually. When it was above 2 million T (1.8 million t), annual breeding success had a mean value of 0.73 chicks per pair (Crawford *et al.* 2006, p. 119). The significant relationships obtained between breeding success of African penguins and estimates of the biomass of their fish prey confirm that reproduction is influenced by the abundance of food (Adams *et al.* 1992, p. 969; Crawford *et al.* 1999, p. 143). The levels of breeding success recorded in the most recent studies of the African penguin were found to be inadequate to sustain the African penguin population (Crawford *et al.* 2006, p. 119).

In addition to guano collection, as described in Factor A, disturbance of breeding colonies may arise from other human activities such as angling and swimming, tourism, and mining (Ellis *et al.* 1998, p. 121). Such disturbances can cause the penguins to panic and desert their nesting sites. Exploitation and disturbance by humans is probably the reason for penguins ceasing to breed at four colonies, one of which has since been re-colonized (Crawford *et al.* 1995b, p. 112). Burrows can be accidentally destroyed by humans walking near breeding sites, leading to penguin mortality.

Oil and chemical spills can have direct effects on the African penguin. Based on previous incidents and despite national and international measures to prevent and respond to oil spills referenced in Factor D, we consider this to be a significant threat to the species. African penguins live along the major global transport route for oil and have been frequently impacted by both major and minor oil spills. Since 1948, there have been 13 major oil spill events in South Africa, each of which oiled from 500 to 19,000 African penguins. Nine of these involved tanker collisions or groundings, three involved oil of unknown origins, and one involved an oil supply pipeline bursting in Cape Town harbor (Underhill 2001, pp. 2–3). In addition to these major events, which are described in detail below, there is a significant number of smaller spill events, impacting smaller number of birds. These smaller incidental spills result in about 1,000 oiled penguins being brought to SANCCOB, which has facilities to clean oiled birds, over the course of each year (Adams 1994, pp. 37–38; Underhill 2001, p. 1). Overall, from 1968 to the present, SANCCOB (2007b, p. 2), has handled more than 83,000 oiled sea birds, with the primary focus on African penguins.

The most recent and most serious event, the *Treasure* spill, occurred on June 23, 2000, when the iron ore carrier *Treasure* sank between Robben and Dassen Islands, where the largest and third-largest colonies of African penguin occur (Crawford *et al.* 2000, pp. 1–4). Large quantities of oil came ashore at both islands. South Africa launched a concerted effort to collect and clean oiled birds, to move non-oiled birds away from the region, to collect penguin chicks for artificial rearing, and to clean up oiled areas. Nineteen thousand African penguins were oiled and brought for cleaning to the SANCCOB facility. An additional 19,500 penguins were relocated to prevent them from being oiled. A total of 38,500 birds were handled in the context of this major oil spill. The last oil was removed from *Treasure* on July 18, 2000. Two months after the spill, mortality of African penguins from the spill stood at 2,000 adults and immature birds and 4,350 chicks (Crawford *et al.* 2000, p. 9). The Avian Demography Unit (ADU) of the University of Cape Town has undertaken long-term monitoring of penguins released after spill incidents. Response in the *Treasure* spill and success in rehabilitation have shown that response efforts have improved dramatically. The next most serious spill of the *Apollo Sea,* which occurred in June 1994, released about 2,401 T (2,177 t) of fuel oil near Dassen Island. About 10,000 penguins were contaminated with only 50 percent of these birds successfully de-oiled and put back in the wild. Over the 10 years after this spill, the ADU followed banded released birds to monitor their survival and reproductive histories (Wolfaardt *et al.* 2007, p. 68). They found that success in restoring oiled birds to the point that they attempt to breed after release has steadily improved. The breeding success of restored birds and the growth rates of their chicks, however, are lower than for non-oiled birds. Nevertheless, because adults could be returned successfully to the breeding population, they concluded that de-oiling and reintroduction of adults are effective conservation interventions (Wolfaardt *et al.* 2007, p. 68).

Therefore, we find that immediate and ongoing competition for food resources with fisheries and other species, overall decreases in food abundance, and ongoing severe direct and indirect threat of oil pollution are threats to the African penguin throughout all of its range.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this

proposed rule, we defined the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the African penguin, we considered the threats acting on the species, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species.

The African penguin is in serious decline throughout its range, and this decline is accelerating at the present time in all three population clusters. We have identified a number of threats to the coastal and marine habitat of the African penguin, and we predict that these threats are reasonably likely to continue to result in African penguin population declines in the foreseeable future. We have found that predation by Cape Fur Seals is a threat to the African penguin throughout all of its range, and we have no reason to believe the threat will be ameliorated within the foreseeable future. We have found that regulatory and conservation measures have been insufficient to significantly reduce or remove the threats to the African penguin, and we do not expect this to change in the foreseeable future. Finally, we have found that competition for food resources with fisheries and other species, decreases in food abundance, and severe direct and indirect threats of oil pollution are threats to the African penguin, and based on the information available, we have no reason to believe that these threats will lessen in the foreseeable future.

African Penguin Finding

The African penguin is in serious decline throughout its range. This decline is accelerating at the present time in all three population clusters, with a one-year decrease of 12 percent from 2006–2007 to between 31,000 to 32,000 breeding pairs, and an overall 3-year decline of 45 percent from 2004–2007. These verified, accelerating, and immediate declines, across all areas inhabited by African penguin populations are directly attributable to ongoing threats that are severely impacting the species at this time. Historical threats to terrestrial habitat, such as destruction of nesting areas for guano collection and the threat of direct harvest, have been overtaken by long-term competition for prey from human fisheries beginning in the 1930s. This competition is now exacerbated by the increased role of burgeoning Cape fur seal populations throughout the range in competing with commercial fisheries for the prey of the African penguin (Crawford 1998, p. 362). In combination, competition with fisheries and fur seals have reduced the carrying capacity of the marine environment for African penguins to 10 to 20 percent of its 1920s value and by themselves represent significant immediate threats to the African penguin throughout all of its range.

Changes in the different portions of the range of the African penguin are adding additional stressors to the overall declines in the prey of African penguins. In Namibia, the fisheries declines in the marine environment are being exacerbated by long-term declines in upwelling intensities and increased sea surface temperatures. These changes have hampered the recovery of sardine and anchovy populations in the region even as fishing pressure on those species has been relaxed, forcing penguins to shift to a less nutritious prey, the pelagic goby. The changes have also forced a regime shift in the Benguela ecosystem to other fish species, which are not the prey of African penguins. The phenomenon of sulfide eruption has further hampered the recovery of the food base.

In the Western Cape, in addition to the severe fisheries declines and severe reduction of the carrying capacity of the marine environment, the primary food source of African penguins has, beginning in 1997, shifted consistently eastward to areas east of the southernmost tip of South Africa. Over the past decade, the primary food base for the most populous African penguin colonies in South Africa has shifted outside the accessible foraging range for those colonies. This shift has led to declines in penguin recruitment and significant decreases in adult survival and represents an additional significant immediate threat to the West Cape populations of the African penguin.

On land, the effects of guano removal from penguin breeding islands continue to be felt in lack of predator protection and heat stress in breeding birds. Predation on penguins by kelp gulls and recovering Cape fur seals has become a predominant threat factor. In Namibia, where African penguin numbers are lowest, with only 3,402 pairs, low-lying islands have experienced flooding from increased rainfall and rising sea-levels, threatening 10 percent of the nests in the four major breeding colonies, further stressing a species under severe immediate threat from factors in the marine environment.

Finally, the marine and coastal habitat of the African penguin lies on one of the world's busiest sea lanes. Despite improvements in oil spill response capability and global recognition of the importance of protecting these waters from the impacts of oil, catastrophic and chronic spills have been and continue to be the norm. The most recent catastrophic spill in 2000 in South Africa resulted in the oiling of 19,000 penguins and the translocation of 19,500 more birds in direct danger from the spill. With the global population at a historical low (between 31,000 and 32,000 pairs), future oil spills, which consistent experience shows may occur at any time, pose a significant and immediate threat to the species throughout all of its range.

We have carefully assessed the best scientific and commercial information available regarding the threats faced by this species. The African penguin is in serious decline throughout all of its range, and the decline is currently accelerating. This decline is due to threats of a high magnitude—(1) The immediate impacts of a reduced carrying capacity for the African penguin throughout its range due to fisheries declines and competition for food with Cape fur seals (severely exacerbated by rapid ongoing ecosystem changes in the marine environment at the northern end of the penguin's distribution and by major shifts of prey resources to outside of the accessible foraging range of breeding penguins at the southern end of distribution); (2) the continued threats to African penguins on land throughout their range from habitat modification and destruction and predation; and (3) the immediate and ongoing threat of oil spills and oil pollution to the African penguin. The severity of these threats to the African penguin within its breeding and foraging range puts the species in danger of extinction. Therefore, we find that the African penguin is in danger of extinction throughout all of its range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation

actions by Federal governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the African penguin is not native to the United States, no critical habitat is being proposed for designation in this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the African penguin. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

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

Peer Review

In accordance with our joint policy with National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period, on our specific assumptions and conclusions regarding the proposal to list the African penguin as endangered.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see **DATES**). Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

National Environmental Policy Act (NEPA)

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

Clarity of the Rule

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The authors of this proposed rule are staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by adding a new entry for ''Penguin, African,'' in

alphabetical order under ''BIRDS'' to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Penguin, African	*Spheniscus demersus.*	Atlantic Ocean—South Africa, Namibia.	Entire	E	.....	NA	NA
*	*	*	*	*	*		*

* * * * *

Dated: December 2, 2008.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–29676 Filed 12–17–08; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Thursday,
December 18, 2008

Part IV

Department of Transportation

Federal Transit Administration

FTA Fiscal Year 2009 Apportionments, Allocations, and Program Information; Notice

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FTA Fiscal Year 2009 Apportionments, Allocations, and Program Information

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, (Pub. L. 110–329) signed into law by President Bush on September 30, 2008, continues to fund the Federal transit programs of the Department of Transportation (DOT) at the same levels that were available under Division K of the ''Consolidated Appropriations Act, 2008'' (Pub. L. 110–161) until a DOT Appropriations Act for Fiscal Year (FY) 2009 is enacted or March 6, 2009, whichever occurs first. This notice provides information on funding amounts that are currently available for the Federal Transit Administration (FTA) assistance programs; provides program guidance and requirements; and provides information on several program issues important in the current year. The notice also includes tables that show certain discretionary programs unobligated (carryover) funding from previous years that will be available for obligation during FY 2009.

FOR FURTHER INFORMATION CONTACT: For general information about this notice contact Henrika Buchanan-Smith, Director, Office of Transit Programs, at (202) 366–2053. Please contact the appropriate FTA regional office for any specific requests for information or technical assistance. The Appendix at the end of this notice includes contact information for FTA regional offices. An FTA headquarters contact for each major program area is also included in the discussion of that program in the text of the notice.

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I. Overview

This document apportions or allocates the FY 2009 funds that were made available under Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, (Pub. L. 110–329, September 30, 2008), hereinafter, (''Continuing Appropriations Act, 2009'') among potential program recipients according to statutory formulas in 49 U.S.C. Chapter 53 and existing Full Funding Grant Agreements. The notice only includes the amount of FY 2009 funds that is currently available, which is approximately 5/12 or 43% of the amounts that were available under the Consolidated Appropriations Act, 2008. The notice does not include any extension or reprogramming of any discretionary funds that lapsed to the designated project as of September 30, 2008. The notice also does not include partial amounts made available to projects designated Bus and Bus-Related Facilities Program funds or National Research Program funds under SAFETEA–LU. FTA will issue a supplemental notice at a later date regarding these projects and any additional increments of formula and discretionary funds that become available.

For each FTA program included in this notice, we have provided relevant information on the FY 2009 funding currently available, program requirements, period of availability, and other related program information and highlights, as appropriate. A separate section of the document provides information on program requirements and guidance that are applicable to all FTA programs.

II. FY 2009 Funding for FTA Programs

A. Funding Based on the Continuing Appropriations Act, 2009 (Pub. L. 110–329, September 30, 2008) and SAFETEA–LU Authorization

The Continuing Appropriations Act, 2009, provides general funds and obligation authority on trust funds from the MTA that total $4.1 billion for FTA programs, until a DOT Appropriations Act for FY 2009 is enacted or a continued continuing Resolution after March 6, 2009, whichever occurs first. Table 1 of this document shows the funding for the FTA programs, as provided for in the Continuing Appropriations Act, 2009. All Formula Programs and the Section 5309 Bus and Bus-Related Facilities Program are funded entirely from MTA of the Highway Trust Fund in FY 2009. The Section 5309 New Starts Program, the Research Program, and FTA administrative expenses are funded by appropriations from the General Fund of the Treasury.

Congress has enacted a partial year Continuing Appropriations Act, 2009. This **Federal Register** notice includes tables of apportionments and allocations for FTA formula programs based on that Act. Prorated allocations based on FY 2008 funding levels are also included for active Full Funding Grant Agreements (FFGAs) under the New Starts discretionary program; however, FY 2009 discretionary allocations for other discretionary programs will not be published until FTA issues a subsequent notice as additional resources are made available.

B. Program Funds Set-Aside for Project Management Oversight

FTA uses a percentage of funds appropriated to certain FTA programs for program oversight activities conducted by the agency. The funds are used to provide necessary oversight activities, including oversight of the construction of any major capital project under these statutory programs; to conduct safety and security, civil rights, procurement systems, management, planning certification and, financial reviews and audits, as well as evaluations and analyses of grantee specific problems and issues; and to provide technical assistance to correct deficiencies identified in compliance reviews and audits.

Section 5327 of title 49 U.S.C., authorizes the takedown of funds from FTA programs for project management oversight. Section 5327 provides oversight takedowns at the following levels: 0.5 percent of Planning funds, 0.75 percent of Urbanized Area Formula funds, 1 percent of Capital Investment funds, 0.5 percent of Special Needs of Elderly Individuals and Individuals with Disabilities formula funds, 0.5 percent of Nonurbanized Area Formula funds, and 0.5 percent of the Paul S. Sarbanes Transit in the Parks Program funds (formerly the Alternative Transportation in the Parks and Public Lands Program).

III. FY 2009 FTA Program Initiatives and Changes

A. SAFETEA–LU Implementation

In FY 2009, FTA continues to focus on implementation of SAFETEA–LU through issuance of new and revised program guidance and regulations. Before any documents that place binding obligations on grantees are finalized and issued, FTA makes them available for public comment. We encourage grantees to regularly check the FTA Web site at *http://www.fta.dot.gov* and the U.S. Government docket management Website at *http://regulations.gov* for new issuances and to comment to the docket established for each document on relevant issues.

B. Planning Emphasis Areas

In recognition of the priority planning organizations and grantees are giving to the implementation of the new and changed provisions of SAFETEA–LU, FTA and the Federal Highway Administration (FHWA) are not issuing new planning emphasis areas for FY 2009, and have rescinded planning emphasis areas from prior years.

C. Earmarks and Competitive Grant Opportunities

SAFETEA–LU contained statutory earmarks under several programs. Absent future legislation to the contrary, FTA will honor the statutory earmarks; however, funds for the FY 2009 discretionary programs with the exception of New Start Program funds for existing FFGAs will not be made available in partial increments. FTA will publish the availability of discretionary funds in a subsequent notice. This notice does include tables of unobligated balances for earmarks from previous years under the Bus and Bus-Related Facilities Program, the New Starts Program, the Clean Fuels Program, and the Alternatives Analysis Program. FTA will continue to honor those earmarks. FTA will supplement this notice, at a later date, to provide any additional discretionary allocations of funds made available in FY 2009 and any lapsed prior year earmarks that the Secretary of Transportation determines to extend or reprogram, once the Department has examined the requests.

D. Flexible Funding Procedures

Obligation authority for flexible funds, high priority projects and other transit projects in title 23 U.S.C. is transferred to FTA when States and local agencies determine that FTA will administer the project. The liquidating cash, however, is transferred between Federal accounts only as needed to ensure that adequate funds are available for disbursement on a timely basis. In order to track the cash flow more closely, FTA no longer combines funds transferred from FHWA into a single grant with FTA funds in the program to which they are transferred. FTA has established codes and procedures for grants involving funds transferred from FHWA. Grantees can contact the appropriate regional office for assistance.

E. Changes in Match for Biodiesel Vehicles and Hybrid Retrofits

Section 164 of the Consolidated Appropriations Act, 2008, allowed a 90 percent Federal share for biodiesel buses and for the net capital cost of factory-installed or retrofitted hybrid electric propulsion systems and any equipment related to such a system. This increased federal share is a cross-cutting provision and is applicable across FTA programs for any grants awarded during FY 2008 regardless of what fiscal year funding is used. This provision remains in effect pursuant to Division A of the Continuing Appropriations Act, 2009, which expires on or before March 6, 2009. Grantees may apply for a 90 percent Federal share for the entire cost of a biodiesel bus, but only for the cost of the propulsion system and related equipment in the case of the hybrid electric systems, not for 90 percent of the cost of the entire vehicle. In lieu of calculating the costs of the equipment separately, grantees may apply for 83 percent of the cost of the vehicle.

F. National Transit Database (NTD) Disaster Adjustments Policy

Previously, when a transit provider could not report to the NTD due to an ''Act of God'', such as an earthquake, fire, or flood, FTA would grant the affected transit provider a ''hold harmless adjustment,'' by using the previous year's service data reported to the NTD for that transit provider in the apportionment of formula grants for urbanized areas. On August 14, 2008, FTA proposed to change this policy and initiated notice and comment on the proposal. Effective November 13, 2008, (73 FR 67247), FTA established a new policy, retroactive to NTD Report Year (RY) 2007 data, allowing transit providers that suffer a marked decrease in service data due to a natural or man-made disaster to receive a similar ''hold harmless adjustment'' in the apportionment of formula grants for urbanized areas. This adjustment is not automatic and must be requested in writing by either the affected transit provider, or the affected designated recipient for the urbanized area. FTA will approve or deny each request at its discretion based on the following factors: (1) Whether a Federal disaster declaration was in place for all or part of the current report year, for either all or part of the transit provider's service area; (2) whether the request demonstrates that the decrease in transit service from the report year before the disaster is in large part due to the ongoing impact of the disaster; and (3) whether the request demonstrates that the decrease in transit service reasonably appears to be temporary, and does not reflect the true transit needs of the urbanized area. FTA will not grant adjustment requests that do not address all three factors. Adjustment requests should include sufficient documentation to allow FTA to evaluate the request based on these factors. FTA may request additional information from an applicant for an adjustment to evaluate the request based on these factors. A request for an adjustment may only be made for one year at a time. Requests for an adjustment related to the same disaster may be made in subsequent years, provided that the applicant can continue to support its request based on the above factors. If the adjustment request is granted, the NTD data in all publicly-available data sets and data products would remain unadjusted, and would reflect the actual NTD submission for the transit provider. The only adjustment would be in using data from the previous full NTD Report Year before the disaster occurred in the data sets used for the apportionments of formula grants for urbanized areas.

Further instructions for requesting a ''hold harmless'' adjustment will be found in future editions of the NTD Annual Reporting Manual, available at *http://www.ntdprogram.gov.*

IV. FTA Programs

This section of the notice provides available FY 2009 funding and/or other important program-related information for the three major FTA funding accounts included in the notice (Formula and Bus Grants, Capital Investment Grants, and Research Grants). Of the 17 separate FTA programs contained in this notice that fall under the major program area headings, funding for ten programs is apportioned by statutory or administrative formula. Funding for the other seven is allocated on a discretionary or competitive basis.

Funding and/or other important information for each of the 17 programs is presented immediately below. This includes program apportionments or allocations, certain program requirements, length of time FY 2009 funding is available for obligation and other significant program information pertaining to FY 2009.

A. Metropolitan Planning Program (49 U.S.C. 5305(d))

Section 5305(d) authorizes federal funding to support a cooperative, continuous, and comprehensive planning program for transportation investment decision-making at the metropolitan area level. The specific requirements of metropolitan transportation planning are set forth in 49 U.S.C. 5303 and further explained in 23 CFR Part 450 as referenced in 49 CFR Part 613, *Statewide Transportation Planning; Metropolitan Transportation Planning; Final Rule.* State Departments of Transportation are direct recipients of funds allocated by FTA, which are then suballocated to Metropolitan Planning Organizations (MPOs) by formula, for planning activities that support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency; increasing the safety and security of the transportation system for motorized and non-motorized users; increasing the accessibility and mobility options available to people and for freight; protecting and enhancing the environment, promoting energy conservation, and improving quality of life; enhancing the integration and connectivity of the transportation system, across and between modes, for people and freight; promoting efficient system management and operation; and emphasizing the preservation of the existing transportation system. This funding must support work elements and activities resulting in balanced and comprehensive intermodal transportation planning for the movement of people and goods in the metropolitan area. Comprehensive transportation planning is not limited to transit planning or surface transportation planning, but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. Eligible work elements or activities include, but are not limited to studies relating to management, planning, operations, capital requirements, and economic feasibility; evaluation of previously funded projects; peer reviews and exchanges of technical data, information, assistance, and related activities in support of planning and environmental analysis among MPOs and other transportation planners; work elements and related activities preliminary to and in preparation for constructing, acquiring, or improving the operation of facilities and equipment. An exhaustive list of eligible work activities is provided in FTA Circular 8100.1C, Program Guidance for Metropolitan Planning and State Planning and Research Program Grants, dated September 1, 2008. For more about the Metropolitan Planning Program and the FTA Circular 8100.1C, contact Victor Austin Office of Planning and Environment at (202) 366–2996.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $38,068,323 to the Metropolitan Planning Program (49 U.S.C. 5305(d)) to support metropolitan transportation planning activities set forth in 49 U.S.C. 5303. The total amount apportioned for the Metropolitan Planning Program to States for MPOs' use in urbanized areas (UZAs) is 37,877,981, as shown in the table below, after the deduction for oversight and the addition of prior year reapportioned funds.

METROPOLITAN PLANNING PROGRAM

Total Appropriation	$38,068,323
Oversight Deduction	−190,342
Total Apportioned	37,877,981

States' apportionments for this program are displayed in Table 2.

2. Basis for Formula Apportionments

As specified in law, 82.72 percent of the amounts authorized for Section 5305 are allocated to the Metropolitan Planning program. FTA allocates Metropolitan Planning funds to the States according to a statutory formula. Eighty percent of the funds are distributed to the States as a basic allocation based on each State's UZA population, based on the most recent decennial Census. The remaining 20 percent is provided to the States as a supplemental allocation based on an FTA administrative formula to address planning needs in the larger, more complex UZAs. The amount published for each State is a combined total of both the basic and supplemental allocation.

3. Program Requirements

The State allocates Metropolitan Planning funds to MPOs in UZAs or portions thereof to provide funds for projects included in an annual work program (the Unified Planning Work Program, or UPWP) that includes both highway and transit planning projects. Each State has either reaffirmed or developed, in consultation with their MPOs, a new allocation formula, as a result of the 2000 Census. The State allocation formula may be changed annually, but any change requires approval by the FTA regional office before grant approval. Program guidance for the Metropolitan Planning Program is found in FTA Circular 8100.1C, Program Guidance for Metropolitan Planning and State Planning and Research Program Grants, dated September 1, 2008. For more about the Metropolitan Planning Program and the FTA Circular 8100.1C, contact Victor Austin of the Office of Planning and Environment at (202) 366–2996.

4. Period of Availability

The funds apportioned under the Metropolitan Planning program remain available to be obligated by FTA to recipients for four fiscal years—which includes the year of apportionment plus three additional years. Any apportioned funds that remain unobligated at the close of business on September 30, 2012, will revert to FTA for reapportionment under the Metropolitan Planning Program.

5. Other Program or Apportionment Related Information and Highlights

a. Planning Emphasis Areas (PEAs). FTA and FHWA are not issuing new PEAs this year, and are rescinding PEAs issued in prior years, in light of the priority given to implementation of SAFETEA–LU planning and program provisions.

b. Consolidated Planning Grants. FTA and FHWA planning funds under both the Metropolitan Planning and State Planning and Research Programs can be consolidated into a single consolidated planning grant (CPG), awarded by either FTA or FHWA. The CPG eliminates the need to monitor individual fund sources, if several have been used, and ensures that the oldest funds will always be used first. Unlike ''flex funds'' for capital programs, planning funds from FHWA may be combined with FTA planning funds in a single grant. Alternatively, FTA planning funds may be transferred to FHWA to be administered as combined grants.

Under the CPG, States can report metropolitan planning program expenditures (to comply with the Single Audit Act) for both FTA and FHWA under the Catalogue of Federal Domestic Assistance number for FTA's Metropolitan Planning Program (20.505). Additionally, for States with an FHWA Metropolitan Planning (PL) fund-matching ratio greater than 80 percent, the State can waive the 20 percent local share requirement, with FTA's concurrence, to allow FTA funds used for metropolitan planning in a CPG to be granted at the higher FHWA rate. For some States, this Federal match rate can exceed 90 percent.

States interested in transferring planning funds between FTA and FHWA should contact the FTA Regional Office or FHWA Division Office for more detailed procedures. Current guidelines are included in Federal Highway Administration Memorandum dated July 12, 2007, ''Information: Final Transfers to Other Agencies that Administer Title 23 Programs.''

For further information on CPGs, contact Kristen Clarke, Office of Budget and Policy, FTA, at (202) 366–1686, Ken Johnson, Office of Program Management, FTA, at (202) 366–1659, or Kenneth Petty, Office of Planning and Environment, FHWA, at (202) 366–6654.

B. State Planning and Research Program (49 U.S.C. 5305(e))

This program provides financial assistance to States for Statewide transportation planning and other technical assistance activities, including supplementing the technical assistance program provided through the Metropolitan Planning program. The specific requirements of Statewide transportation planning are set forth in 49 U.S.C. 5304 and further explained in 23 CFR Part 450 as referenced in 49 CFR Part 613, *Statewide Transportation Planning; Metropolitan Transportation Planning; Final Rule.* This funding must support work elements and activities resulting in balanced and comprehensive intermodal transportation planning for the movement of people and goods. Comprehensive transportation planning is not limited to transit planning or surface transportation planning, but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. For more information, contact Victor Austin of the Office of Planning and Environment at (202) 366–2996.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $7,952,377 to the State Planning and Research Program (49 U.S.C. 5305). The total amount apportioned for the State Planning and Research Program (SPRP) is $7,912,615, as shown in the table below, after the deduction for oversight (authorized by 49 U.S.C. 5327).

STATE PLANNING AND RESEARCH PROGRAM

Total Appropriation	$7,952,377
Oversight Deduction	−39,762
Total Apportioned	7,912,615

State apportionments for this program are displayed in Table 2.

2. Basis for Apportionment Formula

As specified in law, 17.28 percent of the amounts authorized for Section 5305 are allocated to the State Planning and Research program. FTA apportions funds to States by a statutory formula that is based on the most recent decennial Census, and the State's UZA population as compared to the UZA population of all States.

3. Requirements

Funds are provided to States for Statewide transportation planning programs. These funds may be used for a variety of purposes such as planning, technical studies and assistance, demonstrations, and management training. In addition, a State may authorize a portion of these funds to be used to supplement Metropolitan Planning funds allocated by the State to its UZAs, as the State deems appropriate. Program guidance for the State Planning and Research program is found in FTA Circular 8100.1C. This funding must support work elements and activities resulting in balanced and comprehensive intermodal

transportation planning for the movement of people and goods. Comprehensive transportation planning is not limited to transit planning or surface transportation planning, but also encompasses the relationships among land use and all transportation modes, without regard to the programmatic source of Federal assistance. Eligible work elements or activities include, but are not limited to studies relating to management, planning, operations, capital requirements, and economic feasibility; evaluation of previously funded projects; peer reviews and exchanges of technical data, information, assistance, and related activities in support of planning and environmental analysis; work elements and related activities preliminary to and in preparation for constructing, acquiring, or improving the operation of facilities and equipment. An exhaustive list of eligible work activities is provided in FTA Circular 8100.1C, Program Guidance for Metropolitan Planning and State Planning and Research Program Grants, dated September 1, 2008. For more information, contact Victor Austin, Office of Planning and Environment at (202) 366–2996.

4. Period of Availability

The funds apportioned under the State Planning and Research program remain available to be obligated by FTA to recipients for four fiscal years—which include the year of apportionment plus three additional fiscal years. Any apportioned funds that remain unobligated at the close of business on September 30, 2012, will revert to FTA for reapportionment under the State Planning and Research Program.

5. Other Program or Apportionment Related Information and Highlights

See Section A5 for information about Planning Emphasis Areas and CPGs.

C. Urbanized Area Formula Program (49 U.S.C. 5307)

Section 5307 authorizes Federal capital and operating assistance, in some cases, for transit in Urbanized Areas (UZAs). A UZA is an area with a population of 50,000 or more that has been defined and designated as such in the most recent decennial Census by the U.S. Census Bureau. The Urbanized Area Formula Program funds may also be used to support planning activities, and may supplement to planning projects funded under the Metropolitan Planning program described above. Urbanized Areas Formula Program funds used for planning must be shown in the UPWP for MPO(s) with responsibility for that area. Funding is apportioned directly to each UZA with a population of 200,000 or more, and to the State Governors for UZAs with populations between 50,000 and 200,000. Eligible applicants are limited to entities designated as recipients in accordance with 49 U.S.C. 5307(a)(2) and other public entities with the consent of the Designated Recipient. Generally, operating assistance is not an eligible expense for UZAs with populations of 200,000 or more. However, there are several exceptions to this restriction. The exceptions are described in section 3(d)(5) below.

For more information about the Urbanized Area Formula Program contact Scott Faulk, Office of Transit Programs, at (202) 366–1660.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $1,682,053,574 to the Urbanized Area Formula Program (49 U.S.C. 5307). The total amount apportioned for the Urbanized Area Formula Program is $1,828,187,915 as shown in the table below, after the 0.75 percent deduction for oversight (authorized by 49 U.S.C. 5327) and including funds apportioned to UZAs from the appropriation for Section 5340 for Growing States and High Density States.

URBANIZED AREA FORMULA PROGRAM

Total Appropriation	$1,682,053,574 [a]
Oversight Deduction	− 12,615,402
Section 5340 Funds Added	158,749,743
Total Apportioned	1,828,187,915

[a] One percent set-aside for Small Transit Intensive Cities Formula.

Table 3 displays the amounts apportioned under the Urbanized Area Formula Program.

2. Basis for Formula Apportionment

FTA apportions Urbanized Area Formula Program funds based on legislative formulas. Different formulas apply to UZAs with populations of 200,000 or more and to UZAs with populations less than 200,000. For UZAs with 50,000 to 199,999 in population, the formula is based solely on population and population density. For UZAs with populations of 200,000 and more, the formula is based on a combination of bus revenue vehicle miles, bus passenger miles, fixed guideway revenue vehicle miles, and fixed guideway route miles, as well as population and population density. Table 4 includes detailed information about the formulas.

To calculate a UZA's FY 2009 apportionment, FTA used population and population density statistics from the 2000 Census and (when applicable) validated mileage and transit service data from transit providers' 2007 National Transit Database (NTD) Report Year. Pursuant to 49 U.S.C. 5336(b), FTA used 60 percent of the directional route miles attributable to the Alaska Railroad passenger operations system to calculate the apportionment for the Anchorage, Alaska UZA.

We have calculated dollar unit values for the formula factors used in the Urbanized Area Formula Program apportionment calculations. These values represent the amount of money each unit of a factor is worth in this year's apportionment. The unit values change each year, based on all of the data used to calculate the apportionments. The dollar unit values for FY 2009 are displayed in Table 5. To replicate the basic formula component of a UZA's apportionment, multiply the dollar unit value by the appropriate formula factor (*i.e.*, the population, population × population density), and when applicable, data from the NTD (*i.e.*, route miles, vehicle revenue miles, passenger miles, and operating cost).

In FY 2009, one percent of funds appropriated for Section 5307, or $16,820,536 based on the Continuing Appropriations Act, is set aside for Small Transit Intensive Cities (STIC). FTA apportions these funds to UZAs under 200,000 in population that operate at a level of service equal to or above the industry average level of service for all UZAs with a population of at least 200,000, but not more than 999,999, in one or more of six performance categories: Passenger miles traveled per vehicle revenue mile, passenger miles traveled per vehicle revenue hour, vehicle revenue miles per capita, vehicle revenue hours per capita, passenger miles traveled per capita, and passengers per capita.

The data for these categories for the purpose of FY 2009 apportionments comes from the NTD reports for the 2007 reporting year. This data is used to determine a UZA's eligibility under the STIC formula, and is also used in the STIC apportionment calculations. Because these performance data change with each year's NTD reports, the UZAs eligible for STIC funds and the amount each receives may vary each year. In FY 2009, FTA apportioned $56,826 for each performance factor/category for which the urbanized area exceeded the national average for UZAs with a

population of at least 200,000 but not more than 999,999.

In addition to the funds apportioned to UZAs, according to the Section 5307 formula factors contained in 49 U.S.C. 5336, FTA also apportions funds to urbanized areas under Section 5340 Growing States and High Density States formula factors. In FY 2009, FTA apportions $64,557,843 to 453 UZA's in all 50 States and $94,191,900 to 46 UZAs in seven High Density States. Half of the funds appropriated for Section 5340 are available to Growing States and half to High Density States. FTA apportions Growing States funds by a formula based on State population forecasts for 15 years beyond the most recent Census. FTA distributes the amounts apportioned for each State between UZAs and nonurbanized areas based on the ratio of urbanized/nonurbanized population within each State in the 2000 census, and to UZAs proportionately based on UZA population in the 2000 census because population estimates are not available at the UZA level. FTA apportions the High Density States funds to States with population densities in excess of 370 persons per square mile. These funds are apportioned only to UZAs within those States. FTA pro-rates each UZA's share of the High Density funds based on the population of the UZAs in the State in the 2000 census.

FTA cannot provide unit values for the Growing States or High Density formulas because the allocations to individual States and urbanized areas are based on their relative population data, rather than on a national per capita basis.

Based on language in the conference report accompanying SAFETEA–LU, FTA is to show a single apportionment amount for Section 5307, STIC and Section 5340. FTA shows a single Section 5307 apportionment amount for each UZA in Table 3, the Urbanized Area Formula apportionments. The amount includes funds apportioned based on the Section 5307 formula factors, any STIC funds, and any Growing States and High Density States funding allocated to the area. FTA uses separate formulas to calculate and generate the respective apportionment amounts for the Section 5307, STIC and Section 5340. For technical assistance purposes, the UZAs that received STIC funds are listed in Table 6. FTA will make available breakouts of the funding allocated to each UZA under these formulas, upon request to the regional office.

3. Program Requirements

Program guidance for the Urbanized Area Formula Program is presently found in FTA Circular C9030.1C, Urbanized Area Formula Program: Grant Application Instructions, dated October 1, 1998, and supplemented by additional information or changes provided in this document. FTA is in the process of updating the circular. Several important program requirements are highlighted below.

a. Urbanized Area Formula Apportionments to Governors

For small UZAs, those with a population of less than 200,000, FTA apportions funds to the Governor of each State for distribution. A single total Governor's apportionment amount for the Urbanized Area Formula, STIC, and Growing States and High Density States is shown in the Urbanized Area Formula Apportionment Table 3. The table also shows the apportionment amount attributable to each small UZA within the State. The Governor may determine the sub-allocation of funds among the small UZAs except that funds attributed to a small UZA that is located within the planning boundaries of a Transportation Management Area (TMA) must be obligated to that small UZA, as discussed in subsection f below.

b. Transit Enhancements

Section 5307(d)(1)(K) requires that one percent of Section 5307 funds apportioned to UZAs with populations of 200,000 or more be spent on eligible transit enhancement activities or projects. This requirement is now treated as a certification, rather than as a set-aside as was the case under the Transportation Equity Act for the 21st Century (TEA–21). Designated recipients in UZAs with populations of 200,000 or more certify they are spending not less than one percent of Section 5307 funds for transit enhancements. In addition, Designated Recipients must submit an annual report on how they spent the money with the Federal fiscal year's final quarterly progress report in TEAM-Web. The report should include the following elements: (a) Grantee name; (b) UZA name and number; (c) FTA project number; (d) transit enhancement category; (e) brief description of enhancement and progress towards project implementation; (f) activity line item code from the approved budget; and (g) amount awarded by FTA for the enhancement. The list of transit enhancement categories and activity line item (ALI) codes may be found in the table of Scope and ALI codes on TEAM-Web, which can be accessed at *http://FTATEAMWeb.fta.dot.gov.*

The term ''transit enhancement'' includes projects or project elements that are designed to enhance public transportation service or use and are physically or functionally related to transit facilities. Eligible enhancements include the following: (1) Historic preservation, rehabilitation, and operation of historic mass transportation buildings, structures, and facilities (including historic bus and railroad facilities); (2) bus shelters; (3) landscaping and other scenic beautification, including tables, benches, trash receptacles, and street lights; (4) public art; (5) pedestrian access and walkways; (6) bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on mass transportation vehicles; (7) transit connections to parks within the recipient's transit service area; (8) signage; and (9) enhanced access for persons with disabilities to mass transportation.

It is the responsibility of the MPO to determine how the one-percent for transit enhancements will be allotted to transit projects. The one percent minimum requirement does not preclude more than one percent from being expended in a UZA for transit enhancements. However, activities that are only eligible as enhancements—in particular, operating costs for historic facilities—may be assisted only within the one-percent funding level.

c. Transit Security Projects

Pursuant to section 5307(d)(1)(J), each recipient of Urbanized Area Formula funds must certify that of the amount received each fiscal year, it will expend at least one percent on ''public transportation security projects'' or must certify that it has decided the expenditure is not necessary. For applicants not eligible to receive Section 5307 funds for operating assistance, only capital security projects may be funded with the one percent. SAFETEA–LU, however, expanded the definition of eligible ''capital'' projects to include specific crime prevention and security activities, including: (1) Projects to refine and develop security and emergency response plans; (2) projects aimed at detecting chemical and biological agents in public transportation; (3) the conduct of emergency response drills with public transportation agencies and local first response agencies; and (4) security training for public transportation employees, but excluding all expenses related to operations, other than such

expenses incurred in conducting emergency drills and training. ALI codes have been established for these four new capital activities. The one percent may also include security expenditures included within other capital activities, and, where the recipient is eligible, operating assistance. The relevant ALI codes would be used for those activities.

FTA is often called upon to report to Congress and others on how grantees are expending Federal funds for security enhancements. To facilitate tracking of grantees' security expenditures, which are not always evident when included within larger capital or operating activity line items in the grant budget, we have established a non-additive (''non-add'') scope code for security expenditures—Scope 991. The non-add scope is to be used to aggregate activities included in other scopes, and it does not increase the budget total. Section 5307 grantees should include this non-add scope in the project budget for each new Section 5307 grant application or amendment. Under this non-add scope, the applicant should repeat the full amount of any of the line items in the budget that are exclusively for security and include the portion of any other line item in the project budget that is attributable to security, using under the non-add scope the same line item used in the project budget. The grantee can modify the ALI description or use the extended text feature, if necessary, to describe the security expenditures.

The grantee must provide information regarding its use of the one percent for security as part of each Section 5307 grant application, using a special screen in TEAM-Web. If the grantee has certified that it is not necessary to expend one percent for security, the Section 5307 grant application must include information to support that certification. FTA will not process an application for a Section 5307 grant until the security information is complete.

d. FY 2009 Operating Assistance

UZAs under 200,000 in population may use Section 5307 funds for operating assistance. In addition, Section 5307, as amended by, SAFETEA–LU and TEA–21, allows some UZAs with a population of 200,000 or more to use FY 2009 Urbanized Area Formula funds for operating assistance under certain conditions. The specific provisions allowing the limited use of operating assistance in large UZAs are as follows:

(1) Section 5307(b)(1)(E) provides for grants for the operating costs of equipment and facilities for use in public transportation in the Evansville, IN–KY urbanized area, for a portion or portions of the UZA if the portion of the UZA includes only one State, the population of the portion is less than 30,000, and the grants will be not used to provide public transportation outside of the portion of the UZA.

(2) Section 5307(b)(1)(F) provides operating costs of equipment and facilities for use in public transportation for local governmental authorities in areas which adopted transit operating and financing plans that became a part of the Houston, Texas, UZA as a result of the 2000 decennial census of population, but lie outside the service area of the principal public transportation agency that serves the Houston UZA.

(3) Section 5336(a)(2) prescribes the formula to be used to apportion Section 5307 funds to UZAs with population of 200,000 or more. SAFETEA–LU amended 5336(a)(2) to add language that stated, ''* * * except that the amount apportioned to the Anchorage urbanized area under subsection (b) shall be available to the Alaska Railroad for any costs related to its passenger operations.'' This language has the effect of directing that funds apportioned to the Anchorage urbanized area, under the fixed guideway tiers of the Section 5307 apportionment formula, be made available to the Alaska Railroad, and that these funds may be used for any capital or operating costs related to its passenger operations.

(4) Section 3027(c)(3) of TEA–21, as amended (49 U.S.C. 5307 note), provides an exception to the restriction on the use of operating assistance in a UZA with a population of 200,000 or more, by allowing transit providers/grantees that provide service exclusively to elderly persons and persons with disabilities and that operate 20 or fewer vehicles to use Section 5307 funds apportioned to the UZA for operating assistance. The total amount of funding made available for this purpose under Section 3027(c)(3) is $1.4 million. Transit providers/grantees eligible under this provision have already been identified and notified.

(5) Pursuant to the SAFETEA–LU Technical Corrections Act, 2008, in FY 2009, section 5307(b)(2) allows (1) UZAs that grew in population from under 200,000 to over 200,000 or that were under 200,000 but merged into another urbanized area and the population is over 200,000, as a result of the 2000 Census to use Section 5307 funds for operating assistance in an amount up to 50 percent of the grandfathered amount for FY 2002 funds; (2) Areas that were nonurbanized under the 1990 Census and became urbanized, as a result of the 2000 Census, to use no more than 50 percent of the amount apportioned to the area for FY 2003 for operating assistance; and (3) nonurbanized areas under the 1990 Census that merged into urbanized areas over 200,000, as a result of the 2000 Census, to use 50 percent of the amount the area received in FY 2002 Section 5311 funding for operating assistance.

e. Sources of Local Match

Pursuant to Section 5307(e), the Federal share of an urbanized area formula grant is 80 percent of net project cost for a capital project and 50 percent of net project cost for operating assistance unless the recipients project a greater local share. The remainder of the net project cost (i.e., 20 percent and 50 percent, respectively) shall be provided from the following sources:

1. In cash from non-Government sources other than revenues from providing public transportation services;
2. From revenues derived from the sale of advertising and concessions;
3. From an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital;
4. From amounts received under a service agreement with a State or local social service agency or private social service organization; and
5. Proceeds from the issuance of revenue bonds.

In addition, funds from Section 403(a)(5)(C)(vii) of the Social Security Act (42 U.S.C. 603(a)(5)(C)(vii)) can be used to match Urbanized Area Formula funds.

f. Designated Transportation Management Areas (TMA)

Guidance for setting the boundaries of TMAs is in the joint transportation planning regulations codified at 23 CFR Part 450 as reference in 49 CFR Part 613. In some cases, the TMA planning boundaries established by the MPO for the designated TMA includes one or more small UZAs. In addition, one small UZA (Santa Barbara, CA) has been designated as a TMA. In either of these situations, the Governor cannot allocate ''Governor's Apportionment'' funds attributed to the small UZAs to other areas; that is, the Governor only has discretion to allocate Governor's Apportionment funds attributable to areas that are outside of designated TMA planning boundaries.

The list of small UZAs included within the planning boundaries of

designated TMAs is provided in the table below.

Designated TMA	Small urbanized area included in TMA planning boundary
Albany, NY	Saratoga Springs, NY.
Houston, TX	Galveston, TX; Lake Jackson-Angleton, TX; Texas City, TX; The Woodlands, TX.
Jacksonville, FL	St. Augustine, FL.
Orlando, FL	Kissimmee, FL.
Palm Bay-Melbourne, FL	Titusville, FL.
Philadelphia, PA–NJ–DE–MD	Pottstown, PA.
Pittsburg, PA	Monessen, PA; Weirton, WV-Steubenville, OH–PA (PA portion); Uniontown-Connellsville, PA.
Seattle, WA	Bremerton, WA.
Washington, DC–VA–MD	Frederick, MD.

The MPO must notify the Associate Administrator for Program Management, Federal Transit Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, in writing, no later than July 1 of each year, to identify any small UZA within the planning boundaries of a TMA.

g. Urbanized Area Formula Funds Used for Highway Purposes

Funds apportioned to a TMA are eligible for transfer to FHWA for highway projects, if the Designated Recipient has allocated a portion of the areas section 5307 funding for such use. However, before funds can be transferred, the following conditions must be met: (1) Such use must be approved by the MPO in writing, after appropriate notice and opportunity for comment and appeal are provided to affected transit providers; (2) in the determination of the Secretary, such funds are not needed for investments required by the Americans with Disabilities Act of 1990 (ADA); and (3) the MPO determines that local transit needs are being addressed.

The MPO should notify the appropriate FTA Regional Administrator of its intent to use FTA funds for highway purposes, as prescribed in section V.D below. Urbanized Area Formula funds that are designated by the MPO for highway projects will be transferred to and administered by FHWA.

4. Period of Availability

The Urbanized Area Formula Program funds apportioned in this notice remain available to be obligated during the year of appropriation plus three additional years. Accordingly, these funds must be obligated by FTA to recipients by September 30, 2012. Any of these apportioned funds that remain unobligated at the close of business on September 30, 2012, will revert to FTA for reapportionment under the Urbanized Area Formula Program.

5. Other Program or Apportionment Related Information and Highlights

In each UZA with a population of 200,000 or more, the Governor in consultation with responsible local officials, and publicly owned operators of public transportation has designated one or more entities to be the Designated Recipient for Section 5307 funds apportioned to the UZA. The same entity(s) may or may not be the Designated Recipient for the Job Access and Reverse Commute (JARC) and New Freedom program funds apportioned to the UZA. In UZAs under 200,000 in population, the State is the Designated Recipient for Section 5307 as well as JARC and New Freedom programs. The Designated Recipient for Section 5307 may authorize other entities to apply directly to FTA for Section 5307 grants pursuant to a supplemental agreement. While the requirement that projects selected for funding be included in a locally developed coordinated public transit/human service transportation plan is not included in Section 5307 as it is in Sections 5310, 5316 (JARC) and 5317 (New Freedom), FTA expects that in their role as public transit providers, recipients of Section 5307 funds will be participants in the local planning process for these programs.

D. Clean Fuels Grant Program (49 U.S.C. 5308)

The Clean Fuels Grant Program supports the use of alternative fuels in air quality maintenance or nonattainment areas for ozone or carbon monoxide through capital grants to urbanized areas for clean fuel vehicles and facilities. Previously an unfunded Formula Program under TEA–21, the program is now a discretionary program. For more information about this program, contact Kimberly Sledge, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $21,074,900 to the Clean Fuels Grant Program (49 U.S.C. 5308). FTA will publish project allocations in a supplemental notice when all program funds have been made available.

2. Requirements

Clean Fuels program funds may be made available to any grantee in a UZA that is designated as maintenance or nonattainment area for ozone or carbon monoxide as defined in the Clean Air Act. Eligible recipients include Section 5307 Designated Recipients as well as recipients in small UZAs. In the case of a small UZA, the State in which the area is located will act as the recipient.

Eligible projects include the purchase or lease of clean fuel buses (including buses that employ a lightweight composite primary structure), the construction or lease of clean fuel buses or electrical recharging facilities and related equipment for such buses, and construction or improvement of public transportation facilities to accommodate clean fuel buses.

Legislation will be necessary if a recipient wishes to use Clean Fuels funds earmarked in SAFETEA–LU for eligible program activities outside the scope of a project description.

Unless otherwise specified in law, grants made under the Clean Fuels program must meet all other eligibility requirements as outlined in Section 5308.

3. Period of Availability

Funds designated for specific Clean Fuels Program projects remain available for obligation for three fiscal years, which includes the year of appropriation plus two additional fiscal years. The FY 2009 funding for projects will remain available through September 30, 2011. Clean Fuels funds not obligated in an FTA grant for eligible purposes at the end of the period of availability will generally be made available for other projects.

5. Other Program or Allocation Related Information and Highlights

Prior year unobligated balances for Clean Fuel allocations in the amount of $46,862,483 remain available for obligation in FY 2009. This includes $6,690,000 in FY 2007 and $40,172,483 in FY 2008 unobligated allocations. The unobligated amounts available as of September 30, 2008, are displayed in Table 7.

E. Capital Investment Program (49 U.S.C. 5309)—Fixed Guideway Modernization

This program provides capital assistance for the modernization of existing fixed guideway systems. Funds are allocated by a statutory formula to UZAs with fixed guideway systems that have been in operation for at least seven years. A ''fixed guideway'' refers to any transit service that uses exclusive or controlled rights-of-way or rails, entirely or in part. The term includes heavy rail, commuter rail, light rail, monorail, trolleybus, aerial tramway, inclined plane, cable car, automated guideway transit, ferryboats, that portion of motor bus service operated on exclusive or controlled rights-of-way, and high-occupancy-vehicle (HOV) lanes. Eligible applicants are the public transit authorities in those urbanized areas to which the funds are allocated. For more information about Fixed Guideway Modernization contact Scott Faulk, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $675,257,000 to the Fixed Guideway Modernization Program. The total amount apportioned for the Fixed Guideway Modernization Program is $668,504,430, after the deduction for oversight, and addition of prior year reapportioned funds, as shown in the table below.

FIXED GUIDEWAY MODERNIZATION PROGRAM

Total Appropriation	$675,257,000
Oversight Deduction	−6,752,570
Total Apportioned	668,504,430

The FY 2009 Fixed Guideway Modernization Program apportionments to eligible areas are displayed in Table 8.

2. Basis for Formula Apportionment

The formula for allocating the Fixed Guideway Modernization funds contains seven tiers. The apportionment of funding under the first four tiers is based on amounts specified in law and NTD data used to apportion funds in FY 1997. Funding under the last three tiers is apportioned based on the latest available data on route miles and revenue vehicle miles on segments at least seven years old, as reported to the NTD. Section 5337(f) of title 49, U.S.C. provides for the inclusion of Morgantown, West Virginia (population 55,997) as an eligible UZA for purposes of apportioning fixed guideway modernization funds. Also, pursuant to 49 U.S.C. 5336(b) FTA used 60 percent of the directional route miles attributable to the Alaska Railroad passenger operations system to calculate the apportionment for the Anchorage, Alaska UZA under the Section 5309 Fixed Guideway Modernization formula.

FY 2009 Formula apportionments are based on data grantees provided to the NTD for the 2007 reporting year. Table 9 provides additional information and details on the formula. Dollar unit values for the formula factors used in the Fixed Guideway Modernization Program are displayed in Table 5. To replicate an area's apportionment, multiply the dollar unit value by the appropriate formula factor, *i.e.*, route miles and revenue vehicle miles.

3. Program Requirements

Fixed Guideway Modernization funds must be used for capital projects to maintain, modernize, or improve fixed guideway systems. Eligible UZAs (those with a population of 200,000 or more) with fixed guideway systems that are at least seven years old are entitled to receive Fixed Guideway Modernization funds. A threshold level of more than one mile of fixed guideway is required in order to receive Fixed Guideway Modernization funds. Therefore, UZAs reporting one mile or less of fixed guideway mileage under the NTD are not included. However, funds apportioned to an urbanized area may be used on any fixed guideway segment in the UZA. Program guidance for Fixed Guideway Modernization is presently found in FTA Circular C9300.1B, Capital Facilities and Formula Grant Programs, dated November 1, 2008.

4. Period of Availability

The funds apportioned in this notice under the Fixed Guideway Modernization Program remain available to be obligated by FTA to recipients during the year of appropriation plus three additional years. FY 2009 Fixed Guideway Modernization funds that remain unobligated at the close of business on September 30, 2012, will revert to FTA for reapportionment under the Fixed Guideway Modernization Program.

F. Capital Investment Program (49 U.S.C. 5309)—Bus and Bus-Related Facilities

This program provides capital assistance for new and replacement buses, and related equipment and facilities. Funds are allocated on a discretionary basis. Eligible purposes are acquisition of buses for fleet and service expansion, bus maintenance and administrative facilities, transfer facilities, bus malls, transportation centers, intermodal terminals, park-and-ride stations, acquisition of replacement vehicles, bus rebuilds, bus preventive maintenance, passenger amenities such as passenger shelters and bus stop signs, accessory and miscellaneous equipment such as mobile radio units, supervisory vehicles, fare boxes, computers, and shop and garage equipment. Eligible applicants are State and local governmental authorities. Eligible subrecipients include other public agencies, private companies engaged in public transportation and private non-profit organizations. For more information about Bus and Bus-Related Facilities contact Kimberly Sledge, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $350,455,128 for the Bus and Bus-Related Facilities program. FTA will publish project allocations in a supplemental notice when all program funds have been made available.

The SAFETEA–LU Technical Corrections Act of 2008 extended funds made available for FY 2006 SAFTETEA–LU projects number 176 and 652. Funds for these projects remain available until September 30, 2009 and are shown in Table 10.

2. Requirements

FTA honors Congressional earmarks for the purpose designated, for purposes eligible under the program or under the expanded eligibility of a ''notwithstanding'' provision. Projects designated for funding in the report language accompanying the Consolidated Appropriations Act, 2008, were incorporated as earmarks into the Act by reference. FTA will treat these projects as projects designated in law. To apply to use funds designated in report language under the Bus Program in any year for project activities outside the scope of the project designation included in report language, the recipient must submit a request for reprogramming to the House and Senate

Committees on Appropriations for resolution.

FTA will continue to honor projects earmarked to receive Section 5309 bus funds in SAFETEA–LU for fiscal years 2007 and 2008 as well as projects earmarked by reference in the Consolidated Appropriations Act, 2008. Legislation will be necessary to amend the earmark if you wish to use funds for project activities outside the scope of the project description.

Grants made under the Bus and Bus-Related Facilities program must meet all other eligibility requirements as outlined in Section 5309 unless otherwise specified in law.

Program guidance for Bus and Bus-Related Facilities is found in FTA Circular C9300.1B, ''Capital Investment Program Guidance and Application Instructions,'' (November 1, 2008).

3. Period of Availability

The FY 2007 and FY 2008 Bus and Bus-Related Facilities funds not obligated in a grant for eligible purposes as of September 30, 2009 and September 30, 2010, respectively, may be made available for other projects under 49 U.S.C. 5309.

4. Other Program or Allocation Related Information and Highlights

Prior year unobligated balances for Bus and Bus-Related allocations in the amount of $665,031,952 remain available for obligation in FY 2009. This includes $1,772,317 for FY 2006 earmarks extended in the SAFETEA–LU Technical Corrections Act, 2008; $197,666,184 in FY 2007 unobligated allocations (earmarked and discretionary projects); and $465,593,451in FY 2008 unobligated allocations. The unobligated amounts available as of September 30, 2008, are displayed in Table 10. The FTA will issue a supplemental notice at a later date that identifies project funds that are redirected to other eligible activities or extended to the original project by subsequent action. Project funding that was extended or redirected under the SAFETEA–LU Technical Corrections Act of 2008 are listed above in section 1 and also included in Table 10.

G. Capital Investment Program (49 U.S.C. 5309)—New Starts

The New Starts program provides funds for construction of new fixed guideway systems or extensions to existing fixed guideway systems. Eligible purposes are light rail, rapid rail (heavy rail), commuter rail, monorail, automated fixed guideway system (such as a ''people mover''), or a busway/high occupancy vehicle (HOV) facility, Bus Rapid Transit that is fixed guideway, or an extension of any of these. Projects become candidates for funding under this program by successfully completing the appropriate steps in the major capital investment planning and project development process. Major new fixed guideway projects, or extensions to existing systems, financed with New Starts funds typically receive these funds through a full funding grant agreement (FFGA) that defines the scope of the project and specifies the total multi-year Federal commitment to the project. Beginning in FY 2007, up to $200,000,000 each year is designated for ''Small Starts'' (Section 5309(e)) projects with a New Starts share of less than $75,000,000 and a net project cost of less than $250,000,000.

For more information about New Starts project development contact Elizabeth Day, Office of Planning and Environment, at (202) 366–4033, or for information about published allocations contact Kimberly Sledge, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $668,117,803 to New Starts. The total amount allocated for New Starts is $430,252,472, as shown in the table below.

CAPITAL INVESTMENT PROGRAM (NEW STARTS)

Total Appropriation	$674,866,468
Oversight (one percent)	−6,748,665
Undistributed Amount	237,865,331
Total Allocated	430,252,472

2. Basis for Allocation

Congress included authorizations for specific New Starts projects with Full Funding Grant Agreements (FFGA) in SAFETEA–LU. Under the Continuing Appropriations Act, 2009, FFGAs have been allocated 5/12ths and the one percent statutory project management oversight takedown has been applied. Funds allocated to specific projects are shown in Table 11.

3. Requirements

Because New Starts projects are earmarked in law rather than report language, reprogramming for a purpose other than that specified must also occur in law. New Starts projects are subject to a complex set of approvals related to planning and project development set forth in 49 CFR Part 611. FTA has published a number of rulemakings and interim guidance documents related to the New Starts program since the passage of SAFETEA–LU. Grantees should reference the FTA Web site at *http://www.fta.dot.gov* for the most current program guidance about project developments and management. Grant related guidance for New Starts is found in FTA Circular C9300.1B, Capital Investment Program Guidance and Application Instructions dated November 1, 2008; and C5200.1A, Full Funding Grant Agreement Guidance, dated December 5, 2002.

4. Period of Availability

New Starts funds remain available for three fiscal years (including the fiscal year the funds are made available or appropriated plus two additional years). FY 2009 funds remain available through September 30, 2011. Funds may be made available for other section 5309 projects after the period of availability has expired.

5. Other Program or Apportionment Related Information and Highlights

Prior year unobligated allocations for New Starts in the amount of $325,627,924 remain available for obligation in FY 2009. This amount includes $62,712,383 in FY 2007 and $262,915,541 in FY 2008 unobligated allocations. These unobligated amounts are displayed in Table 12.

H. Special Needs of Elderly Individuals and Individuals With Disabilities Program (49 U.S.C. 5310)

This program provides formula funding to States for capital projects to assist private nonprofit groups in meeting the transportation needs of the elderly and individuals with disabilities when the public transportation service provided in the area is unavailable, insufficient, or inappropriate to meet these needs. A State agency designated by the Governor administers the Section 5310 program. The State's responsibilities include: Notifying eligible local entities of funding availability; developing project selection criteria; determining applicant eligibility; selecting projects for funding; and ensuring that all subrecipients comply with Federal requirements. Eligible nonprofit organizations or public bodies must apply directly to the designated State agency for assistance under this program. For more information about the Elderly and Individuals with Disabilities Program contact David Schneider, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $54,622,700 to the Elderly and Individuals with Disabilities Program (49 U.S.C. 5310).

After deduction of 0.5 percent for oversight, and the addition of reapportioned prior year funds, $54,349,586 remains available for allocation to the States.

ELDERLY AND INDIVIDUALS WITH DISABILITIES PROGRAM

Total Appropriation	$54,622,700
Oversight Deduction	−273,113
Total Apportioned	54,349,587

The FY 2009 Elderly and Individuals with Disabilities Program apportionments to the States are displayed in Table 13.

2. Basis for Apportionment

FTA allocates funds to the States by an administrative formula consisting of a $125,000 floor for each State ($50,000 for smaller territories) with the balance allocated based on 2000 Census population data for persons aged 65 and over and for persons with disabilities.

3. Requirements

Funds are available to support the capital costs of transportation services for older adults and people with disabilities. Uniquely under this program, eligible capital costs include the acquisition of service. Seven specified States (Alaska, Louisiana, Minnesota, North Carolina, Oregon, South Carolina, and Wisconsin) may use up to 33 percent of their apportionment for operating assistance under the terms of the SAFETEA–LU Section 3012(b) pilot program.

Capital assistance is provided on an 80 percent Federal, 20 percent local matching basis except that Section 5310(c) allows States eligible for a higher match under the sliding scale for FHWA programs to use that match ratio for Section 5310 capital projects. Operating assistance is 50 percent Federal, 50 percent local. Funds provided under other Federal programs (other than those of the DOT, with the exception of the Federal Lands Highway Program established by 23 U.S.C. 204) may be used as match. Revenue from service contracts may also be used as local match.

While the assistance is intended primarily for private non-profit organizations, public bodies approved by the State to coordinate services for the elderly and individuals with disabilities, or any public body that certifies to the State that there are no non-profit organizations in the area that are readily available to carry out the service, may receive these funds.

States may use up to ten percent of their annual apportionment to administer, plan, and provide technical assistance for a funded project. No local share is required for these program administrative funds. Funds used under this program for planning must be shown in the United Planning Work Program (UPWP) for MPO(s) with responsibility for that area.

The State recipient must certify that: The projects selected were derived from a locally developed, coordinated public transit-human services transportation plan; and, the plan was developed through a process that included representatives of public, private, and nonprofit transportation and human services providers and participation by the public. The locally developed, coordinated public transit-human services transportation planning process must be coordinated and consistent with the metropolitan and statewide planning processes and funding for the program must included in the metropolitan and statewide Transportation Improvement Program (TIP and STIP) at a level of specificity or aggregation consistent with State and local policies and procedures. Finally, the State must certify that allocations of the grant to subrecipients are made on a fair and equitable basis.

The coordinated planning requirement is also a requirement in two additional programs. Projects selected for funding under the Job Access Reverse Commute program and the New Freedom program are also required to be derived from a locally developed coordinated public transit/human service transportation plan. FTA anticipates that most areas will develop one consolidated plan for all the programs, which may include separate elements and other human service transportation programs.

The Section 5310 program is subject to the requirements of Section 5307 to the extent the Secretary determines appropriate. Program guidance is found in FTA C 9070.1F, dated May 1, 2007. The circular is posted on the FTA Web site at *http://www.fta.dot.gov.*

4. Period of Availability

FTA has administratively established a three year period of availability for Section 5310 funds. Funds allocated to States under the Elderly and Individuals with Disabilities Program in this notice must be obligated by September 30, 2011. Any funding that remains unobligated as of that date will revert to FTA for reapportionment among the States under the Elderly and Individuals with Disabilities Program.

5. Other Program or Apportionment Related Information and Highlights

States may transfer Section 5310 funds to Section 5307 or Section 5311, but only for projects selected under the Section 5310 program, not as a general supplement for those programs. FTA anticipates that the States would use this flexibility primarily for projects to be implemented by a Section 5307 recipient in a small urbanized area, or for Federally recognized Indian Tribes that elect to receive funds as a direct recipient from FTA under Section 5311. A State that transfers Section 5310 funds to Section 5307 must certify that each project for which the funds are transferred has been coordinated with private nonprofit providers of services. FTA has established a scope code (641) to track 5310 projects included within a Section 5307 or 5311 grant. Transfer to Section 5307 or 5311 is permitted but not required. FTA expects primarily to award stand-alone Section 5310 grants to the State for any and all subrecipients.

I. Nonurbanized Area Formula Program (49 U.S.C. 5311)

This program provides formula funding to States and Indian Tribes for the purpose of supporting public transportation in areas with a population of less than 50,000. Funding may be used for capital, operating, State administration, and project administration expenses. Eligible subrecipients include State and local public agencies, Indian Tribes, private non-profit organizations, and private operators of public transportation services, including intercity bus companies. Indian Tribes are also eligible direct recipients under Section 5311, both for funds apportioned to the States and for projects selected to be funded with funds set aside for a separate Tribal Transit Program.

For more information about the Nonurbanized Area Formula Program contact Lorna Wilson, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $188,383,800 to the Nonurbanized Area Formula Program (49 U.S.C. 5311). The total amount apportioned for the Nonurbanized Area Formula Program is $208,147,062, after take-downs of two percent for the Rural Transportation Assistance Program (RTAP), 0.5 percent for oversight, and $5,161,200 for the Tribal Transit Program, and the addition of Section 5340 funds and prior year funds

reapportioned, as shown in the table below.

NONURBANIZED AREA FORMULA PROGRAM

Total Appropriation	$188,383,800
Oversight Deduction	−941,919
RTAP Takedown	−3,767,676
Tribal Transit Takedown	−5,161,200
Section 5340 Funds Added	29,634,057
Total Apportioned	208,147,062

The FY 2009 Nonurbanized Area Formula apportionments to the States are displayed in Table 14.

2. Basis for Apportionments

FTA apportions the funds available for apportionment after take-down for oversight, the Tribal Transit Program, and RTAP according to a statutory formula. FTA apportions the first twenty percent to the States based on land area in nonurbanized areas with no state receiving more than 5 percent of the amount apportioned. FTA apportions the remaining eighty percent based on nonurbanized population of each State relative to the national nonurbanized population. FTA does not apportion Section 5311 funds to the Virgin Islands, which by a statutory exception are treated as an urbanized area for purposes of the Section 5307 formula program.

FTA is allocating $29,634,057 to the 50 States for nonurbanized areas from the Growing States portion of Section 5340. FTA apportions Growing States funds by a formula based on State population forecasts for 15 years beyond the most recent census. FTA distributes the amounts apportioned for each State between UZAs and nonurbanized areas based on the ratio of urbanized/nonurbanized population within each State in the 2000 census.

3. Program Requirements

The Nonurbanized Area Formula Program provides capital, operating and administrative assistance for public transit service in nonurbanized areas under 50,000 in population.

The Federal share for capital assistance is 80 percent and for operating assistance is 50 percent, except that States eligible for the sliding scale match under FHWA programs may use that match ratio for Section 5311 capital projects and 62.5 percent of the sliding scale capital match ratio for operating projects.

Each State must spend no less than 15 percent of its FY 2009 Nonurbanized Area Formula apportionment for the development and support of intercity bus transportation, unless the State certifies, after consultation with affected intercity bus service providers, that the intercity bus service needs of the State are being adequately met. FTA also encourages consultation with other stakeholders, such as communities affected by loss of intercity service.

Each State prepares an annual program of projects, which must provide for fair and equitable distribution of funds within the States, including Indian reservations, and must provide for maximum feasible coordination with transportation services assisted by other Federal sources.

In order to retain eligibility for funding, recipients of Section 5311 funding must report data annually to the NTD.

Program guidance for the Nonurbanized Area Formula Program is found in FTA C 9040.1F, Nonurbanized Area Formula Program Guidance and Grant Application Instructions, dated April 1, 2007, which was revised and reissued after notice and comment. The circular is posted at *http://www.fta.dot.gov.*

4. Period of Availability

Funds apportioned to nonurbanized areas under the Nonurbanized Area Formula Program during FY 2009 will remain available for two additional fiscal years after the year of apportionment. Any funds that remain unobligated at the close of business on September 30, 2011, will revert to FTA for allocation among the States under the Nonurbanized Area Formula Program.

5. Other Program or Apportionment Related Information and Highlights

a. NTD Reporting. By law, FTA requires that each recipient under the Section 5311 program submit an annual report to the NTD containing information on capital investments, operations, and service provided with funds received under the Section 5311 program. Section 5311(b)(4), as amended by SAFETEA–LU, specifies that the report should include information on total annual revenue, sources of revenue, total annual operating costs, total annual capital costs, fleet size and type, and related facilities, revenue vehicle miles, and ridership. State or Territorial DOT 5311 grant recipients must complete a one-page form of basic data for each 5311 subrecipient, unless the subrecipient is already providing a full report to the NTD as a Tribal Transit direct recipient or as an urbanized area reporter (without receiving a Nine or Fewer Vehicles Waiver). For the 2008 Report Year State or Territorial DOTs must report on behalf of any subrecipient receiving Section 5311 grants in 2008, or that continued to benefit in 2008 from capital assets purchased using Section 5311 grants. Tribal Transit direct recipients must report if they received an obligation or an outlay for a Section 5311 grant in 2008, or if they continued to benefit in 2008 from capital assets using Section 5311 Grants, unless the Tribe is already filing a full NTD Reports as an urbanized area reporter or unless the Tribe only received $50,000 or less in planning grants. The NTD Rural Reporting Manual contains detailed reporting instructions and is posted on the NTD Web site, *http://www.ntdprogram.gov.*

b. Extension of Intercity Bus Pilot of In-Kind Match. Beginning in FY 2007, FTA implemented a two year pilot program of in-kind match for intercity bus service. The initial program was set to expire after FY 2008; however, FTA decided to extend the program through FY 2009. FTA published guidance on the in-kind match pilot in the **Federal Register** on February 28, 2007, as Appendix 1 of the Notice announcing the final revised circular 9040.1F.

J. Rural Transportation Assistance Program (49 U.S.C. 5311(b)(3))

This program provides funding to assist in the design and implementation of training and technical assistance projects, research, and other support services tailored to meet the needs of transit operators in nonurbanized areas. For more information about Rural Transportation Assistance Program (RTAP) contact Lorna Wilson, Office of Transit Programs, at (202) 366–2053.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $3,767,676 to RTAP (49 U.S.C. 5311(b)(2)), as a two percent takedown from the funds appropriated for Section 5311. FTA has reserved 15 percent for the National RTAP program. After adding prior year funds eligible for reapportionment, $3,202,525 is available for allocations to the States, as shown in the table below.

RURAL TRANSIT ASSISTANCE PROGRAM

Total Appropriation	$3,767,676
National RTAP Takedown	−565,151
Total Apportioned	3,202,525

Table 14 shows the FY 2009 RTAP allocations to the States.

2. Basis for Allocation

FTA allocates funds to the States by an administrative formula. First FTA allocates $65,000 to each State ($10,000 to territories), and then allocates the balance based on nonurbanized population in the 2000 census.

3. Program Requirements

States may use the funds to undertake research, training, technical assistance, and other support services to meet the needs of transit operators in nonurbanized areas. These funds are to be used in conjunction with a State's administration of the Nonurbanized Area Formula Program, but may also support the rural components of the Section 5310, JARC, and New Freedom programs.

4. Period of Availability

Funds apportioned to States under RTAP remain available for two fiscal years following FY 2009. Any funds that remain unobligated at the close of business on September 30, 2011, will revert to FTA for allocation among the States under the RTAP.

5. Other Program or Apportionment Related Information and Highlights

The National RTAP project is administered by cooperative agreement and re-competed at five-year intervals. In FY 2008, FTA awarded the cooperative agreement to the Neponset Valley Transportation Management Association (NVTMA) located in Waltham, Massachusetts through a competitive process. The projects are guided by a project review board that consists of managers of rural transit systems and State DOT RTAP programs. National RTAP resources also support the biennial TRB National Conference on Rural Public and Intercity Bus Transportation and other research and technical assistance projects of a national scope.

K. Public Transportation on Indian Reservations Program (49 U.S.C. 5311(c)(1))

FTA refers to this program as the Tribal Transit Program. It is funded as a takedown from funds appropriated for the Section 5311 program. Federally recognized Indian Tribes are defined as eligible direct recipients. The funds are to be apportioned for grants to Indian Tribes for any purpose eligible under Section 5311, which includes capital, operating, planning, and administrative assistance for rural public transit services and rural intercity bus service. For more information about the Tribal Transit Program contact Lorna Wilson, Office of Transit Programs, at (202) 366–2053.

1. Funding Availability in FY 2009

Under the Continuing Appropriations Act, 2009, the amount allocated to the program in FY 2009 is $5,161,200, as authorized in Section 5311(c)(1)(C).

2. Basis for Allocation

Based on procedures developed in consultation with the Tribes, FTA will issue a Notice of Funding Availability (NOFA) soliciting applications for FY 2009 funds.

3. Requirements

FTA developed streamlined program requirements based on statutory authority allowing the Secretary to determine the terms and conditions appropriate to the program. These conditions are contained in the annual NOFA. Beginning with grants awarded in FY 2009, the grant agreement will incorporate the statement of warranty for labor protective arrangements, and tribal grants will be submitted to the Department of Labor (DOL) upon FTA approval.

4. Period of Availability

Funds remain available for three fiscal years, which includes the fiscal year the funds were apportioned or appropriated plus two additional years. Funds appropriated in FY 2009 will remain available for obligation to the tribes competitively selected to receive the funds through September 30, 2011. Any funds that remain unobligated after September 30, 2011, will revert to FTA for reallocation among the Tribes.

5. Other Program or Apportionment Related Information and Highlights

Prior year unobligated allocations under the Tribal Transit Program in the amount of $2,876,718 remain available for obligation in FY 2009. These unobligated amounts are displayed in Table 15.

The funds set aside for the Tribal Transit Program are not meant to replace or reduce funds that Indian Tribes receive from states through the Section 5311 program but are to be used to enhance public transportation on Indian reservations and transit serving tribal communities. Funds allocated to Tribes by the States may be included in the State's Section 5311 application or awarded by FTA in a grant directly to the tribe. We encourage Tribes intending to apply to FTA as direct recipients to contact the appropriate FTA regional office at the earliest opportunity.

Technical assistance for Tribes may be available from the State DOT using the State's allocation of RTAP or funds available for State administration under Section 5311, from the Tribal Transportation Assistance Program (TTAP) Centers supported by FHWA, and from the Community Transportation Association of America under a program funded by the United States Department of Agriculture (USDA). The National RTAP will also be developing new resources for Tribal Transit.

L. National Research Programs (49 U.S.C. 5314)

FTA's National Research Programs (NRP) include the National Research and Technology Program (NRTP), the Transit Cooperative Research Program (TCRP), the National Transit Institute (NTI), and the University Transportation Centers Program (UTC).

Through funding under these programs, FTA seeks to deliver solutions that improve public transportation. FTA's Strategic Research Goals are to provide transit research leadership, increase transit ridership, improve capital and operating efficiencies, improve safety and emergency preparedness, and to protect the environment and promote energy independence. For more information contact Bruce Robinson, Office of Research, Demonstration and Innovation, at (202) 366–4209.

1. Funding Availability in FY 2009

The Continuing Appropriations Act, 2009, provides $28,112,583 for the Research and University Research Centers Programs. Of this amount $3,999,930 is allocated for TCRP, $1,849,430 for NTI, $3,010,700 for the UTC, and $19,252,523 for NRTP. Within the NRTP, $22,615,000 is allocated for specific activities under 49 U.S.C. 5338(d) and in Section 3046 of SAFETEA–LU, more than the amount currently available. All research and research and development projects, as defined by the Office of Management and Budget, are subject to a 2.6% reduction for the Small Business Innovative Research Program (SBIR). A project allocation table with the entire year's funding will be published in a subsequent notice.

2. Program Requirements

Application Instructions and Program Management Guidelines are set forth in FTA Circular 6100.1C. Research projects must support FTA's Strategic Research Goals and meet the Office of Management and Budget's Research and Development Investment Criteria. All

research recipients are required to work with FTA to develop approved Statements of Work and plans to evaluate research results before award.

Eligible activities under the NRTP include research, development, demonstration and deployment projects as defined by 49 U.S.C. 5312(a); Joint Partnership projects for deployment of innovation as defined by 49 U.S.C. 5312(b); International Mass Transportation Projects as defined by 49 U.S.C. 5312(c); and, human resource programs as defined by 49 U.S.C. 5322. Unless otherwise specified in law, all projects must meet one of these eligibility requirements.

Problem Statements for TCRP can be submitted on TCRP's website: *http://www.tcrponline.org.* Information about NTI courses can be found at *http://www.ntionline.com.* UTC funds are transferred to the Research and Innovative Technology Administration to make awards.

3. Period of Availability

Funds are available until expended.

4. Other Program or Apportionment Related Information and Highlights

Funds not designated by Congress for specific projects and activities will be programmed by FTA based on national priorities. Opportunities are posted in *http://www.grants.gov* under Catalogue of Federal Domestic Assistance Number 20.514.

M. Job Access and Reverse Commute Program (49 U.S.C. 5316)

The Job Access and Reverse Commute (JARC) program provides formula funding to States and Designated Recipients to support the development and maintenance of job access projects designed to transport welfare recipients and low-income individuals to and from jobs and activities related to their employment, and for reverse commute projects designed to transport residents of UZAs and other than urbanized to suburban employment opportunities. For more information about the JARC program contact David Schneider, Office of Transit Programs, at (202) 366–2053.

1. Funding Availability in FY 2009

The Continuing Appropriations Act, 2009, provides $67,095,600 for the JARC Program. The total amount apportioned by formula is shown in the table below.

JOB ACCESS AND REVERSE COMMUTE PROGRAM

Total Apportioned	$67,095,600

Table 16 shows the FY 2009 JARC apportionments.

2. Basis for Formula Apportionment

By law, FTA allocates 60 percent of funds available to UZAs with populations of 200,000 or more persons (large UZAs); 20 percent to the States for urbanized areas with populations ranging from 50,000 to 200,000 persons (small UZAs), and 20 percent to the States for rural and small urban areas with populations of less than 50,000 persons. FTA apportions funds based upon the number of low income individuals residing in a State or large urbanized area, using data from the 2000 Census for individuals below 150 percent of poverty. FTA publishes apportionments to each State for small UZAs and for rural and small urban areas and a single apportionment for each large UZA.

The Designated Recipient, either for the State or for a large UZA, is responsible for further allocating the funds to specific projects and subrecipients through a competitive selection process. If the Governor has designated more than one recipient of JARC funds in a large UZA, the Designated Recipients may agree to conduct a single competitive selection process or sub-allocate funds to each Designated Recipient, based upon a percentage split agreed upon locally, and conduct separate competitions.

States may transfer funds between the small UZA and the nonurbanized apportionments, if all of the objectives of JARC are met in the size area the funds are taken from. States may also use funds in the small UZA and nonurbanized area apportionments for projects anywhere in the State (including large UZAs) if the State has established a statewide program for meeting the objectives of JARC. A State planning to transfer funds under either of these provisions should submit a request to the FTA regional office. FTA will assign new accounting codes to the funds before obligating them in a grant.

3. Requirements

States and Designated Recipients must solicit grant applications and select projects competitively, based on application procedures and requirements established by the Designated Recipient, consistent with the Federal JARC program objectives. In the case of large UZAs, the area-wide solicitation shall be conducted in cooperation with the appropriate MPO(s).

Funds are available to support the planning, capital, and operating costs of transportation services that are eligible for funding under the program. Assistance may be provided for a variety of transportation services and strategies directed at assisting welfare recipients and eligible low-income individuals address unmet transportation needs, and to provide reverse commute services. The transportation services may be provided by public, non-profit, or private-for-profit operators. The Federal share is 80 percent of capital and planning expenses and 50 percent of operating expenses. Funds provided under other Federal programs (other than those of the DOT, with the exception of the Federal Lands Highway Program established by 23 U.S.C. 204) may be used for local/State match for funds provided under Section 5316, and revenue from service contracts may be used as local match.

States and Designated Recipients may use up to ten percent of their annual apportionment for administration, planning, and to provide technical assistance. No local share is required for these program administrative funds. Funds used under this program for planning in urbanized areas must be shown in the UPWP for MPO(s) with responsibility for that area.

The Designated Recipient must certify that: the projects selected were derived from a locally developed, coordinated public transit-human services transportation plan; and, the plan was developed through a process that included representatives of public, private, and nonprofit transportation and human services providers and participation by the public, including those representing the needs of welfare recipients and eligible low-income individuals. The locally developed, coordinated public transit-human services transportation planning process must be coordinated and consistent with the metropolitan and statewide planning processes and funding for the program must be included in the metropolitan and statewide Transportation Improvement Program (TIP and STIP) at a level of specificity or aggregation consistent with State and local policies and procedures. Finally, the State must certify that allocations of the grant to subrecipients are made on a fair and equitable basis.

The coordinated planning requirement is also a requirement in two additional programs. Projects selected for funding under the Section 5310 program and the New Freedom program are also required to be derived from a locally developed coordinated public transit-human service transportation plan. FTA anticipates that most areas will develop one consolidated plan for all the programs, which may include

separate elements and other human service transportation programs. The goal of the coordinated planning process is not to be an exhaustive document, but to serve as a tool for planning and implementing beneficial projects. The level of effort required to develop the plan will vary among communities based on factors such as the availability of resources. FTA does not approve coordinated plans.

The JARC program is subject to the relevant requirements of Section 5307, including the requirement for certification of labor protections. JARC program requirements are published in FTA circular 9050.1, dated April 1, 2007. The circular and other guidance including frequently asked questions are posted on the FTA Web site at *http://www.fta.dot.gov.*

4. Period of Availability

FTA has established a consistent three-year period of availability for JARC, New Freedom, and the Section 5310 program, which includes the year of apportionment plus two additional years. FY 2009 funding is available through FY 2011. Any funding that remains unobligated on September 30, 2011 will revert to FTA for reapportionment among the States and large UZAs under the JARC program.

5. Other Program or Apportionment Related Information and Highlights

a. Carryover Earmarks. Table 17 lists prior year carryover of $7,791,630 for JARC projects designated by Congress in FYs 2002–2005. JARC earmarks carried over from TEA–21 are subject to the terms and conditions under which they were originally appropriated, including the requirement for a 50 percent local share for both capital and operating assistance. All projects should be in a regional JARC Plan as required under TEA–21 or in the new local coordinated plan required by the new formula JARC program. FTA will award a grant for a designated project upon receipt of a complete application, but can honor changes to the original designation only if so directed by the Appropriations Committee chairs. FTA intends to propose that any remaining JARC Discretionary Program funds be reallocated in the agency's FY 2010 budget. Grantees intending to use their remaining discretionary JARC funds should obligate funds prior to September 30, 2009.

b. Designated Recipient. FTA must have received formal notification from the Governor or Governor's designee of the Designated Recipient for JARC funds apportioned to a State or large UZA before awarding a grant to that area for JARC projects.

c. Transfers to Section 5307 or 5311. States may transfer JARC funds to Section 5307 or Section 5311, but only for projects competitively selected under the JARC program, not as a general supplement for those programs. FTA anticipates that the States would use this flexibility primarily for projects to be implemented by a Section 5307 recipient in a small urbanized area or for Federally recognized Indian Tribes that elect to receive funds as a direct recipient from FTA under Section 5311. FTA has established a scope code (646) to track JARC projects included within a Section 5307 or 5311 grant. Transfer to Section 5307 or 5311 is permitted but not required. FTA will also award stand-alone Section 5316 grants to the State for any and all subrecipients. In order to track disbursements accurately against the appropriate program, FTA will not combine JARC funds with Section 5307 funds in a single Section 5307 grant, nor will FTA combine JARC with New Freedom funds in a single Section 5307 grant.

d. Evaluation. Section 5316(i)(2), of SAFETEA–LU, requires FTA to conduct a study to evaluate the effectiveness of the JARC program. To support the evaluation, annual GAO reports on the program, and DOT Performance Measures, while reducing the burden grantees previously experienced from separate reporting required for the JARC program under TEA–21. FTA has established a web-based system for designated recipients to report their program measures on behalf of themselves and their subrecipients.

N. New Freedom Program (49 U.S.C. 5317)

SAFETEA–LU established the New Freedom Program under 49 U.S.C. 5317. The program purpose is to provide new public transportation services and public transportation alternatives beyond those currently required by the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) that assist individuals with disabilities with transportation, including transportation to and from jobs and employment support services. For more information about the New Freedom program contact David Schneider, Office of Transit Programs, at (202) 366–2053.

1. Funding Availability in FY 2009

The Continuing Appropriations Act, 2009, provides $37,633,750 for the New Freedom Program. The entire amount is apportioned by formula, as shown in the table below.

NEW FREEDOM PROGRAM

Total Apportioned	$37,633,750

Table 18 shows the FY 2009 New Freedom apportionments.

2. Basis for Formula Apportionment

By law, FTA allocates 60 percent of funds available to UZAs with populations of 200,000 or more persons (large UZAs); 20 percent to the States for urbanized areas with populations ranging from 50,000 to 200,000 persons (small UZAs), and 20 percent to the States for rural and small urban areas with populations of less than 50,000 persons. FTA apportions funds based upon the number of persons with disabilities over the age of five residing in a State or large urbanized area, using data from the 2000 Census. FTA publishes apportionments to each State for small UZAs and for rural and small urban areas and a single apportionment for each large UZA.

The Designated Recipient, either for the State or for a large UZA, is responsible for further allocating the funds to specific projects and subrecipients through a competitive selection process. If the Governor has designated more than one recipient of New Freedom funds in a large UZA, the Designated Recipients may agree to conduct a single competitive selection process or sub-allocate funds to each Designated Recipient, based upon a percentage split agreed on locally and conduct separate competitions.

3. Requirements

States and Designated Recipients must solicit grant applications and select projects competitively, based on application procedures and requirements established by the Designated Recipient, consistent with the Federal New Freedom program objectives. In the case of large UZAs, the area-wide solicitation shall be conducted in cooperation with the appropriate MPO(s).

Funds are available to support the capital and operating costs of new public transportation services and public transportation alternatives that are beyond those required by the Americans with Disabilities Act. Funds provided under other Federal programs (other than those of the DOT, with the exception of the Federal Lands Highway Program established by 23 U.S.C. 204) may be used as match for capital funds provided under Section 5317, and revenue from contract services may be used as local match.

Funding is available for transportation services provided by public, non-profit,

or private-for-profit operators. Assistance may be provided for a variety of transportation services and strategies directed at assisting persons with disabilities to address unmet transportation needs. Eligible public transportation services and public transportation alternatives funded under the New Freedom program must be both new and beyond the ADA. (In FY 2007, FTA published interim guidance holding Designated Recipients harmless for project selections conducted in good faith based on FTA's earlier preliminary determination that eligible services could be either new or beyond the ADA. Grants awarded in FY 2009 are now subject to the requirements of the final guidance which was published April 1, 2007).

The Federal share is 80 percent of capital expenses and 50 percent of operating expenses. Funds provided under other Federal programs (other than those of the DOT) may be used for local/state match for funds provided under Section 5317, and revenue from service contracts may be used as local match.

States and Designated Recipients may use up to ten percent of their annual apportionment to administer, plan, and provide technical assistance for a funded project. No local share is required for these program administrative funds. Funds used under this program for planning must be shown in the UPWP for MPO(s) with responsibility for that area.

The Designated Recipient must certify that: the projects selected were derived from a locally developed, coordinated public transit-human services transportation plan; and, the plan was developed through a process that included representatives of public, private, and nonprofit transportation and human services providers and participation by the public, including those representing the needs of welfare recipients and eligible low-income individuals. The locally developed, coordinated public transit-human services transportation planning process must be coordinated and consistent with the metropolitan and statewide planning processes and funding for the program must be included in the metropolitan and statewide Transportation Improvement Program (TIP and STIP) at a level of specificity or aggregation consistent with State and local policies and procedures. Finally, the State must certify that allocations of the grant to subrecipients are made on a fair and equitable basis.

The coordinated planning requirement is also a requirement in two additional programs. Projects selected for funding under the Section 5310 program and the JARC program are also required to be derived from a locally developed coordinated public transit-human service transportation plan. FTA anticipates that most areas will develop one consolidated plan for all the programs, which may include separate elements and other human service transportation programs.

The New Freedom program is subject to the relevant requirements of Section 5307, but certification of labor protections is not required. New Freedom Program requirements are published in FTA circular 9045.1, which was effective May 1, 2007. The circular and other guidance including frequently asked questions are posted on the FTA Web site at *http://www.fta.dot.gov.*

4. Period of Availability

FTA has established a consistent three-year period of availability for New Freedom, JARC, and the Section 5310 program, which includes the year of apportionment plus two additional years. FY 2009 funding is available through FY 2011. Any funding that remains unobligated on September 30, 2011, will revert to FTA for reapportionment among the States and large UZAs under the New Freedom program.

5. Other Program or Apportionment Related Information and Highlights

a. Designated Recipient. FTA must have received formal notification from the Governor or Governor's designee of the Designated Recipient for New Freedom funds apportioned to a State or large UZA before awarding a grant to that area for New Freedom projects.

b. Transfers to Section 5307 or 5311. States may transfer New Freedom funds to Section 5307 or Section 5311, but only for projects competitively selected under the New Freedom program, not as a general supplement for those programs. FTA anticipates that the States would use this flexibility for projects to be implemented by a Section 5307 recipient in a small urbanized area or for Federally recognized Indian Tribes that elect to receive funds as a direct recipient from FTA under Section 5311. FTA has established a scope code (647) to track New Freedom projects included within a Section 5307 or 5311 grant. Transfer to Section 5307 or 5311 is permitted but not required. FTA will also award stand-alone Section 5317 grants to the State for any and all subrecipients. In order to track disbursements accurately against the appropriate program, FTA will not combine New Freedom funds with Section 5307 funds in a single Section 5307 grant, nor will FTA combine New Freedom with JARC funds in a single Section 5307 grant.

c. Performance Measures. To support the evaluation of the program and Departmental reporting under the Governmental Performance and Results Act and the Office of Management and Budget's Performance Assessment and Rating Tool, FTA has established a web-based system for designated recipients to report their program measures on behalf of themselves and their subrecipients.

O. Paul S. Sarbanes Transit in Parks Program (49 U.S.C. 5320)

The Paul S. Sarbanes Transit in Parks Program (Transit in Parks Program), formally the Alternative Transportation in Parks and Public Lands (ATPPL) program, is administered by FTA in partnership with the Department of the Interior (DOI) and the U.S. Department of Agriculture's Forest Service. The purpose of the program is to enhance the protection of national parks and Federal lands, and increase the enjoyment of those visiting them. The program funds capital and planning expenses for alternative transportation systems such as buses and trams in federally-managed parks and public lands. Federal land management agencies and State, tribal and local governments acting with the consent of a Federal land management agency are eligible to apply.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, makes $10,752,500 available for the program in FY 2009. Up to ten percent of the funds may be reserved for planning, research, and technical assistance. FTA will publish a Notice of Funding Availability (NOFA) in the **Federal Register** inviting applications for projects to be funded in FY 2009.

2. Program Requirements

Projects are competitively selected based on criteria specified in the Notice of Funding Availability. The terms and conditions applicable to the program are also specified in the NOFA. Projects must conserve natural, historical, and cultural resources, reduce congestion and pollution, and improve visitor mobility and accessibility. No more than 25 percent may be allocated for any one project.

3. Period of Availability

The funds under the Transit in Parks Program remain available until expended.

4. Other Program or Apportionment Related Information and Highlights

Project selections for the FY 2008 funding were published in the **Federal Register** on October 10, 2008. Fifty-two projects totaling $24,470,501 were awarded.

P. Alternatives Analysis Program (49 U.S.C. 5339)

The Alternatives Analysis Program provides grants to States, authorities of the States, metropolitan planning organizations, and local government authorities to develop studies as part of the transportation planning process. These studies include an assessment of a wide range of public transportation alternatives designed to address a transportation problem in a corridor or subarea; sufficient information to enable the Secretary to make the findings of project justification and local financial commitment required; the selection of a locally preferred alternative; and the adoption of the locally preferred alternative as part of the state or regional long-range transportation plan. For more information about this program contact Ron Fisher, Office of Planning and Environment, at (202) 366–4033.

1. FY 2009 Funding Availability

The Continuing Appropriations Act, 2009, provides $10,619,642 to the Alternatives Analysis Program (49 U.S.C. 5339). FTA will publish project allocations in a supplemental notice when all program funds have been made available.

2. Requirements

Alternatives Analysis program funds may be made available to States, authorities of the States, metropolitan planning organizations, and local governmental authorities. The Government's share of the cost of an activity funded may not exceed 80 percent of the cost of the activity. The funds will be awarded as separate Section 5339 grants. The grant requirements will be comparable to those for Section 5309 grants. Eligible projects include planning and corridor studies and the adoption of locally preferred alternatives within the fiscally constrained Metropolitan Transportation Plan for that area. Funds awarded under the Alternatives Analysis Program must be shown in the UPWP for MPO(s) with responsibility for that area. Pre-award authority applies to these funds after Congress appropriates funds for these projects and the allocations are published in an FTA notice of apportionments and allocations.

Legislation to amend a 2007 or 2008 earmark under section 3037(c) of SAFETEA–LU is necessary should a recipient wish to use section 5339 funds for eligible project activities outside the scope of the project description. Unless otherwise specified in law, grants made under the Alternatives Analysis program must meet all other eligibility requirements as outlined in Section 5309.

3. Period of Availability

Funds designated for specific Alternatives Analysis Program projects remain available for obligation for three fiscal years, which includes the year of availability plus two additional fiscal years. Alternatives Analysis funds not obligated in an FTA grant for eligible purposes at the end of the period of availability will generally be made available for other projects.

4. Other Program or Apportionment Related Information and Highlights

Table 19 lists prior year carryover of $23,481,600 for Alternatives Analysis projects allocated project funding in FY 2007 and FY 2008. This amount includes $480,000 for FY 2006, which was competitively awarded in FY 2007. The total carryover amount also includes $8,987,600 from FY 2007 and $14,014,000 from FY 2008.

The SAFETEA–LU Technical Corrections Act of 2008 rescinded FY 2006 and FY 2007 funding in the amount of $500,000 for the Middle Rio Grande Coalition of Governments, Albuquerque to Santa Fe Corridor Study. Funding for the Lane County, Oregon Bus Rapid Transit Phase II Corridor Study is now available to all phases of the project.

Q. Growing States and High Density States Formula Factors

The Continuing Appropriations Act, 2009, makes $188,383,800 available for apportionment in accordance with the formula factors prescribed for Growing States and High Density States in Section 5340 of SAFETEA–LU. Fifty percent of this amount (or $94,191,900) is apportioned to eligible States and urbanized areas using the Growing State formula factors. The other 50 percent is apportioned to eligible States and urbanized areas using the High Density States formula factors. Based on application of the formulas, $64,557,843 of the Growing States funding was apportioned to urbanized areas and $29,634,057 to nonurbanized areas. All of the $94,191,900 allotted to High Density States was apportioned to urbanized areas.

The term 'State' is defined only to mean the 50 States. For the Growing State portion of Section 5340, funds are allocated based on the population forecasts for fifteen years after the date of that census. Forecasts are based on the trend between the most recent decennial census and Census Bureau population estimates for the most current year. Census population estimates as of December 27, 2007 were used in the FY 2009 apportionments Funds allocated to the States are then sub-allocated to urbanized and non-urbanized areas based on forecast population, where available. If forecasted population data at the urbanized level is not available, as is currently the case, funds are allocated to current urbanized and non-urbanized areas on the basis of current population in the 2000 Census. Funds allocated to urbanized areas are included in their Section 5307 apportionment. Funds allocated for non-urbanized areas are included in the states' Section 5311 apportionments.

R. Over-the-Road Bus Accessibility Program (49 U.S.C. 5310 note)

The Over-the-Road Bus Accessibility (OTRB) Program authorizes FTA to make grants to operators of over-the-road buses to help finance the incremental capital and training costs of complying with the DOT over-the-road bus accessibility final rule, 49 CFR Part 37, published on September 28, 1998 (63 FR 51670). FTA conducts a national solicitation of applications, and grantees are selected on a competitive basis. For more information about the OTRB program contact Blenda Younger, Office of Transit Programs, at (202) 366–2053.

1. Funding Availability in FY 2009

The Continuing Appropriations Act, 2009, provides $3,569,830 for the Over-the-Road Bus Accessibility (OTRB) Program, which is the total amount allocable for OTRB, as shown in the table below.

OVER-THE-ROAD BUS ACCESSIBILITY PROGRAM

Total Apportioned	$3,569,830

Of this amount, $2,677,373 is allocable to providers of intercity fixed-route service, and $892,457 to other providers of over-the-road bus services, including local fixed-route service, commuter service, and charter and tour service.

2. Program Requirements

Projects are competitively selected. The Federal share of the project is 90

percent of net project cost. Program guidance is provided in the **Federal Register** notice soliciting applications. Assistance under the program is available to private operators of over-the-road buses that are used substantially or exclusively in intercity, fixed route and over-the-road bus service. Assistance is also available to private operators of over-the-road buses in other services, such as charter, tour, and commuter service. Capital projects eligible for funding include projects to add lifts and other accessibility components to new vehicle purchases and to purchase lifts to retrofit existing vehicles. Eligible training costs include developing training materials or providing training for local providers of over-the-road bus services. A comprehensive listing of program requirements is published annually in the OTRB Program Notice of Funding Availability (NOFA).

3. Period of Availability

FTA has observed that some private operators selected to receive funding under this program have not acted promptly to obligate the funds in a grant and request reimbursement for expenditures. While the program does not have a statutory period of availability, in the FY 2008 Apportionment Notice, FTA published its intention to limit the period of availability to a selected operator to three years, which includes the year of allocation plus two additional years. Accordingly, funds for projects selected in FY 2005 or prior years are no longer available for obligation in a grant and will be reallocated in the FY 2009 competition. FY 2006 funds will be reallocated at the end of FY 2009 if not obligated in a grant by September 30, 2009. FY 2007 and FY 2008 funds were allocated on August 22, 2008 and will be reallocated if not obligated in a grant by September 30, 2010. Funds for project selections announced in FY 2009 will be reallocated if not obligated in a grant by September 30, 2011.

4. Other Program or Apportionment Related Information and Highlights

FTA will publish a NOFA soliciting applications for FY 2009 in a subsequent notice once the full funding level is made available to the program. The notice will be available at *http://www.fta.dot.gov/laws/leg_reg_federal_register.html.*

V. FTA Policy and Procedures for FY 2009 Grants

A. Automatic Pre-Award Authority To Incur Project Costs

1. Caution to New Grantees and Grantees Using Innovative Financing

While we provide pre-award authority to incur expenses prior to grant award for many projects, we recommend that first-time grant recipients not utilize this automatic pre-award authority and wait until the grant is actually awarded by FTA before incurring costs. As a new grantee, it is easy to misunderstand pre-award authority conditions and not be aware of all of the applicable FTA requirements that must be met in order to be reimbursed for project expenditures incurred in advance of grant award. FTA programs have specific statutory requirements that are often different from those for other Federal grant programs with which new grantees may be familiar. If funds are expended for an ineligible project or activity, FTA will be unable to reimburse the project sponsor and, in certain cases, the entire project may be rendered ineligible for FTA assistance.

Grantees proposing to use innovative financing techniques or capital leasing are required to consult with the applicable FTA Regional Office (see Appendix A) prior to entering into the financial agreement—especially where the grantee expects to use Federal funds for debt service or capital lease payments. Consulting with FTA prior to entering into the agreement allows FTA to advise the grantee of any applicable federal regulations, such as the Capital Leasing Regulation, and will minimize the risk of the costs being ineligible for reimbursement at a later date.

2. Policy

FTA provides pre-award authority to incur expenses prior to grant award for certain program areas described below. This pre-award authority allows grantees to incur certain project costs prior to grant approval and retain the eligibility of those costs for subsequent reimbursement after grant approval. The grantee assumes all risk and is responsible for ensuring that all conditions are met to retain eligibility. This pre-award spending authority permits a grantee to incur costs on an eligible transit capital, operating, planning, or administrative project without prejudice to possible future Federal participation in the cost of the project. In the **Federal Register** Notice of November 30, 2006, FTA extended pre-award authority for capital assistance under all formula programs through FY 2009, the duration of SAFETEA–LU. In this notice, FTA extends pre-award authority through FY 2010 for capital assistance under all formula programs. FTA provides pre-award authority for planning and operating assistance under the formula programs without regard to the period of the authorization. In addition, we extend pre-award authority for certain discretionary programs based on the annual Appropriations Act each year. All pre-award authority is subject to conditions and triggers stated below:

a. FTA does not impose additional conditions on pre-award authority for operating, planning, or administrative assistance under the formula grant programs. Grantees may be reimbursed for expenses incurred prior to grant award so long as funds have been expended in accordance with all Federal requirements. In addition to cross-cutting Federal grant requirements, program specific requirements must be met. For example, a planning project must have been included in a Unified Planning Work Program (UPWP); a New Freedom operating assistance project or a JARC planning or operating project must have been derived from a coordinated public transit-human services transportation plan (coordinated plan) and competitively selected by the Designated Recipient prior to incurring expenses; expenditure on State Administration expenses under State Administered programs must be consistent with the State Management Plan. Designated Recipients for JARC and New Freedom have pre-award authority for the ten percent of the apportionment they may use for program administration, if the use is consistent with their Program Management Plan.

b. Pre-Award authority for Alternatives Analysis planning projects under 49 U.S.C. 5339 is triggered by the publication of the allocation in FTA's **Federal Register** Notice of Apportionments and Allocations following the annual Appropriations Act, or announcement of additional discretionary allocations. The projects must be included in the UPWP of the MPO for that metropolitan area.

c. Pre-award authority for design and environmental work on a capital project is triggered by the authorization of formula funds, or the appropriation of funds for a discretionary project.

d. Following authorization of formula funds or appropriation and publication of discretionary projects, pre-award authority for capital project implementation activities including property acquisition, demolition,

construction, and acquisition of vehicles, equipment, or construction materials is triggered by completion of the environmental review process with FTA's concurrence in the categorical exclusion (CE) determination or signing of an environmental Record of Decision (ROD) or Finding of No Significant Impact (FONSI). Prior to exercising pre-award authority, grantees must comply with the conditions and Federal requirements outlined in paragraph 3 below. Failure to do so will render an otherwise eligible project ineligible for FTA financial assistance. Capital projects under the Section 5310, JARC, and New Freedom programs must comply with specific program requirements, including coordinated planning and competitive selection. In addition, prior to incurring costs, grantees are strongly encouraged to consult with the appropriate FTA regional office regarding the eligibility of the project for future FTA funds and the applicability of the conditions and Federal requirements.

e. As a general rule, pre-award authority applies to the Section 5309 Capital Investment Bus and Bus-Related Facilities, the Clean Fuels Bus program, high priority project designations, and any other transit discretionary projects designated in SAFETEA–LU only AFTER funds have been appropriated. Pre-award authority is currently extended for FY 2007 and FY 2008 discretionary project funding. As of the date of this notice, FTA extends preaward authority to FY 2009 projects designated discretionary funding in SAFETEA–LU and to discretionary allocations extended or reprogrammed under the SAFETEA–LU Technical Corrections Act of 2008, as of June 6, 2008. For Section 5309 Capital Investment Bus and Bus-Related, Clean Fuels Program, or other transit capital discretionary projects such as those designated in an annual Appropriations Act, the date that costs may be incurred is: (1) For design and environmental review, the appropriations bill which funds the project was enacted; and (2) for property acquisition, demolition, construction, and acquisition of vehicles, equipment, or construction materials, the date that FTA approves the document (ROD, FONSI, or CE determination) that completes the environmental review process required by the National Environmental Policy Act (NEPA) and its implementing regulations. FTA introduced this new trigger for pre-award authority in FY 2006 in recognition of the growing prevalence of new grantees unfamiliar with Federal and FTA requirements to ensure FTA's continued ability to comply with NEPA and related environmental laws. Because FTA does not sign a final NEPA document until MPO and statewide planning requirements (including air quality conformity requirements, if applicable) have been satisfied, this new trigger for pre-award will ensure compliance with both planning and environmental requirements prior to irreversible action by the grantee.

f. In previous notices, FTA extended pre-award authority to Section 330 projects referenced in the DOT Appropriation Act, 2002, and the Consolidated Appropriations Resolution, 2003 and to those surface transportation projects commonly referred to as Section 115 projects administered by FTA, for which amounts were provided in the Consolidated Appropriations Act, 2004, Section 117 projects in the 2005 Appropriations Act, and Section 112 of the 2006 Appropriations Act that are to be administered by FTA. FTA, in the FY 2008 Apportionment Notice, extended pre-award authority to high priority projects in SAFETEA–LU, as of the date they were transferred or allotted to FTA for administration. The same conditions described for bus projects apply to these projects. We strongly encourage any prospective applicant that does not have a previous relationship with FTA to review Federal grant requirements with the FTA regional office before incurring costs.

g. Blanket pre-award authority does not apply to Section 5309 Capital Investment New Starts funds. Specific instances of pre-award authority for Capital Investment New Starts projects are described in paragraph 4 below. Pre-award authority does not apply to Capital Investment Bus and Bus-Related Facilities or Clean Fuels projects authorized for funding beyond this fiscal year. Before an applicant may incur costs for Capital Investment New Starts projects, Bus and Bus-Related Facilities projects, or any other projects not yet published in a notice of apportionments and allocations, it must first obtain a written Letter of No Prejudice (LONP) from FTA. To obtain an LONP, a grantee must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described below.

h. Blanket pre-award authority does not apply to Section 5314 National Research Programs. Before an applicant may incur costs for National Research Programs, it must first obtain a written Letter of No Prejudice (LONP) from FTA. To obtain an LONP, a grantee must submit a written request accompanied by adequate information and justification to the appropriate FTA headquarters office. Information about LONP procedures may be obtained from the appropriate headquarters office.

3. Conditions

The conditions under which pre-award authority may be utilized are specified below:

a. Pre-award authority is not a legal or implied commitment that the subject project will be approved for FTA assistance or that FTA will obligate Federal funds. Furthermore, it is not a legal or implied commitment that all items undertaken by the applicant will be eligible for inclusion in the project.

b. All FTA statutory, procedural, and contractual requirements must be met.

c. No action will be taken by the grantee that prejudices the legal and administrative findings that the Federal Transit Administrator must make in order to approve a project.

d. Local funds expended by the grantee pursuant to and after the date of the pre-award authority will be eligible for credit toward local match or reimbursement if FTA later makes a grant or grant amendment for the project. Local funds expended by the grantee prior to the date of the pre-award authority will not be eligible for credit toward local match or reimbursement. Furthermore, the expenditure of local funds on activities such as land acquisition, demolition, or construction prior to the date of pre-award authority for those activities (*i.e.*, the completion of the NEPA process) would compromise FTA's ability to comply with Federal environmental laws and may render the project ineligible for FTA funding.

e. The Federal amount of any future FTA assistance awarded to the grantee for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/local match ratio at the time the funds are obligated.

f. For funds to which the pre-award authority applies, the authority expires with the lapsing of the fiscal year funds.

g. When a grant for the project is subsequently awarded, the Financial Status Report, in TEAM-Web, must indicate the use of pre-award authority.

h. Environmental, Planning, and Other Federal Requirements.

All Federal grant requirements must be met at the appropriate time for the project to remain eligible for Federal funding. The growth of the Federal transit program has resulted in a growing number of inexperienced grantees who make compliance with

Federal planning and environmental laws increasingly challenging. FTA has therefore modified its approach to pre-award authority to use the completion of the NEPA process, which has as a prerequisite the completion of planning and air quality requirements, as the trigger for pre-award authority for all activities except design and environmental review.

i. The requirement that a project be included in a locally adopted metropolitan transportation plan, the metropolitan transportation improvement program and Federally-approved statewide transportation improvement program (23 CFR Part 450) must be satisfied before the grantee may advance the project beyond planning and preliminary design with non-Federal funds under pre-award authority. If the project is located within an EPA-designated non-attainment area for air quality, the conformity requirements of the Clean Air Act, 40 CFR Part 93, must also be met before the project may be advanced into implementation-related activities under pre-award authority. Compliance with NEPA and other environmental laws and executive orders (*e.g.*, protection of parklands, wetlands, and historic properties) must be completed before State or local funds are spent on implementation activities, such as site preparation, construction, and acquisition, for a project that is expected to be subsequently funded with FTA funds. The grantee may not advance the project beyond planning and preliminary design before FTA has determined the project to be a categorical exclusion, or has issued a Finding of No Significant Impact (FONSI) or an environmental Record of Decision (ROD), in accordance with FTA environmental regulations, 23 CFR Part 771. For planning projects, the project must be included in a locally-approved Unified Planning Work Program (UPWP) that has been coordinated with the State.

j. In addition, Federal procurement procedures, as well as the whole range of applicable Federal requirements (*e.g.*, Buy America, Davis-Bacon Act, Disadvantaged Business Enterprise) must be followed for projects in which Federal funding will be sought in the future. Failure to follow any such requirements could make the project ineligible for Federal funding. In short, this increased administrative flexibility requires a grantee to make certain that no Federal requirements are circumvented through the use of pre-award authority. If a grantee has questions or concerns regarding the environmental requirements, or any other Federal requirements that must be met before incurring costs, it should contact the appropriate regional office.

4. Pre-Award Authority for New Starts Projects

a. Preliminary Engineering (PE) and Final Design (FD). Projects proposed for Section 5309 New Starts funds are required to follow a Federally defined New Starts project development process. This New Starts process includes, among other things, FTA approval of the entry of the project into PE and into FD. In accordance with Section 5309(d), FTA considers the merits of the project, the strength of its financial plan, and its readiness to enter the next phase in deciding whether or not to approve entry into PE or FD. Upon FTA approval to enter PE, FTA extends pre-award authority to incur costs for PE activities. Upon FTA approval to enter FD, FTA extends pre-award authority to incur costs for FD activities. The pre-award authority for each phase is automatic upon FTA's signing of a letter to the project sponsor approving entry into that phase. PE and FD are defined in the New Starts regulation entitled Major Capital Investment Projects, found at 49 CFR Part 611.

b. Real Property Acquisition Activities. FTA extends automatic pre-award authority for the acquisition of real property and real property rights for a New Starts project upon completion of the NEPA process for that project. The NEPA process is completed when FTA signs an environmental Record of Decision (ROD) or Finding of No Significant Impact (FONSI), or makes a Categorical Exclusion (CE) determination. With the limitations and caveats described below, real estate acquisition for a New Starts project may commence, at the project sponsor's risk, upon completion of the NEPA process.

For FTA-assisted projects, any acquisition of real property or real property rights must be conducted in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and its implementing regulations, 49 CFR Part 24. This pre-award authority is strictly limited to costs incurred: (i) To acquire real property and real property rights in accordance with the URA regulation, and (ii) to provide relocation assistance in accordance with the URA regulation. This pre-award authority is limited to the acquisition of real property and real property rights that are explicitly identified in the final environmental impact statement (FEIS), environmental assessment (EA), or CE document, as needed for the selected alternative that is the subject of the FTA-signed ROD or FONSI, or CE determination. This pre-award authority does not cover site preparation, demolition, or any other activity that is not strictly necessary to comply with the URA, with one exception. That exception is when a building that has been acquired, has been emptied of its occupants, and awaits demolition poses a potential fire-safety hazard or other hazard to the community in which it is located, or is susceptible to reoccupation by vagrants. Demolition of the building is also covered by this pre-award authority upon FTA's written agreement that the adverse condition exists.

Pre-award authority for property acquisition is also provided when FTA makes a CE determination for a protective buy or hardship acquisition in accordance with 23 CFR 771.117(d)(12), and when FTA makes a CE determination for the acquisition of a pre-existing railroad right-of-way in accordance with 49 U.S.C. 5324(c). When a tiered environmental review in accordance with 23 CFR 771.111(g) is being used, pre-award authority is not provided upon completion of the first-tier environmental document except when the Tier-1 ROD or FONSI signed by FTA explicitly provides such pre-award authority for a particular identified acquisition.

Project sponsors should use pre-award authority for real property acquisition and relocation assistance very carefully, with a clear understanding that it does not constitute a funding commitment by FTA. FTA provides pre-award authority upon completion of the NEPA process to maximize the time available to project sponsors to move people out of their homes and places of business, in accordance with the requirements of the Uniform Relocation Act, but also with maximum sensitivity to the plight of the people so affected. Although FTA provides pre-award authority for property acquisition upon completion of the NEPA process, FTA will not make a grant to reimburse the sponsor for real estate activities conducted under pre-award authority until the project has been approved into FD. Even if funds have been appropriated for the project, the timing of an actual grant for property acquisition and related activities must await FD approval to ensure that Federal funds are not risked on a project whose advancement beyond PE is still not yet assured.

c. National Environmental Policy Act (NEPA) Activities. NEPA requires that major projects proposed for FTA funding assistance be subjected to a

public and interagency review of the need for the project, its environmental and community impacts, and alternatives to avoid and reduce adverse impacts. Projects of more limited scope also need a level of environmental review, either to support an FTA finding of no significant impact (FONSI) or to demonstrate that the action is categorically excluded from the more rigorous level of NEPA review.

FTA's regulation titled ''Environmental Impact and Related Procedures,'' at 23 CFR Part 771 states that the costs incurred by a grant applicant for the preparation of environmental documents requested by FTA are eligible for FTA financial assistance (23 CFR 771.105(e)). Accordingly, FTA extends pre-award authority for costs incurred to comply with NEPA regulations and to conduct NEPA-related activities for a proposed New Starts or Small Starts project, effective as of the date of the Federal approval of the relevant STIP or STIP amendment that includes the project or any phase of the project. NEPA-related activities include, but are not limited to, public involvement activities, historic preservation reviews, section 4(f) evaluations, wetlands evaluations, endangered species consultations, and biological assessments. This pre-award authority is strictly limited to costs incurred to conduct the NEPA process, and to prepare environmental, historic preservation and related documents. It does not cover PE activities beyond those necessary for NEPA compliance.

For many FTA programs, costs incurred by a grant applicant exercising pre-award authority in the preparation of environmental documents required by FTA are eligible for FTA reimbursement (See also 23 CFR 771.105(e)). FTA assistance for environmental documents for New Starts and Small Starts projects, however, is subject to certain restrictions. Under SAFETEA–LU, Section 5309 New Starts funds cannot be used for any activity, including a NEPA-related activity that occurs prior to the approval of a New Starts project into PE or a Small Starts project into Project Development (PD). Section 5339 (Alternatives analysis program), Section 5307 (Urbanized Area Formula Program) and flexible highway funds are available for NEPA work conducted prior to PE approval (for New Starts) or PD approval (for Small Starts). Section 5309 New Starts funds, however, as well as Section 5307 (Urban Formula program) and flexible highway funds, can be used for NEPA work conducted after PE approval (for New Starts) or PD approval (for Small Starts). NEPA-related activities include, but are not limited to, public involvement activities, historic preservation reviews, section 4(f) evaluations, wetlands evaluations, endangered species consultations, and biological assessments. As with any pre-award authority, FTA reimbursement for costs incurred is not guaranteed.

d. Other New Starts Activities Requiring Letter of No Prejudice (LONP). Except as discussed in paragraphs a through c above, a grant applicant must obtain a written LONP from FTA before incurring costs for any activity expected to be funded by New Start funds not yet awarded. To obtain an LONP, an applicant must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described in B below.

5. Pre-Award Authority for Small Starts

When FTA issues a Project Development approval letter for a Small Starts project, FTA grants pre-award authority for the engineering and design activities necessary to complete NEPA. Upon FTA's issuance of a Record of Decision (ROD), a Finding of No Significant Impact (FONSI), or a Categorical Exclusion (CE) determination, pre-award authority is granted to incur costs for all other project engineering activities including right-of-way acquisition and utility relocation. When FTA issues a Project Construction Grant Agreement (PCGA), FTA grants pre-award authority for the construction phase of the project. Pre-award authority for NEPA-related work on a Small Starts project is described in paragraph 4.c above. Pre-award authority for real property acquisition activities for a Small Starts project is granted under the same conditions and for the same reasons as for New Starts projects, as described in paragraph 4.b above.

B. Letter of No Prejudice (LONP) Policy

1. Policy

LONP authority allows an applicant to incur costs on a project utilizing non-Federal resources, with the understanding that the costs incurred subsequent to the issuance of the LONP may be reimbursable as eligible expenses or eligible for credit toward the local match should FTA approve the project at a later date. LONPs are applicable to projects and project activities not covered by automatic pre-award authority. The majority of LONPs will be for Section 5309 New Starts or Small Starts funds not covered under a full funding grant agreement (FFGA) or PCGA, or for Section 5309 Bus and Bus-Related projects authorized but not yet appropriated by Congress. LONPs may be issued for formula and discretionary funds beyond the life of the current authorization or FTA's extension of automatic pre-award authority; however, the LONP is limited to a five-year period.

2. Conditions and Federal Requirements

The conditions for pre-award authority specified in section V.A.2 above apply to all LONPs. The Environmental, Planning and Other Federal Requirements described in section V.A.3 also apply to all LONPs. Because project implementation activities may not be initiated prior to NEPA completion, FTA will not issue an LONP for such activities until the NEPA process has been completed with a ROD, FONSI, or Categorical Exclusion determination.

3. Request for LONP

Before incurring costs for a project not covered by automatic pre-award authority, the project sponsor must first submit a written request for an LONP, accompanied by adequate information and justification, to the appropriate regional office and obtain written approval from FTA. FTA approval of an LONP for a New Starts or Small Starts project is determined on a case-by-case basis. As a prerequisite to FTA approval of an LONP for a New Starts or Small Starts project, FTA will require project sponsors to demonstrate project worthiness and readiness that establish the project as a promising candidate for an FFGA or PCGA. For New Starts projects, this usually cannot be determined prior to the project's approval to enter final design. However, there may be limited instances where LONP requests prior to entry into final design are approved, if strongly justified. Projects will be assessed based upon the criteria considered in the New Start evaluation process. Specifically, when requesting an LONP, the applicant shall provide sufficient information to allow FTA to consider the following items:

a. Description of the activities to be covered by the LONP.

b. Justification for advancing the identified activities. The justification should include an accurate assessment of the consequences to the project scope, schedule, and budget should the LONP not be approved.

c. Data that indicates that the project will maintain its ability to receive a rating of ''medium'', or better and that its cost-effectiveness rating will be ''medium'' or better, unless such project

has been specifically exempted from such a requirement.

d. Allocated level of risk and contingency for the activity requested.

e. Status of procurement progress, including, if appropriate, submittal of bids for the activities covered by the LONP.

f. Strength of the capital and operating financial plan for the New Starts project and the future transit system.

g. Adequacy of the Project Management Plan.

h. Resolution of any readiness issues that would affect the project, such as land acquisition and technical capacity to carry out the project.

C. FTA FY 2009 Annual List of Certifications and Assurances

The full text of the FY 2009 Certifications and Assurances was published in the **Federal Register** on October 31, 2008, and is available on the FTA Website and in TEAM-Web. The FY 2009 Certifications and Assurances must be used for all grants made in FY 2009, including obligation of carryover. All grantees with active grants are required to have signed the FY 2009 Certifications and Assurances within 90 days after publication. Any questions regarding this document may be addressed to the appropriate Regional Office or to Nydia Picayo, in the FTA Office of Program Management, at (202) 366–1662.

D. FHWA Funds Used for Transit Purposes

SAFETEA–LU continues provisions in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and TEA–21 that expanded modal choice in transportation funding by including substantial flexibility to transfer funds between FTA and FHWA formula program funding categories. The provisions also allow for transfer of certain discretionary program funds for administration of highway projects by FHWA and transit projects by FTA. FTA and FHWA execute Flex Funding Transfers between the Formula and Bus Grants Transit programs and the Federal Aid Highway programs. This also includes the transfer of Metropolitan and Statewide planning set-aside funds from FHWA to FTA to be combined with metropolitan and statewide planning resources as Consolidated Planning Grants (CPG). These transfers are based on States requests to transfer funding from the Highway and/or Transit programs to fund States and local project priorities, and joint planning needs. This practice can result in transfers to the Federal Transit Program from the Federal Aid Highway Program or vice versa.

1. Transfer Process for Funds

SAFETEA–LU was enacted on August 10, 2005. With the enactment of SAFETEA–LU, beginning in FY2006, Federal transit programs are funded solely from general funds or trust funds. The transit formula and bus grant programs are now funded from MTA of the Highway Trust Fund. The Formula and Bus Grant Programs receives flex funding transfers from the Federal Aid Highway Program.

As a result of the changes to program funding mechanisms, there is no longer a requirement to transfer budget authority and liquidating cash resources simultaneously upon the execution of a flex funding transfer request by a State. Since the transfers are between trust fund accounts, the only requirement is to transfer budget authority (obligation limitation) between the Federal Aid Program trust fund account and the Federal Transit Formula and Bus Grant Program account. At the point in time that the obligation resulting from the transfer of budgetary authority is expended, a transfer of liquidating cash will be required.

Beginning in FY 2007, the accounting process was changed for transfers of flex funds and other specific programs to allow budget authority to be transferred and the cash to be transferred separately. FTA requires that flexed fund transfers to FTA be in separate and identifiable grants in order to ensure that the draw-down of flexed funds can be tracked, thus securing the internal controls for monitoring these resources from the Federal Highway Administration to avoid deficiencies in FTA's Formula and Bus Grants account.

FTA monitors the expenditures of flexed funded grants and requests the transfer of liquidating cash from FHWA to ensure sufficient funds are available to meet expenditures. To facilitate tracking of grantees' flex funding expenditures, FTA developed codes to provide distinct identification of ''flex funds.''

The process for transferring flexible funds between FTA and FHWA programs is described below. Note that the new transfer process for ''flex funds'' that began in FY 2007 does not apply to the transfer of State planning set-aside funds from FHWA to FTA to be combined with metropolitan and statewide planning resources as Consolidated Planning Grants (CPG). These transfers are based on States requests to transfer funding from the Highway and/or Transit programs to fund States and local project priorities, and joint planning needs. Planning funds transferred will be allowed to be merged in a single grant with FTA planning resources using the same process implemented in FY 2006. For information on the process for the transfer of funds between FTA and FHWA planning programs refer to section IV.A and B. Note also that certain prior year appropriations earmarks (Sections 330, 115, 117, and 112) are allotted annually for administration rather than being transferred. For information regarding these procedures, please contact Kristen D. Clarke, FTA Budget Office, at (202) 366–1686; or FHWA Budget Division, at (202) 366–2845.

a. Transfer From FHWA to FTA

FHWA funds transferred to FTA are used primarily for transit capital projects and eligible operating activities that have been designated as part of the metropolitan and statewide planning and programming process. The project must be included in an approved STIP before the funds can be transferred. By letter, the State DOT requests the FHWA Division Office to transfer highway funds for a transit project. The letter should specify the project, amount to be transferred, apportionment year, State, urbanized area, Federal aid apportionment category (i.e., Surface Transportation Program (STP), Congestion Mitigation and Air Quality (CMAQ) or identification of the earmark and indication of the intended FTA formula program (i.e., Section 5307, 5311 or 5310) and should include a description of the project as contained in the STIP. Note that FTA may also administer certain transfers of statutory earmarks under the Section 5309 bus program, for tracking purposes.

The FHWA Division Office confirms that the apportionment amount is available for transfer and concurs in the transfer, by letter to the State DOT and FTA. The FHWA Office of Budget and Finance then transfers obligation authority. All FHWA, CMAQ, and STP funds transferred to FTA will be transferred to one of the three FTA formula programs (i.e. Urbanized Area Formula (Section 5307), Nonurbanized Area Formula (Section 5311) or Elderly and Persons with Disabilities (Section 5310). High Priority projects in Section 1702 of SAFETEA–LU or Transportation Improvement projects in Section 1934 of SAFETEA–LU and other Congressional earmarks that are transferred to FTA will be aligned with and administered through FTA's discretionary Bus and Bus Related Facilities Program (Section 5309). The most recent guidance on transfers of FHWA funds as allowed

under SAFETEA–LU is FHWA Memorandum, dated July 19, 2007, ''Information Fund Transfers to Other Agencies and Among Title 23 Programs.''

The FTA grantee's application for the project must specify which program the funds will be used for, and the application must be prepared in accordance with the requirements and procedures governing that program. Upon review and approval of the grantee's application, FTA obligates funds for the project.

Transferred funds are treated as FTA formula or discretionary funds, but are assigned a distinct identifying code for tracking purposes. The funds may be transferred for any capital purpose eligible under the FTA formula program to which they are transferred and, in the case of CMAQ, for certain operating costs. FHWA issued revised interim guidance on project eligibility under the CMAQ program in a Notice at 71 FR 76038 *et seq.* (December 19, 2006) incorporating changes made by SAFETEA–LU. In accordance with 23 U.S.C. 104(k), all FTA requirements except local share are applicable to transferred funds except in certain cases when CMAQ funds are authorized for operating expenses. Earmarks that are transferred to the Section 5309 Bus Program for administration, however, can be used for the Congressionally designated transit purposes, and in some case where the law provides, are not limited to eligibility under the Bus Program.

In the event that transferred formula funds are not obligated for the intended purpose within the period of availability of the formula program to which they were transferred, they become available to the Governor for any eligible capital transit project. Earmarked funds, however, can only be used for the Congressionally designated purposes.

b. Transfers From FTA to FHWA

The MPO submits a written request to the FTA regional office for a transfer of FTA Section 5307 formula funds (apportioned to a UZA 200,000 and over in population) to FHWA based on approved use of the funds for highway purposes, as determined by the designated recipient under Section 5307 and contained in the Governor's approved State Transportation Improvement Program. The MPO must certify that: (1) Notice and opportunity for comment and appeal has been provided to affected transit providers; (2) the funds are not needed for capital investments required by the Americans with Disabilities Act, and (3) local transit needs are being addressed. The FTA Regional Administrator reviews and, if he or she concurs in the request, then forwards the approval in written format to FTA Headquarters, where a reduction equal to the dollar amount being transferred to FHWA is made to the grantee's Urbanized Area Formula Program apportionment.

Transfers of discretionary earmarks for administration by FHWA are handled on a case-by-case basis, by the FTA regional office, in consultation with the FTA Office of Program Management, Office of Chief Counsel, and Office of Budget and Policy.

c. Matching Share for FHWA Transfers

The provisions of Section 104(k) of title 23 U.S.C., regarding the non-Federal share, apply to Title 23 funds used for transit projects. Thus, FHWA funds transferred to FTA retain the same matching share that the funds would have if used for highway purposes and administered by FHWA.

There are four instances in which a Federal share higher than 80 percent would be permitted. First, in States with large areas of Indian and certain public domain lands and national forests, parks and monuments, the local share for highway projects is determined by a sliding scale rate, calculated based on the percentage of public lands within that State. This sliding scale, which permits a greater Federal share, but not to exceed 95 percent, is applicable to transfers used to fund transit projects in these public land States. FHWA develops the sliding scale matching ratios for the increased Federal share.

Second, commuter carpooling and vanpooling projects and transit safety projects using FHWA transfers administered by FTA may retain the same 100 percent Federal share that would be allowed for ride-sharing or safety projects administered by FHWA.

The third instance is the 100 percent Federally-funded safety projects; however, these are subject to a nationwide 10 percent program limitation.

The fourth instance occurs with CMAQ funds. H.R. 6, The Energy Independence and Security Act, 2007, increased the federal share of CMAQ projects to 100% at the State's discretion. FTA will honor this increased match for CMAQ funds transferred to FTA for implementation if the state chooses to fund the project at a higher federal share than 80 percent. The federal share for CMAQ projects cannot be lower than 80 percent.

D. Miscellaneous Transit Earmarks in FHWA Programs

The FY 2002 and FY 2003 Appropriations Acts and accompanying reports included Section 330, which identified a number of transit projects among projects designated to receive funding from certain FHWA funding sources. The FY 2004 Appropriations Act similarly included transit projects among projects designated to receive funding from certain FHWA sources in Section 115, the FY 2005 Appropriations Act included a set of designations under Section 117, and the FY 2006 Appropriations Act included designations under Section 112, which may include some projects that FHWA will identify to be administered by FTA. For those projects identified by FHWA as transit in nature, FHWA allots the funds to FTA to administer. The funds are available for the designated project until obligated and expended. Some of these FY 2002–2006 designations for transit projects have not yet been obligated. However, because these are FHWA funds, funds for projects unobligated at the end of the FY are not automatically available as carry over made available in the following FY. Instead FHWA re-allots obligation authority to FTA annually, after reconciling account balances. Because the requirements and procedures associated with these projects differ in some cases from those for the FTA programs that FTA grantees are familiar with, and the availability of funds for obligation by FTA depends on allotments from FHWA, transit applicants seeking funding under these miscellaneous FHWA designations must work closely with the appropriate FTA regional office and FHWA Division Office when applying for a grant under these designations.

E. Grant Application Procedures

1. Grantees must provide a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number for inclusion in all applications for a Federal grant or cooperative agreement. The DUNS number should be entered into the grantee profile in TEAM-Web. Additional information about this and other Federal grant streamlining initiatives mandated by the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) can be accessed on OMB's Web site at *http://www.whitehouse.gov/omb/grants/reform.html.*

2. All applications for FTA funds should be submitted electronically to the appropriate FTA regional office through TEAM-Web, an Internet-

accessible electronic grant application system. FTA has provided limited exceptions to the requirement for electronic filing of applications.

3. In FY 2009, FTA remains committed to processing applications promptly upon receipt of a completed application by the appropriate regional office. In order for an application to be considered complete and for FTA to assign a grant number, enabling submission in TEAM-Web, the following requirements must be met:

a. The project is listed in a currently approved Metropolitan Transportation Plan, Metropolitan Transportation Improvement Program (TIP); FTA approved Statewide Transportation Improvement Program (STIP), or Unified Planning Work Program (UPWP).

b. All eligibility issues have been resolved.

c. Required environmental findings have been made.

d. The project budget's Activity Line Items (ALI), scope, and project description meet FTA requirements.

e. Local share funding source(s) have been identified.

f. The grantee's required Civil Rights submissions are current.

g. Certifications and assurances are properly submitted.

h. Funding is available, including any flexible funds included in the budget.

i. For projects involving new construction (using at least $100 million in New Starts or formula funds), FTA engineering staff has reviewed the project management plan and given approval.

j. When required for grants related to New Starts projects, PE and/or FD has been approved.

k. Milestone information is complete, or FTA determines that milestone information can be finalized before the grant is ready for award. The grant must include sufficient milestones appropriate to the scale of the project to allow adequate oversight to monitor the progress of projects from the start through completion and closeout.

4. Under most FTA programs, grants involving funding related to transit operations must be submitted to the Department of Labor (DOL) for certification of labor protective arrangements, prior to grant award. Grants under the Nonurbanized Area Formula Program and Over-the-Road Bus Program are covered under the special warranty provision and do not require certification. Beginning with grants associated in FY 2009, Tribal Transit grants are also covered by the special warranty. Although grants under these programs will not be certified, they must be submitted to DOL upon approval by FTA. This change resulted from the new DOL Regulations, 29 CFR Part 215, published on August 13, 2008. In addition, before FTA can award grants for discretionary projects and activities designated by Congress, notification must be given to members of Congress, and in the case of awards greater than $500,000, to the House and Senate authorizing and appropriations committees three days prior to award. Discretionary grants allocated by FTA also go through the Congressional notification process if they are greater than $500,000. In previous years, the amount requiring notification was $1 million; however, the Continuing Appropriations Act, 2008, lowered the threshold for notification to $500,000 dollars.

5. Other important issues that impact FTA grant processing activities are discussed below.

a. Change in Budget Structure

Because SAFETEA–LU restructured FTA's accounts from split funded accounts to one solely trust funded account and three general funded accounts, FTA does not mix funds from years prior to FY 2006 in the same grant with funds appropriated in FY 2006 and beyond (except for New Starts and research grants). Prior to FY 2006, all programs were funded approximately 80 percent from MTA of the Highway Trust Fund and 20 percent from the General Funds U.S. Treasury. The trust funds were transferred into the general funded accounts at the beginning of the year. Under SAFETEA–LU most programs are funded entirely from trust funds derived from the MTA, while the New Starts and Research programs are funded with general funds. For a New Starts or research project, any prior year funds currently available for obligation and FY 2009 funds may be included in an amendment to an existing grant.

For formula programs funded solely from trust funds beginning in FY 2006, grantees may not combine funds appropriated since FY 2006 in the same grant with FY 2005 and prior year funds. Grant amendments cannot be made to add FY 2006 and later year funds to a grant that includes FY 2005 or prior funds. However, grantees are able to amend new grants established with FY 2006 or later year funds to add funds made available after FY 2006. We regret any inconvenience this accounting change may cause as we implement new statutory requirements under SAFETEA–LU. We encourage grantees to spend down and close out old grants as quickly as possible to minimize the inconvenience.

b. Grant Budgets—SCOPE and Activity Line Item (ALI) Codes

FTA uses the SCOPE and Activity Line Item (ALI) Codes in the grant budgets to track program trends, to report to Congress, and to respond to requests from the Inspector General and the Government Accountability Office (GAO), as well as to manage grants. The accuracy of the data is dependent on the careful and correct use of codes. As needed, we revise the SCOPE and ALI table to include new codes for newly eligible capital items, to better track certain expenditures, and to accommodate new or modified programs. We encourage grantees to review the table before selecting codes from the drop-down menus in TEAM-Web while creating a grant budget and to consult with the regional office in the correct use of codes.

c. Earmark and Discretionary Program Tracking

FTA has implemented procedures in TEAM-Web for matching grants to earmarks or projects selected by FTA under discretionary programs. Each earmark or selected discretionary project published in the **Federal Register** is associated with a unique identifier. Tables of earmarks and selected discretionary projects have also been established in TEAM-Web. When applying for a grant using funding designated by Congress or FTA for a particular project, grantees are asked to identify the amount of funding associated with each specific earmark or discretionary project used in the grant. Further instructions are posted on the TEAM-Website and regional staff can provide additional assistance.

F. Payments

Once a grant has been awarded and executed, requests for payment can be processed. To process payments FTA uses ECHO-Web, an Internet accessible system that provides grantees the capability to submit payment requests on-line, as well as receive user-IDs and passwords via e-mail. New applicants should contact the appropriate FTA regional office to obtain and submit the registration package necessary for set-up under ECHO-Web.

G. Oversight

FTA conducts periodic oversight reviews to assess grantee compliance with Federal requirements. Each urbanized area grantee is reviewed every three years (a Triennial Review). Triennial reviews have been modified to look at the grantee's involvement in the coordinated planning for transportation for the populations targeted by the JARC

and New Freedom programs and participation in delivery of specialized services under those programs in the urbanized area. States are reviewed periodically for their management of the Section 5310, 5311, JARC, and New Freedom programs. Other more detailed reviews are scheduled based on an annual grantee risk assessment, for example, reviews in the areas of Procurement, Financial Management, Safety and Civil Rights.

H. Technical Assistance

FTA headquarters and regional staff will be pleased to answer your questions and provide any technical assistance you may need to apply for FTA program funds and manage the grants you receive. This notice and the program guidance circulars previously identified in this document may be accessed via the FTA Web site at *http://www.fta.dot.gov.*

In addition, copies of the following circulars and other useful information are available on the FTA Web site and may be obtained from FTA regional offices; Circular 4220.1F, Third Party Contracting Requirements; and Circular 5010.1D, Grant Management Guidelines. Both circulars were recently revised and can be found at *http://www.fta.dot.gov/laws/leg_reg_circulars_guidance.html*. The FY 2009 Annual List of Certifications and Assurances and Master Agreement are also posted on the FTA Web site. The DOT final rule on ''Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,'' which was effective July 16, 2003, can be found at *http://www.access.gpo.gov/nara/cfr/waisidx_04/49cfr26_04.html/*

Issued in Washington, DC, this 8th day of December 2008.

Sherry Little,

Acting Administrator.

Appendix A

FTA Regional Offices

Richard H. Doyle, Regional Administrator, Region 1—Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617 494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Brigid Hynes-Cherin, Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. No. 212 668–2170.

States served: New Jersey, New York

Letitia Thompson, Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215 656–7100.

States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia

Yvette Taylor, Regional Administrator, Region 4—Atlanta, Atlanta Federal Center, Suite 17T50, 61 Forsyth Street, SW., Atlanta, GA 30303, Tel. 404 562–3500.

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands

Marisol Simon, Regional Administrator, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312 353–2789.

States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Robert C. Patrick, Regional Administrator, Region 6—Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817 978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas

Mokhtee Ahmad, Regional Administrator, Region 7—Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816 329–3920.

States served: Iowa, Kansas, Missouri, and Nebraska

Terry Rosapep, Regional Administrator, Region 8—Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.

States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming

Leslie T. Rogers, Regional Administrator, Region 9—San Francisco, 201 Mission Street, Room 2210, San Francisco, CA 94105–1926, Tel. 415 744–3133.

States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands

Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206 220–7954.

States served: Alaska, Idaho, Oregon, and Washington

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FEDERAL TRANSIT ADMINISTRATION

TABLE 1

FY 2009 AVAILABLE FUNDING AND APPORTIONMENTS FOR FORMULA GRANT PROGRAMS

(The total available amount for a program is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

FORMULA GRANTS	
Section 5303 Metropolitan Transportation Planning Program	
Total Available	$38,068,323
Less Oversight (one-half percent)	(190,342)
Total Apportioned	$37,877,981
Section 5304 Statewide Transportation Planning Program	
Total Available	$7,952,377
Less Oversight (one-half percent)	(39,762)
Total Apportioned	$7,912,615
Section 5307 Urbanized Area Formula Program	
Total Available	$1,682,053,574
Less Oversight (three-fourths percent)	(12,615,402)
Total Apportioned	$1,669,438,172
Section 5309 Fixed Guideway Modernization	
Total Available	$675,257,000
Less Oversight (one percent)	(6,752,570)
Total Apportioned	$668,504,430
Section 5310 Special Needs of Elderly Individuals and Individuals with Disabilities Program	
Total Available	$54,622,700
Less Oversight (one-half percent)	(273,113)
Total Apportioned	$54,349,587
Section 5311 Nonurbanized Area Formula Program	
Total Available	$179,454,924
Less Oversight (one-half percent)	(941,919)
Total Apportioned	$178,513,005
Section 5311(b)(3) Rural Transportation Assistance Program (RTAP)	
Total Available	$3,767,676
Less Amount Reserved for National RTAP	(565,151)
Total Apportioned	$3,202,525
Section 5316 Job Access and Reverse Commute Program	
Total Available	$67,095,600
Total Apportioned	$67,095,600
Section 5317 New Freedom Program	
Total Available	$37,633,750
Total Apportioned	$37,633,750
Section 5340 Growing States and High Density States Formula	
Total Available	$188,383,800 1/
Total Apportioned	$188,383,800
CAPITAL INVESTMENT GRANTS	
Section 5309 New Starts	
Total Available	$674,866,468
Less Oversight (one percent)	(6,748,665)
Funds Available for Allocation	$668,117,803
RESEARCH	
Section 5314 National Research Program	$28,112,583
TOTAL AVAILABLE (Above Grant Programs)	**$3,637,268,775** 2/
TOTAL APPORTIONMENT (Above Grant Programs)	**$3,609,141,851**

1/ Apportionments derived from the Section 5340 formula are combined with the Section 5307 or Section 5311 apportionments, as appropriate, in accordance with language in the SAFETEA-LU conference report

2/ The amount shown here only includes funding for the programs included in this notice and shown above It does not include $5,161,200 in funds currently available under the Tribal Transit Program, which will be competitively awarded when the full year's appropriation is available

FEDERAL TRANSIT ADMINISTRATION

TABLE 2

FY 2009 SECTION 5303 METROPOLITAN TRANSPORTATION PLANNING PROGRAM AND SECTION 5304 STATEWIDE TRANSPORTATION PLANNING PROGRAM APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

STATE	SECTION 5303 APPORTIONMENT	SECTION 5304 APPORTIONMENT
Alabama	$286,721	$74,869
Alaska	151,512	39,563
Arizona	757,521	150,731
Arkansas	151,512	39,563
California	5,958,872	1,157,809
Colorado	567,666	123,919
Connecticut	420,753	109,862
Delaware	151,512	39,563
District of Columbia	151,512	39,563
Florida	2,475,345	519,519
Georgia	976,319	193,232
Hawaii	151,512	39,563
Idaho	151,512	39,563
Illinois	2,100,582	375,558
Indiana	570,656	131,554
Iowa	164,657	42,996
Kansas	192,524	46,584
Kentucky	240,286	60,427
Louisiana	375,394	97,794
Maine	151,512	39,563
Maryland	849,053	165,746
Massachusetts	1,115,552	217,338
Michigan	1,246,131	253,725
Minnesota	531,797	104,588
Mississippi	151,512	39,563
Missouri	560,916	119,201
Montana	151,512	39,563
Nebraska	151,512	39,563
Nevada	277,311	64,652
New Hampshire	151,512	39,563
New Jersey	1,757,155	299,051
New Mexico	151,512	39,563
New York	3,349,191	597,987
North Carolina	555,490	145,051
North Dakota	151,512	39,563
Ohio	1,205,408	281,984
Oklahoma	219,137	57,221
Oregon	337,099	76,216
Pennsylvania	1,556,191	316,685
Puerto Rico	628,524	134,090
Rhode Island	156,554	39,563
South Carolina	276,768	72,270
South Dakota	151,512	39,563
Tennessee	437,897	114,344
Texas	2,780,527	570,652
Utah	258,196	67,421
Vermont	151,512	39,563
Virginia	859,596	181,784
Washington	807,443	165,991
West Virginia	151,512	39,563
Wisconsin	449,045	109,630
Wyoming	151,512	39,563
TOTAL	**$37,877,981**	**$7,912,615**

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

(Note In accordance with language in the SAFETEA-LU conference report, an urbanized area apportionments for Section 5307 and Section 5340 were combined to show a single amount An area's apportionment amount includes regular Section 5307 funds, Small Transit Intensive Cities funds, and Growing States and High Density States formula funds, as appropriate)

URBANIZED AREA/STATE	APPORTIONMENT
1,000,000 or more in Population	$1,305,455,682
200,000 - 999,999 in Population	332,452,859
50,000 - 199,999 in Population	190,279,374
National Total	$1,828,187,915

Amounts Apportioned to Urbanized Areas 1,000,000 or more in Population:

Atlanta, GA	$26,709,471
Baltimore, MD	23,490,643
Boston, MA--NH--RI	59,803,136
Chicago, IL--IN	100,021,141
Cincinnati, OH--KY--IN	7,630,695
Cleveland, OH	12,130,686
Columbus, OH	4,929,135
Dallas--Fort Worth--Arlington, TX	26,743,484
Denver--Aurora, CO	20,317,367
Detroit, MI	17,586,420
Houston, TX	27,679,509
Indianapolis, IN	4,874,796
Kansas City, MO--KS	6,188,706
Las Vegas, NV	10,260,246
Los Angeles--Long Beach--Santa Ana, CA	118,548,233
Miami, FL	42,629,882
Milwaukee, WI	8,692,728
Minneapolis--St. Paul, MN	20,491,346
New Orleans, LA	7,512,433
New York--Newark, NY--NJ--CT	357,370,192
Orlando, FL	8,035,542
Philadelphia, PA--NJ--DE--MD	57,033,516
Phoenix--Mesa, AZ	19,595,306
Pittsburgh, PA	15,034,189
Portland, OR--WA	15,196,454
Providence, RI--MA	13,909,464
Riverside--San Bernardino, CA	11,099,932
Sacramento, CA	9,173,038
San Antonio, TX	9,510,426
San Diego, CA	24,649,277
San Francisco--Oakland, CA	53,062,730
San Jose, CA	16,843,839
San Juan, PR	13,610,924
Seattle, WA	38,074,668
St. Louis, MO--IL	13,951,377
Tampa--St. Petersburg, FL	10,154,025
Virginia Beach, VA	7,716,692
Washington, DC--VA--MD	65,194,034
Total	**$1,305,455,682**

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

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URBANIZED AREA/STATE	APPORTIONMENT
Amounts Apportioned to Urbanized Areas 200,000 to 999,999 in Population	
Aguadilla--Isabela--San Sebastian, PR	$1,691,338
Akron, OH	2,670,023
Albany, NY	4,397,173
Albuquerque, NM	3,466,741
Allentown--Bethlehem, PA--NJ	3,182,833
Anchorage, AK	9,722,429
Ann Arbor, MI	1,967,293
Antioch, CA	2,628,032
Asheville, NC	784,459
Atlantic City, NJ	4,322,651
Augusta-Richmond County, GA--SC	1,003,742
Austin, TX	7,957,089
Bakersfield, CA	2,476,111
Barnstable Town, MA	2,231,321
Baton Rouge, LA	2,007,548
Birmingham, AL	2,639,729
Boise City, ID	1,096,964
Bonita Springs--Naples, FL	1,024,373
Bridgeport--Stamford, CT--NY	10,506,397
Buffalo, NY	7,306,736
Canton, OH	1,566,955
Cape Coral, FL	1,766,669
Charleston--North Charleston, SC	1,967,230
Charlotte, NC--SC	6,327,383
Chattanooga, TN--GA	1,418,510
Colorado Springs, CO	2,672,993
Columbia, SC	1,620,692
Columbus, GA--AL	900,157
Concord, CA	8,617,621
Corpus Christi, TX	1,925,452
Davenport, IA--IL	1,597,979
Dayton, OH	6,317,812
Daytona Beach--Port Orange, FL	1,816,527
Denton--Lewisville, TX	1,256,806
Des Moines, IA	2,402,745
Durham, NC	2,553,341
El Paso, TX--NM	4,594,169
Eugene, OR	1,972,035
Evansville, IN--KY	895,111
Fayetteville, NC	947,222
Flint, MI	2,435,165
Fort Collins, CO	1,034,016
Fort Wayne, IN	1,244,573
Fresno, CA	3,675,148
Grand Rapids, MI	3,232,272
Greensboro, NC	1,659,792
Greenville, SC	903,672
Gulfport--Biloxi, MS	734,767

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

(Note In accordance with language in the SAFETEA-LU conference report, an urbanized area apportionments for Section 5307 and Section 5340 were combined to show a single amount An area's apportionment amount includes regular Section 5307 funds, Small Transit Intensive Cities funds, and Growing States and High Density States formula funds, as appropriate)

URBANIZED AREA/STATE	APPORTIONMENT
Harrisburg, PA	2,137,245
Hartford, CT	8,669,717
Honolulu, HI	11,530,068
Huntsville, AL	739,861
Indio--Cathedral City--Palm Springs, CA	1,435,169
Jackson, MS	1,049,875
Jacksonville, FL	5,900,577
Knoxville, TN	1,764,827
Lancaster, PA	2,980,938
Lancaster--Palmdale, CA	2,981,348
Lansing, MI	2,176,085
Lexington-Fayette, KY	1,672,048
Lincoln, NE	1,155,451
Little Rock, AR	1,651,876
Louisville, KY--IN	5,376,403
Lubbock, TX	1,187,774
Madison, WI	2,898,331
McAllen, TX	1,432,842
Memphis, TN--MS--AR	5,407,720
Mission Viejo, CA	4,080,332
Mobile, AL	1,241,696
Modesto, CA	1,700,417
Nashville-Davidson, TN	4,266,460
New Haven, CT	7,862,354
Ogden--Layton, UT	2,943,784
Oklahoma City, OK	3,043,354
Omaha, NE--IA	3,004,372
Oxnard, CA	3,103,203
Palm Bay--Melbourne, FL	1,828,142
Pensacola, FL--AL	1,224,748
Peoria, IL	1,279,170
Port St. Lucie, FL	958,497
Poughkeepsie--Newburgh, NY	7,107,218
Provo--Orem, UT	2,185,596
Raleigh, NC	2,760,791
Reading, PA	1,300,624
Reno, NV	2,242,709
Richmond, VA	4,209,554
Rochester, NY	4,713,356
Rockford, IL	1,122,342
Round Lake Beach--McHenry--Grayslake, IL--WI	1,690,871
Salem, OR	1,573,638
Salt Lake City, UT	9,585,720
Santa Rosa, CA	1,902,475
Sarasota--Bradenton, FL	2,811,450
Savannah, GA	1,367,042
Scranton, PA	1,729,300
Shreveport, LA	1,431,077
South Bend, IN--MI	1,719,934
Spokane, WA--ID	3,227,987
Springfield, MA--CT	5,272,433
Springfield, MO	874,329

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

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URBANIZED AREA/STATE	APPORTIONMENT
Stockton, CA	3,062,599
Syracuse, NY	3,085,526
Tallahassee, FL	1,051,175
Temecula--Murrieta, CA	1,237,730
Thousand Oaks, CA	1,202,878
Toledo, OH--MI	2,682,309
Trenton, NJ	4,637,645
Tucson, AZ	4,873,716
Tulsa, OK	2,691,919
Victorville--Hesperia--Apple Valley, CA	1,038,527
Wichita, KS	2,014,710
Winston-Salem, NC	1,154,853
Worcester, MA--CT	3,655,415
Youngstown, OH--PA	1,410,931
Total	**$332,452,859**

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

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URBANIZED AREA/STATE	APPORTIONMENT
Amounts Apportioned to State Governors for Urbanized Areas 50,000 to 199,999 in Population	
ALABAMA	$3,378,718
Anniston, AL	313,671
Auburn, AL	290,055
Decatur, AL	275,873
Dothan, AL	264,529
Florence, AL	332,464
Gadsden, AL	260,290
Montgomery, AL	1,073,111
Tuscaloosa, AL	568,725
ALASKA	$232,079
Fairbanks, AK	232,079
ARIZONA	$1,665,196
Avondale, AZ	405,322
Flagstaff, AZ	300,592
Prescott, AZ	313,254
Yuma, AZ--CA	646,028
ARKANSAS	$2,284,183
Fayetteville--Springdale, AR	852,462
Fort Smith, AR--OK	561,656
Hot Springs, AR	226,207
Jonesboro, AR	236,749
Pine Bluff, AR	294,251
Texarkana, TX--Texarkana, AR	112,858
CALIFORNIA	$25,843,776
Atascadero--El Paso de Robles (Paso Robles), CA	284,683
Camarillo, CA	420,348
Chico, CA	666,134
Davis, CA	943,732
El Centro, CA	486,032
Fairfield, CA	1,069,768
Gilroy--Morgan Hill, CA	486,667
Hanford, CA	560,950
Hemet, CA	763,156
Livermore, CA	566,824
Lodi, CA	626,309
Lompoc, CA	342,155
Madera, CA	360,212
Manteca, CA	396,034
Merced, CA	871,178
Napa, CA	580,685
Petaluma, CA	424,478
Porterville, CA	396,566
Redding, CA	508,227
Salinas, CA	1,496,457
San Luis Obispo, CA	744,466
Santa Barbara, CA	1,739,732
Santa Clarita, CA	1,524,287
Santa Cruz, CA	1,378,251
Santa Maria, CA	872,941
Seaside--Monterey--Marina, CA	1,204,043
Simi Valley, CA	925,437
Tracy, CA	521,971
Turlock, CA	534,772

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

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URBANIZED AREA/STATE	APPORTIONMENT
Vacaville, CA	675,838
Vallejo, CA	1,418,128
Visalia, CA	813,229
Watsonville, CA	604,313
Yuba City, CA	630,563
Yuma, AZ--CA	5,210
COLORADO	$4,212,183
Boulder, CO	1,164,040
Grand Junction, CO	467,572
Greeley, CO	611,877
Lafayette--Louisville, CO	384,441
Longmont, CO	857,154
Pueblo, CO	727,099
CONNECTICUT	$8,483,913
Danbury, CT--NY	3,290,803
Norwich--New London, CT	1,424,909
Waterbury, CT	3,768,201
DELAWARE	$617,962
Dover, DE	601,914
Salisbury, MD--DE	16,048
FLORIDA	$10,116,103
Brooksville, FL	462,132
Deltona, FL	749,234
Fort Walton Beach, FL	761,421
Gainesville, FL	1,233,671
Kissimmee, FL	978,414
Lady Lake, FL	215,970
Lakeland, FL	1,126,520
Leesburg--Eustis, FL	573,550
North Port--Punta Gorda, FL	576,995
Ocala, FL	478,657
Panama City, FL	612,571
St. Augustine, FL	264,324
Titusville, FL	497,705
Vero Beach--Sebastian, FL	587,956
Winter Haven, FL	746,791
Zephyrhills, FL	250,192
GEORGIA	$3,857,766
Albany, GA	460,968
Athens-Clarke County, GA	499,091
Brunswick, GA	233,028
Dalton, GA	249,730
Gainesville, GA	375,057
Hinesville, GA	269,362
Macon, GA	692,656
Rome, GA	393,501
Valdosta, GA	283,650
Warner Robins, GA	400,723

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

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(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

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URBANIZED AREA/STATE	APPORTIONMENT
HAWAII	$1,000,626
Kailua (Honolulu County)--Kaneohe, HI	1,000,626
IDAHO	$1,893,264
Coeur d'Alene, ID	392,175
Idaho Falls, ID	384,372
Lewiston, ID--WA	166,283
Nampa, ID	540,849
Pocatello, ID	409,585
ILLINOIS	$4,848,069
Alton, IL	424,182
Beloit, WI--IL	66,123
Bloomington--Normal, IL	760,754
Champaign, IL	1,122,230
Danville, IL	271,257
Decatur, IL	573,398
DeKalb, IL	384,594
Dubuque, IA--IL	13,420
Kankakee, IL	384,803
Springfield, IL	847,308
INDIANA	$5,008,929
Anderson, IN	471,573
Bloomington, IN	749,875
Columbus, IN	270,491
Elkhart, IN--MI	656,635
Kokomo, IN	388,234
Lafayette, IN	1,018,836
Michigan City, IN--MI	358,401
Muncie, IN	678,203
Terre Haute, IN	416,681
IOWA	$3,709,285
Ames, IA	582,380
Cedar Rapids, IA	969,004
Dubuque, IA--IL	355,250
Iowa City, IA	733,515
Sioux City, IA--NE--SD	472,010
Waterloo, IA	597,126
KANSAS	$1,432,652
Lawrence, KS	645,142
St. Joseph, MO--KS	5,658
Topeka, KS	781,852
KENTUCKY	$1,331,615
Bowling Green, KY	288,684
Clarksville, TN--KY	124,814
Huntington, WV--KY--OH	259,956
Owensboro, KY	348,511
Radcliff--Elizabethtown, KY	309,650
LOUISIANA	$3,920,078
Alexandria, LA	358,730
Houma, LA	622,430
Lafayette, LA	946,349
Lake Charles, LA	625,551
Mandeville--Covington, LA	287,996
Monroe, LA	705,902
Slidell, LA	373,120

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

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URBANIZED AREA/STATE	APPORTIONMENT
MAINE	$1,807,374
Bangor, ME	342,402
Dover--Rochester, NH--ME	40,775
Lewiston, ME	418,586
Portland, ME	966,480
Portsmouth, NH--ME	39,131
MARYLAND	$5,083,028
Aberdeen--Havre de Grace--Bel Air, MD	1,350,916
Cumberland, MD-WV-PA	377,638
Frederick, MD	891,908
Hagerstown, MD--WV--PA	671,162
Salisbury, MD--DE	532,544
St. Charles, MD	683,215
Westminster, MD	575,645
MASSACHUSETTS	$2,939,142
Leominster--Fitchburg, MA	1,062,792
Nashua, NH--MA	236
New Bedford, MA	1,335,426
Pittsfield, MA	540,688
MICHIGAN	$6,023,816
Battle Creek, MI	384,608
Bay City, MI	503,350
Benton Harbor--St. Joseph, MI	285,284
Elkhart, IN--MI	8,163
Holland, MI	490,359
Jackson, MI	445,887
Kalamazoo, MI	1,074,889
Michigan City, IN--MI	2,338
Monroe, MI	332,127
Muskegon, MI	753,195
Port Huron, MI	535,096
Saginaw, MI	751,191
South Lyon--Howell--Brighton, MI	457,329
MINNESOTA	$2,315,425
Duluth, MN--WI	596,034
Fargo, ND--MN	228,116
Grand Forks, ND--MN	48,679
La Crosse, WI--MN	35,451
Rochester, MN	700,781
St. Cloud, MN	706,364
MISSISSIPPI	$568,431
Hattiesburg, MS	301,576
Pascagoula, MS	266,855
MISSOURI	$2,083,398
Columbia, MO	699,709
Jefferson City, MO	252,728
Joplin, MO	325,318
Lee's Summit, MO	332,781
St. Joseph, MO--KS	472,862
MONTANA	$1,318,114
Billings, MT	573,536
Great Falls, MT	372,409
Missoula, MT	372,169

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

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URBANIZED AREA/STATE	APPORTIONMENT
N. MARIANA ISLANDS	$324,996
Saipan, MP	324,996
NEBRASKA	$91,949
Sioux City, IA--NE--SD	91,949
NEVADA	$332,419
Carson City, NV	332,419
NEW HAMPSHIRE	$2,348,270
Dover--Rochester, NH--ME	437,446
Manchester, NH	789,320
Nashua, NH--MA	935,311
Portsmouth, NH--ME	186,193
NEW JERSEY	$1,844,619
Hightstown, NJ	666,835
Vineland, NJ	743,321
Wildwood--North Wildwood--Cape May, NJ	434,463
NEW MEXICO	$1,235,218
Farmington, NM	240,207
Las Cruces, NM	521,287
Santa Fe, NM	473,724
NEW YORK	$4,770,425
Binghamton, NY--PA	1,260,914
Danbury, CT--NY	37,826
Elmira, NY	571,879
Glens Falls, NY	370,211
Ithaca, NY	582,988
Kingston, NY	340,549
Middletown, NY	331,106
Saratoga Springs, NY	426,448
Utica, NY	848,504
NORTH CAROLINA	$5,249,311
Burlington, NC	453,649
Concord, NC	525,189
Gastonia, NC	632,411
Goldsboro, NC	268,963
Greenville, NC	449,335
Hickory, NC	767,926
High Point, NC	631,930
Jacksonville, NC	463,907
Rocky Mount, NC	301,204
Wilmington, NC	754,797
NORTH DAKOTA	$1,649,480
Bismarck, ND	541,160
Fargo, ND--MN	749,703
Grand Forks, ND--MN	358,617
OHIO	$4,256,427
Huntington, WV--KY--OH	170,147
Lima, OH	364,778
Lorain--Elyria, OH	1,105,019
Mansfield, OH	389,729
Middletown, OH	508,830
Newark, OH	492,315
Parkersburg, WV--OH	119,728
Sandusky, OH	258,228

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

(Note In accordance with language in the SAFETEA-LU conference report, an urbanized area apportionments for Section 5307 and Section 5340 were combined to show a single amount An area's apportionment amount includes regular Section 5307 funds, Small Transit Intensive Cities funds, and Growing States and High Density States formula funds, as appropriate)

URBANIZED AREA/STATE	APPORTIONMENT
Springfield, OH	492,956
Weirton, WV--Steubenville, OH--PA	205,583
Wheeling, WV--OH	149,114
OKLAHOMA	$1,024,333
Fort Smith, AR--OK	10,640
Lawton, OK	445,927
Norman, OK	567,766
OREGON	$1,352,410
Bend, OR	285,020
Corvallis, OR	320,463
Longview, WA--OR	7,637
Medford, OR	739,290
PENNSYLVANIA	$6,674,618
Altoona, PA	469,676
Binghamton, NY--PA	16,974
Cumberland, MD-WV-PA	64
Erie, PA	1,291,350
Hagerstown, MD--WV--PA	5,871
Hazleton, PA	267,715
Johnstown, PA	562,990
Lebanon, PA	471,203
Monessen, PA	388,252
Pottstown, PA	338,015
State College, PA	850,637
Uniontown--Connellsville, PA	379,890
Weirton, WV--Steubenville, OH--PA	1,273
Williamsport, PA	559,860
York, PA	1,070,848
PUERTO RICO	$5,069,548
Arecibo, PR	674,963
Fajardo, PR	499,356
Florida--Barceloneta--Bajadero, PR	300,278
Guayama, PR	392,249
Juana Diaz, PR	263,477
Mayaguez, PR	610,500
Ponce, PR	1,343,771
San German--Cabo Rojo--Sabana Grande, PR	472,281
Yauco, PR	512,673
RHODE ISLAND	0
SOUTH CAROLINA	$3,028,568
Anderson, SC	298,740
Florence, SC	460,551
Mauldin--Simpsonville, SC	367,030
Myrtle Beach, SC	552,519
Rock Hill, SC	307,782
Spartanburg, SC	734,837
Sumter, SC	307,109
SOUTH DAKOTA	$1,192,088
Rapid City, SD	382,025
Sioux City, IA--NE--SD	15,668
Sioux Falls, SD	794,395
TENNESSEE	$3,139,954
Bristol, TN--Bristol, VA	162,089
Clarksville, TN--KY	471,339

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

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URBANIZED AREA/STATE	APPORTIONMENT
Cleveland, TN	259,868
Jackson, TN	386,954
Johnson City, TN	447,158
Kingsport, TN--VA	392,141
Morristown, TN	242,233
Murfreesboro, TN	778,172
TEXAS	$16,373,671
Abilene, TX	625,720
Amarillo, TX	1,087,277
Beaumont, TX	717,863
Brownsville, TX	1,275,796
College Station--Bryan, TX	1,020,627
Galveston, TX	650,553
Harlingen, TX	593,831
Killeen, TX	1,061,832
Lake Jackson--Angleton, TX	421,631
Laredo, TX	1,619,931
Longview, TX	385,493
McKinney, TX	301,883
Midland, TX	572,502
Odessa, TX	628,462
Port Arthur, TX	706,843
San Angelo, TX	477,913
Sherman, TX	406,770
Temple, TX	373,381
Texarkana, TX--Texarkana, AR	215,297
Texas City, TX	488,945
The Woodlands, TX	510,704
Tyler, TX	530,177
Victoria, TX	277,230
Waco, TX	884,929
Wichita Falls, TX	538,081
UTAH	$985,029
Logan, UT	648,588
St. George, UT	336,441
VERMONT	$704,236
Burlington, VT	704,236
VIRGIN ISLANDS	$393,048 1/
VIRGINIA	$4,330,295
Blacksburg, VA	554,280
Bristol, TN--Bristol, VA	94,547
Charlottesville, VA	635,672
Danville, VA	250,716
Fredericksburg, VA	468,934
Harrisonburg, VA	457,534
Kingsport, TN--VA	7,408
Lynchburg, VA	569,992
Roanoke, VA	1,023,632
Winchester, VA	267,580
WASHINGTON	$6,707,027
Bellingham, WA	731,177
Bremerton, WA	1,096,901
Kennewick--Richland, WA	1,149,612
Lewiston, ID--WA	96,917
Longview, WA--OR	343,769
Marysville, WA	619,846
Mount Vernon, WA	426,199
Olympia--Lacey, WA	993,803

FEDERAL TRANSIT ADMINISTRATION
TABLE 3

FY 2009 SECTION 5307 AND SECTION 5340 URBANIZED AREA APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

(Note In accordance with language in the SAFETEA-LU conference report, an urbanized area apportionments for Section 5307 and Section 5340 were combined to show a single amount An area's apportionment amount includes regular Section 5307 funds, Small Transit Intensive Cities funds, and Growing States and High Density States formula funds, as appropriate)

URBANIZED AREA/STATE	APPORTIONMENT
Wenatchee, WA	537,527
Yakima, WA	711,276
WEST VIRGINIA	$2,757,042
Charleston, WV	1,017,438
Cumberland, MD-WV-PA	10,572
Hagerstown, MD--WV--PA	138,366
Huntington, WV--KY--OH	459,793
Morgantown, WV	392,158
Parkersburg, WV--OH	312,290
Weirton, WV--Steubenville, OH--PA	142,662
Wheeling, WV--OH	283,763
WISCONSIN	$7,763,806
Appleton, WI	1,161,731
Beloit, WI--IL	244,047
Duluth, MN--WI	188,293
Eau Claire, WI	564,635
Fond du Lac, WI	302,791
Green Bay, WI	1,090,286
Janesville, WI	381,730
Kenosha, WI	752,503
La Crosse, WI--MN	595,783
Oshkosh, WI	620,051
Racine, WI	844,388
Sheboygan, WI	546,545
Wausau, WI	471,023
WYOMING	$705,462
Casper, WY	331,223
Cheyenne, WY	374,239
Total	**$190,279,374**

1/ Language in section 5307(l) of SAFETEA-LU directs that the Virgin Islands be treated as an urbanized area

FEDERAL TRANSIT ADMINISTRATION

TABLE 4

FY 2009 SECTION 5307 APPORTIONMENT FORMULA

Distribution of Available Funds

Of the funds made available to the Section 5307 program, a one percent takedown is authorized for Small Transit Intensive Cities. This amount is apportioned to the Governors based on a separate formula that uses criteria related to specific service performance categories.

The remaining funds are apportioned to small, medium, and large sized urbanized areas (UZAs). 9.32% is made available for UZAs 50,000-199,999 in population, and 90.68% to UZAs 200,000 or more in population.

UZA Population and Weighting Factors

50,000-199,999 in population : 9.32% of available Section 5307 funds
(Apportioned to Governors)

50% apportioned based on population

50% apportioned based on population x population density

200,000 and greater in population: 90.68% of available Section 5307 funds
(Apportioned to UZAs)

33.29% (Fixed Guideway Tier*)

95.61% (Non-incentive Portion of Tier)

--- at least 0.75% to each UZA with commuter rail and pop. 750,000 or greater

60% - fixed guideway revenue vehicle miles

40% - fixed guideway route miles

4.39% ("Incentive" Portion of Tier)

-- at least 0.75% to each UZA with commuter rail and pop. 750,000 or greater

-- fixed guideway passenger miles x fixed guideway passenger miles/operating cost

66.71% ("Bus" Tier)

90.8% (Non-incentive Portion of Tier)

73.39% for UZAs with population 1,000,000 or greater

50% - bus revenue vehicle miles

25% - population

25% - population x population density

26.61% for UZAs pop. < 1,000,000

50% - bus revenue vehicle miles

25% - population

25% - population x density

9.2% ("Incentive" Portion of Tier)

-- bus passenger miles x bus passenger miles/operating cost

* Includes all fixed guideway modes, such as heavy rail, commuter rail, light rail, trolleybus, aerial tramway, inclined plane, cable car, automated guideway transit, ferryboats, exclusive busways, and HOV lanes.

FEDERAL TRANSIT ADMINISTRATION

TABLE 5

FISCAL YEAR 2009 FORMULA PROGRAMS APPORTIONMENT DATA UNIT VALUES

(Apportionment unit values are based on funding made available under the FY 2009 Continuing Resolution - P.L. 110-329)

	APPORTIONMENT DATA UNIT VALUE
Section 5307 Urbanized Area Formula Program - Bus Tier	
Urbanized Areas Over 1,000,000:	
Population	$1.39841610
Population x Density	$0.00035482
Bus Revenue Vehicle Mile	$0.17613278
Urbanized Areas Under 1,000,000:	
Population	$1.28159331
Population x Density	$0.00056074
Bus Revenue Vehicle Mile	$0.22900919
Bus Incentive (PM denotes Passenger Mile):	
Bus PM x Bus PM = Operating Cost	$0.00377591
Section 5307 Urbanized Area Formula Program - Fixed Guideway Tier	
Fixed Guideway Revenue Vehicle Mile	$0.25893392
Fixed Guideway Route Mile	$13,691
Commuter Rail Floor	$3,577,357
Fixed Guideway Incentive:	
Fixed Guideway PM x Fixed Guideway PM = Operating Cost	$0.00026752
Commuter Rail Incentive Floor	$164,257
Section 5307 Urbanized Area Formula Program - Areas Under 200,000	
Population	$2.57765050
Population x Density	$0.00128224
Section 5307 Small Transit Intensive Cities	
For Each Qualifying Performance Category	$56,826
Section 5311 Urbanized Area Formula Program - Areas Under 50,000	
Population	$1.59515476

Section 5309 Capital Program - Fixed Guideway Modernization

	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6	Tier 7
Legislatively Specified Areas:						
Revenue Vehicle Mile	$0.01308985	-------	$0.05880084	$0.01451199	$0.00956834	$0.10753224
Route Mile	$912.86	-------	$3,365.70	$1,129.67	$744.84	$8,370.73
Other Urbanized Areas:						
Revenue Vehicle Mile	$0.07005658	$0.00247808	$0.05880084	$0.02700359	$0.02204374	$0.37160243
Route Mile	$2,046.72	$72.40	$3,365.70	$790.52	$645.32	$10,878.54

Notes:

1. Unit values for Section 5307 do not take into account Section 5340 funding added to the program.

2. The unit value for Section 5311 is based on the total nonurbanized/rural population for the States and territories. It does not take into account Section 5311 funds allocated based on land area in nonurbanized areas, or Section 5340 funding added to the program.

FEDERAL TRANSIT ADMINISTRATION

Table 6

FY 2009 Small Transit Intensive Cities Performance Data and Apportionments

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

State	Urbanized Area (UZA) Description	Passenger Miles per Vehicle Revenue Mile	Passenger Miles per Vehicle Revenue Hour	Vehicle Revenue Mile per Capita	Vehicle Revenue Hour per Capita	Passenger Miles per Capita	Passenger Trips per Capita	Number of Performance Factors Met or Exceeded	STIC Funding: @ ~ $56,826 per Factor Met or Exceeded
	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Alabama	Anniston, AL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Alabama	Auburn, AL	0.903	15.309	4.544	0.268	4.104	1.140	0	0
Alabama	Decatur, AL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Alabama	Dothan, AL	0.715	10.418	10.885	0.747	7.785	2.425	0	0
Alabama	Florence, AL	1.000	13.146	8.335	0.634	8.335	2.806	0	0
Alabama	Gadsden, AL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Alabama	Montgomery, AL	3.439	56.080	8.077	0.495	27.776	5.520	0	0
Alabama	Tuscaloosa, AL	2.924	33.590	2.994	0.261	8.755	1.648	0	0
Alaska	Fairbanks, AK	4.463	81.220	10.100	0.555	45.081	6.257	0	0
Arizona	Avondale, AZ	4.900	65.764	2.844	0.212	13.935	3.513	0	0
Arizona	Flagstaff, AZ	3.107	44.563	11.042	0.770	34.311	13.212	0	0
Arizona	Prescott, AZ	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Arizona	Yuma, AZ-CA	1.956	27.386	10.930	0.781	21.384	3.298	1	56,826
Arkansas	Fayetteville-Springdale, AR	2.914	36.446	5.184	0.414	15.102	8.308	0	0
Arkansas	Fort Smith, AR-OK	2.103	28.060	4.540	0.340	9.546	2.119	0	0
Arkansas	Hot Springs, AR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Arkansas	Jonesboro, AR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Arkansas	Pine Bluff, AR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Atascadero-El Paso de Robles (Paso Robles), CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Camarillo, CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Chico, CA	3.944	55.819	17.307	1.223	68.262	13.525	2	113,652
California	Davis, CA	8.412	110.992	19.110	1.448	160.760	53.302	6	340,958
California	El Centro, CA	0.000	0.000	15.358	1.716	0.000	7.884	2	113,652
California	Fairfield, CA	2.600	48.711	17.329	0.925	45.050	9.330	2	113,652
California	Gilroy-Morgan Hill, CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Hanford, CA	0.559	20.223	67.064	1.855	37.515	11.380	2	113,652
California	Hemet, CA	1.881	36.115	5.453	0.284	10.258	1.045	0	0
California	Livermore, CA	3.609	47.802	5.552	0.419	20.036	4.009	0	0
California	Lodi, CA	1.591	16.485	6.190	0.597	9.848	3.851	0	0
California	Lompoc, CA	9.137	137.500	9.238	0.614	84.409	7.107	2	113,652
California	Madera, CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Manteca, CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0

FEDERAL TRANSIT ADMINISTRATION

Table 6

FY 2009 Small Transit Intensive Cities Performance Data and Apportionments

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

State	Urbanized Area (UZA) Description	Passenger Miles per Vehicle Revenue Mile	Passenger Miles per Vehicle Revenue Hour	Vehicle Revenue Mile per Capita	Vehicle Revenue Hour per Capita	Passenger Miles per Capita	Passenger Trips per Capita	Number of Performance Factors Met or Exceeded	STIC Funding: @ ~ $56,826 per Factor Met or Exceeded
	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
California	Merced, CA	1.729	30.508	17.055	0.966	29.482	11.688	2	113,652
California	Napa, CA	2.935	39.789	7.531	0.556	22.104	5.610	0	0
California	Petaluma, CA	3.310	45.406	6.730	0.491	22.273	4.977	0	0
California	Porterville, CA	3.903	57.983	7.384	0.497	28.819	7.915	0	0
California	Redding, CA	3.175	49.862	10.740	0.684	34.098	7.140	0	0
California	Salinas, CA	6.720	107.059	7.108	0.446	47.765	9.553	1	56,826
California	San Luis Obispo, CA	6.482	130.848	26.869	1.331	174.162	25.255	6	340,958
California	Santa Barbara, CA	10.892	149.740	15.303	1.113	166.686	39.503	6	340,958
California	Santa Clarita, CA	12.691	235.375	15.025	0.810	190.676	15.964	6	340,958
California	Santa Cruz, CA	9.320	132.998	24.058	1.686	224.220	35.388	6	340,958
California	Santa Maria, CA	1.832	27.597	7.485	0.497	13.708	9.441	0	0
California	Seaside-Monterey-Marina, CA	6.928	109.504	17.069	1.080	118.266	20.708	6	340,958
California	Simi Valley, CA	3.591	50.736	6.312	0.447	22.666	4.277	0	0
California	Tracy, CA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
California	Turlock, CA	2.706	36.599	3.634	0.269	9.832	2.576	0	0
California	Vacaville, CA	5.518	100.593	0.767	0.042	4.230	0.683	0	0
California	Vallejo, CA	3.927	62.928	10.422	0.650	40.926	7.502	0	0
California	Visalia, CA	4.865	62.174	9.777	0.765	47.564	11.811	0	0
California	Watsonville, CA	8.072	125.248	4.058	0.262	32.754	5.872	2	113,652
California	Yuba City, CA	5.788	88.300	10.539	0.691	60.998	8.481	0	0
Colorado	Boulder, CO	10.198	142.711	13.802	0.986	140.754	26.371	6	340,958
Colorado	Grand Junction, CO	4.053	62.326	8.169	0.531	33.112	7.215	0	0
Colorado	Greeley, CO	3.410	41.128	5.826	0.483	19.864	5.374	0	0
Colorado	Lafayette-Louisville, CO	6.895	96.362	8.623	0.617	59.456	11.011	1	56,826
Colorado	Longmont, CO	8.830	118.692	11.844	0.881	104.579	19.204	6	340,958
Colorado	Pueblo, CO	4.143	59.384	6.285	0.439	26.043	8.330	0	0
Connecticut	Danbury, CT-NY	29.367	765.557	33.219	1.274	975.542	41.050	6	340,958
Connecticut	Norwich-New London, CT	6.099	122.151	9.128	0.456	55.666	6.676	1	56,826
Connecticut	Waterbury, CT	28.983	676.498	27.320	1.170	791.820	38.318	6	340,958
Delaware	Dover, DE	3.151	54.055	27.928	1.628	87.989	12.117	2	113,652
Florida	Brooksville, FL	1.679	32.069	5.399	0.283	9.064	1.708	0	0
Florida	Deltona, FL	2.940	45.206	9.211	0.599	27.083	4.888	0	0

FEDERAL TRANSIT ADMINISTRATION

Table 6

FY 2009 Small Transit Intensive Cities Performance Data and Apportionments

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

State	Urbanized Area (UZA) Description	Passenger Miles per Vehicle Revenue Mile	Passenger Miles per Vehicle Revenue Hour	Vehicle Revenue Mile per Capita	Vehicle Revenue Hour per Capita	Passenger Miles per Capita	Passenger Trips per Capita	Number of Performance Factors Met or Exceeded	STIC Funding: @ ~ $56,826 per Factor Met or Exceeded
	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Florida	Fort Walton Beach, FL	1.194	17.274	7.822	0.540	9.336	1.699	0	0
Florida	Gainesville, FL	9.985	113.962	19.087	1.672	190.579	56.272	6	340,958
Florida	Kissimmee, FL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Florida	Lady Lake, FL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Florida	Lakeland, FL	4.136	66.870	12.917	0.799	53.428	11.021	2	113,652
Florida	Leesburg-Eustis, FL	0.952	14.598	21.041	1.372	20.031	2.689	2	113,652
Florida	North Port-Punta Gorda, FL	1.135	18.609	4.259	0.260	4.833	0.630	0	0
Florida	Ocala, FL	2.405	35.355	4.214	0.287	10.136	3.209	0	0
Florida	Panama City, FL	3.016	49.818	6.984	0.423	21.063	3.797	0	0
Florida	St. Augustine, FL	1.817	34.791	8.751	0.457	15.902	2.264	0	0
Florida	Titusville, FL	6.863	222.726	18.800	0.579	129.021	4.238	4	227,305
Florida	Vero Beach-Sebastian, FL	3.287	37.789	4.585	0.399	15.070	2.732	0	0
Florida	Winter Haven, FL	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Florida	Zephyrhills, FL	5.288	88.835	5.196	0.309	27.476	4.045	0	0
Georgia	Albany, GA	5.670	90.960	6.988	0.436	39.625	8.274	0	0
Georgia	Athens-Clarke County, GA	5.987	69.280	8.007	0.692	47.939	14.431	0	0
Georgia	Brunswick, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Georgia	Dalton, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Georgia	Gainesville, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Georgia	Hinesville, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Georgia	Macon, GA	4.490	64.351	8.237	0.575	36.983	7.965	0	0
Georgia	Rome, GA	7.502	97.482	10.216	0.786	76.638	11.198	2	113,652
Georgia	Valdosta, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Georgia	Warner Robins, GA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Hawaii	Kailua (Honolulu County)-Kaneohe, HI	10.288	141.002	2.030	0.148	20.881	4.493	2	113,652
Idaho	Coeur d'Alene, ID	0.000	0.000					0	0
Idaho	Idaho Falls, ID	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Idaho	Lewiston, ID-WA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Idaho	Nampa, ID	2.886	59.439	4.939	0.240	14.256	1.336	0	0
Idaho	Pocatello, ID	3.665	48.984	10.615	0.794	38.907	7.775	1	56,826
Illinois	Alton, IL	5.029	89.697	4.172	0.234	20.983	2.818	0	0
Illinois	Bloomington-Normal, IL	4.623	66.449	10.174	0.708	47.033	12.620	0	0

FEDERAL TRANSIT ADMINISTRATION

Table 6

FY 2009 Small Transit Intensive Cities Performance Data and Apportionments

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	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Illinois	Champaign, IL	8.179	94.407	23.290	2.018	190.479	74.875	5	284,131
Illinois	Danville, IL	4.317	75.251	8.456	0.485	36.509	8.492	0	0
Illinois	Decatur, IL	3.610	49.176	11.180	0.821	40.358	12.012	1	56,826
Illinois	DeKalb, IL	1.844	30.375	9.972	0.606	18.393	2.200	0	0
Illinois	Kankakee, IL	5.346	73.248	9.956	0.727	53.228	6.557	0	0
Illinois	Springfield, IL	2.623	32.228	9.492	0.772	24.895	8.622	1	56,826
Indiana	Anderson, IN	1.836	23.061	4.017	0.320	7.375	1.804	0	0
Indiana	Bloomington, IN	6.933	76.367	12.048	1.094	83.529	28.187	4	227,305
Indiana	Columbus, IN	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Indiana	Elkhart, IN-MI	2.029	31.853	5.667	0.361	11.498	2.412	0	0
Indiana	Kokomo, IN	1.163	11.409	11.308	1.153	13.157	2.846	1	56,826
Indiana	Lafayette, IN	10.366	116.834	11.702	1.038	121.298	37.100	5	284,131
Indiana	Michigan City, IN-MI	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Indiana	Muncie, IN	4.838	63.963	13.297	1.006	64.333	23.086	3	170,478
Indiana	Terre Haute, IN	1.228	12.582	4.859	0.474	5.966	2.880	0	0
Iowa	Ames, IA	5.611	59.612	21.594	2.033	121.172	85.048	4	227,305
Iowa	Cedar Rapids, IA	3.636	50.931	9.533	0.681	34.665	7.797	0	0
Iowa	Dubuque, IA-IL	4.019	47.976	8.715	0.730	35.027	10.450	0	0
Iowa	Iowa City, IA	5.881	66.054	21.581	1.922	126.929	69.875	4	227,305
Iowa	Sioux City, IA-NE-SD	4.076	47.842	5.771	0.492	23.524	8.972	0	0
Iowa	Waterloo, IA	1.002	16.675	8.398	0.505	8.415	4.396	0	0
Kansas	Lawrence, KS	1.968	24.446	11.591	0.933	22.811	8.972	1	56,826
Kansas	Topeka, KS	4.239	62.343	10.170	0.691	43.109	12.025	0	0
Kentucky	Bowling Green, KY	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Kentucky	Owensboro, KY	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Kentucky	Radcliff-Elizabethtown, KY	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Louisiana	Alexandria, LA	5.006	76.246	7.357	0.483	36.827	9.023	0	0
Louisiana	Houma, LA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Louisiana	Lafayette, LA	8.636	119.515	4.655	0.336	40.202	8.979	2	113,652
Louisiana	Lake Charles, LA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Louisiana	Mandeville-Covington, LA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Louisiana	Monroe, LA	14.893	205.613	6.342	0.459	94.453	10.085	3	170,478

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	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Louisiana	Slidell, LA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Maine	Bangor, ME	4.852	65.977	10.821	0.796	52.502	13.356	1	56,826
Maine	Lewiston, ME	1.560	21.140	15.775	1.164	24.603	7.058	2	113,652
Maine	Portland, ME	6.998	87.915	9.608	0.765	67.237	13.491	1	56,826
Maryland	Aberdeen-Havre de Grace-Bel Air, MD	1.865	33.796	4.110	0.227	7.667	1.543	0	0
Maryland	Cumberland, MD--WV	5.133	83.977	11.411	0.697	58.574	6.381	0	0
Maryland	Frederick, MD	3.302	43.358	9.200	0.701	30.374	5.957	0	0
Maryland	Hagerstown, MD-WV-PA	2.705	41.215	3.992	0.262	10.795	2.892	0	0
Maryland	Salisbury, MD-DE	0.419	1.139	36.148	13.283	15.136	6.820	2	113,652
Maryland	St. Charles, MD	3.012	63.833	16.487	0.778	49.651	6.409	2	113,652
Maryland	Westminster, MD	1.105	13.582	12.300	1.001	13.593	2.254	2	113,652
Massachusetts	Leominster-Fitchburg, MA	3.323	37.703	19.053	1.679	63.303	9.007	2	113,652
Massachusetts	New Bedford, MA	3.000	36.224	6.331	0.524	18.995	6.635	0	0
Massachusetts	Pittsfield, MA	2.710	38.009	21.645	1.543	58.662	10.290	2	113,652
Michigan	Battle Creek, MI	3.220	41.351	6.590	0.513	21.222	5.822	0	0
Michigan	Bay City, MI	2.251	39.856	20.347	1.149	45.805	8.251	2	113,652
Michigan	Benton Harbor-St. Joseph, MI	1.423	18.116	7.138	0.561	10.155	2.838	0	0
Michigan	Holland, MI	1.662	22.867	8.629	0.627	14.339	2.405	0	0
Michigan	Jackson, MI	1.998	31.169	9.821	0.630	19.626	6.303	0	0
Michigan	Kalamazoo, MI	4.231	51.109	11.410	0.945	48.277	16.027	2	113,652
Michigan	Monroe, MI	2.261	26.333	9.169	0.787	20.733	6.263	1	56,826
Michigan	Muskegon, MI	2.761	39.699	5.879	0.409	16.232	4.485	0	0
Michigan	Port Huron, MI	1.192	17.807	24.070	1.611	28.690	10.777	2	113,652
Michigan	Saginaw, MI	3.693	47.356	6.140	0.479	22.675	5.653	0	0
Michigan	South Lyon-Howell-Brighton, MI	0.000	0.000	6.662	0.333	0.000	0.893	0	0
Minnesota	Duluth, MN-WI	4.968	64.819	15.600	1.196	77.509	24.340	3	170,478
Minnesota	Rochester, MN	5.852	87.754	11.971	0.798	70.062	17.347	3	170,478
Minnesota	St. Cloud, MN	4.507	61.959	16.352	1.190	73.707	22.231	3	170,478
Mississippi	Hattiesburg, MS	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Mississippi	Pascagoula, MS	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Missouri	Columbia, MO	6.456	66.757	8.472	0.819	54.689	16.829	3	170,478
Missouri	Jefferson City, MO	1.822	26.569	10.519	0.721	19.165	8.168	0	0

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	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Missouri	Joplin, MO	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Missouri	Lee's Summit, MO	1.934	29.740	0.459	0.030	0.888	0.127	0	0
Missouri	St. Joseph, MO-KS	2.172	24.336	10.121	0.903	21.982	4.850	1	56,826
Montana	Billings, MT	3.572	48.749	7.583	0.556	27.083	7.740	0	0
Montana	Great Falls, MT	1.438	18.450	9.220	0.718	13.254	7.125	0	0
Montana	Missoula, MT	4.111	58.441	10.329	0.727	42.461	10.895	0	0
N. Mariana Islands	Saipan, MP	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Nevada	Carson City, NV	0.000	0.000	0.000	0.000	0.000	0.000	0	0
New Hampshire	Dover-Rochester, NH-ME	10.957	202.964	4.616	0.249	50.582	2.861	2	113,652
New Hampshire	Manchester, NH	2.618	32.071	3.877	0.316	10.149	3.259	0	0
New Hampshire	Nashua, NH-MA	4.410	55.708	2.303	0.182	10.157	1.979	0	0
New Hampshire	Portsmouth, NH-ME	6.409	100.989	2.748	0.174	17.616	2.155	0	0
New Jersey	Hightstown, NJ	5.835	80.497	0.275	0.020	1.607	0.386	0	0
New Jersey	Vineland, NJ	1.000	15.560	7.122	0.458	7.122	1.388	0	0
New Jersey	Wildwood-North Wildwood-Cape May, NJ	0.000	0.000	0.000	0.000	0.000	0.000	0	0
New Mexico	Farmington, NM	0.000	0.000	0.000	0.000	0.000	0.000	0	0
New Mexico	Las Cruces, NM	4.060	46.081	5.854	0.516	23.766	7.568	0	0
New Mexico	Santa Fe, NM	2.752	24.242	10.214	1.160	28.110	8.385	1	56,826
New York	Binghamton, NY-PA	3.782	53.370	16.840	1.193	63.688	19.788	3	170,478
New York	Elmira, NY	3.103	60.682	15.869	0.811	49.234	10.365	2	113,652
New York	Glens Falls, NY	3.717	58.478	5.528	0.351	20.544	5.717	0	0
New York	Ithaca, NY	4.172	58.652	36.263	2.580	151.298	59.111	4	227,305
New York	Kingston, NY	0.000	0.000	0.000	0.000	0.000	0.000	0	0
New York	Middletown, NY	0.000	0.000	0.000	0.000	0.000	0.000	0	0
New York	Saratoga Springs, NY	7.781	122.538	8.049	0.511	62.628	8.861	2	113,652
New York	Utica, NY	2.680	34.305	10.446	0.816	27.997	10.312	1	56,826
North Carolina	Burlington, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Concord, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Gastonia, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Goldsboro, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Greenville, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Hickory, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0

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	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
North Carolina	High Point, NC	2.740	30.302	5.313	0.480	14.558	5.832	0	0
North Carolina	Jacksonville, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Rocky Mount, NC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
North Carolina	Wilmington, NC	2.930	44.130	8.689	0.577	25.455	9.641	0	0
North Dakota	Bismarck, ND	1.075	14.585	12.354	0.910	13.275	3.960	2	113,652
North Dakota	Fargo, ND-MN	3.962	51.799	7.988	0.611	31.652	9.643	0	0
North Dakota	Grand Forks, ND-MN	0.897	12.713	10.594	0.747	9.499	5.079	0	0
Ohio	Lima, OH	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Ohio	Lorain-Elyria, OH	3.284	54.869	7.515	0.450	24.683	4.099	0	0
Ohio	Mansfield, OH	3.078	32.988	4.134	0.386	12.726	4.172	0	0
Ohio	Middletown, OH	4.714	68.374	2.785	0.192	13.128	2.651	0	0
Ohio	Newark, OH	0.903	15.199	21.883	1.300	19.762	3.800	2	113,652
Ohio	Sandusky, OH	1.272	18.078	6.831	0.481	8.687	1.714	0	0
Ohio	Springfield, OH	3.144	35.395	3.024	0.269	9.508	5.000	0	0
Ohio	Weirton, WV-Steubenville, OH-PA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Oklahoma	Lawton, OK	3.193	47.066	6.656	0.452	21.254	3.934	0	0
Oklahoma	Norman, OK	4.897	53.963	6.124	0.556	29.992	13.193	0	0
Oregon	Bend, OR	0.000	0.000	6.451	0.619	0.000	5.208	0	0
Oregon	Corvallis, OR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Oregon	Medford, OR	2.012	29.283	7.709	0.530	15.507	7.772	0	0
Pennsylvania	Altoona, PA	4.101	53.557	6.844	0.524	28.068	8.556	0	0
Pennsylvania	Erie, PA	3.200	38.303	14.459	1.208	46.262	14.239	2	113,652
Pennsylvania	Hazleton, PA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Pennsylvania	Johnstown, PA	6.997	78.071	9.675	0.867	67.689	16.564	3	170,478
Pennsylvania	Lebanon, PA	2.412	35.813	12.078	0.813	29.127	4.926	2	113,652
Pennsylvania	Monessen, PA	16.238	226.804	4.270	0.306	69.342	2.322	2	113,652
Pennsylvania	Pottstown, PA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Pennsylvania	State College, PA	8.846	108.782	19.839	1.613	175.499	87.006	6	340,958
Pennsylvania	Uniontown-Connellsville, PA	1.143	18.431	23.140	1.436	26.458	4.133	2	113,652
Pennsylvania	Williamsport, PA	6.319	101.964	14.975	0.928	94.634	21.582	4	227,305
Pennsylvania	York, PA	3.453	45.557	13.455	1.020	46.458	10.879	2	113,652
Puerto Rico	Arecibo, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0

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	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Puerto Rico	Fajardo, PR	6.682	130.422	3.431	0.176	22.926	6.351	2	113,652
Puerto Rico	Florida-Barceloneta-Bajadero, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	Guayama, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	Juana Diaz, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	Mayaguez, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	Ponce, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	San German-Cabo Rojo-Sabana Grande, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Puerto Rico	Yauco, PR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
South Carolina	Anderson, SC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
South Carolina	Florence, SC	2.369	55.225	44.339	1.902	105.030	7.894	3	170,478
South Carolina	Mauldin-Simpsonville, SC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
South Carolina	Myrtle Beach, SC	1.925	26.400	7.215	0.526	13.886	2.996	0	0
South Carolina	Rock Hill, SC	0.000	0.000	0.000	0.000	0.000	0.000	0	0
South Carolina	Spartanburg, SC	3.220	45.838	12.164	0.854	39.168	5.255	2	113,652
South Carolina	Sumter, SC	4.387	98.246	11.723	0.524	51.436	4.254	0	0
South Dakota	Rapid City, SD	2.777	34.019	6.771	0.553	18.805	4.591	0	0
South Dakota	Sioux Falls, SD	4.183	55.243	10.158	0.769	42.492	7.484	0	0
Tennessee	Bristol, TN-Bristol, VA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Tennessee	Clarksville, TN-KY	3.253	49.221	9.051	0.598	29.444	5.406	0	0
Tennessee	Cleveland, TN	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Tennessee	Jackson, TN	3.008	40.431	11.438	0.851	34.410	7.914	1	56,826
Tennessee	Johnson City, TN	3.741	40.173	5.140	0.479	19.232	5.197	0	0
Tennessee	Kingsport, TN-VA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Tennessee	Morristown, TN	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Tennessee	Murfreesboro, TN	8.968	124.011	0.293	0.021	2.627	0.603	2	113,652
Texas	Abilene, TX	2.501	34.108	9.975	0.732	24.952	5.571	0	0
Texas	Amarillo, TX	1.858	28.848	4.857	0.313	9.025	2.289	0	0
Texas	Beaumont, TX	3.339	47.069	6.224	0.441	20.779	4.715	0	0
Texas	Brownsville, TX	15.492	183.513	6.119	0.517	94.792	10.815	3	170,478
Texas	College Station-Bryan, TX	13.459	278.354	7.394	0.358	99.516	5.714	3	170,478
Texas	Galveston, TX	1.395	15.418	12.652	1.144	17.645	20.429	3	170,478
Texas	Harlingen, TX	0.759	25.890	0.284	0.008	0.215	0.036	0	0

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Texas	Killeen, TX	1.819	31.156	10.328	0.603	18.783	3.063	0	0
Texas	Lake Jackson-Angleton, TX	1.800	35.174	1.433	0.073	2.579	0.142	0	0
Texas	Laredo, TX	6.798	70.609	11.368	1.094	77.273	24.922	3	170,478
Texas	Longview, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	McKinney, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Midland, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Odessa, TX	1.022	15.532	7.656	0.504	7.821	3.886	0	0
Texas	Port Arthur, TX	2.800	43.114	2.974	0.193	8.328	1.225	0	0
Texas	San Angelo, TX	1.355	27.653	10.047	0.492	13.617	3.578	0	0
Texas	Sherman, TX	0.000	0.000	25.862	1.061	0.000	6.297	2	113,652
Texas	Temple, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Texarkana, TX-Texarkana, AR	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Texas City, TX	1.800	35.174	1.175	0.060	2.115	0.116	0	0
Texas	The Woodlands, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Tyler, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Texas	Victoria, TX	2.120	23.836	5.867	0.522	12.436	4.036	0	0
Texas	Waco, TX	4.279	63.979	5.655	0.378	24.196	4.149	0	0
Texas	Wichita Falls, TX	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Utah	Logan, UT	5.271	77.939	19.253	1.302	101.478	33.613	4	227,305
Utah	St. George, UT	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Vermont	Burlington, VT	4.779	67.503	16.392	1.161	78.344	20.671	3	170,478
Virgin Islands	Virgin Islands	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Virginia	Blacksburg, VA	7.389	66.934	11.788	1.301	87.097	42.732	4	227,305
Virginia	Charlottesville, VA	5.289	72.226	16.148	1.183	85.413	19.525	3	170,478
Virginia	Danville, VA	0.933	14.283	6.331	0.414	5.908	4.266	0	0
Virginia	Fredericksburg, VA	3.628	68.571	8.479	0.449	30.761	3.140	0	0
Virginia	Harrisonburg, VA	6.771	65.167	9.514	0.989	64.426	28.346	3	170,478
Virginia	Lynchburg, VA	7.078	88.636	11.573	0.924	81.914	14.873	2	113,652
Virginia	Roanoke, VA	5.027	68.351	10.341	0.761	51.984	11.088	0	0
Virginia	Winchester, VA	0.000	0.000	0.000	0.000	0.000	0.000	0	0
Washington	Bellingham, WA	4.991	67.696	29.097	2.145	145.216	48.502	4	227,305
Washington	Bremerton, WA	4.734	90.780	33.352	1.739	157.884	28.479	4	227,305

FEDERAL TRANSIT ADMINISTRATION

Table 6

FY 2009 Small Transit Intensive Cities Performance Data and Apportionments

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

State	Urbanized Area (UZA) Description	Passenger Miles per Vehicle Revenue Mile	Passenger Miles per Vehicle Revenue Hour	Vehicle Revenue Mile per Capita	Vehicle Revenue Hour per Capita	Passenger Miles per Capita	Passenger Trips per Capita	Number of Performance Factors Met or Exceeded	STIC Funding: @ ~ $56,826 per Factor Met or Exceeded
	Average for UZAs with populations 200,000 - 999,999	**6.409**	**107.800**	**11.777**	**0.772**	**89.604**	**15.553**		
Washington	Kennewick-Richland, WA	6.725	143.004	56.748	2.669	381.634	31.054	6	340,958
Washington	Longview, WA-OR	4.284	48.778	6.067	0.533	25.994	6.373	0	0
Washington	Marysville, WA	6.743	107.294	8.582	0.539	57.869	8.366	1	56,826
Washington	Mount Vernon, WA	4.184	92.347	29.906	1.355	125.125	10.965	3	170,478
Washington	Olympia-Lacey, WA	6.175	117.403	39.451	2.075	243.599	29.939	5	284,131
Washington	Wenatchee, WA	5.373	99.316	35.050	1.896	188.322	16.379	4	227,305
Washington	Yakima, WA	4.431	78.086	13.100	0.743	58.048	12.713	1	56,826
West Virginia	Charleston, WV	4.186	69.944	14.995	0.897	62.767	12.444	2	113,652
West Virginia	Huntington, WV-KY-OH	3.464	50.656	6.222	0.425	21.552	4.476	0	0
West Virginia	Morgantown, WV	1.293	21.652	17.505	1.045	22.632	13.171	2	113,652
West Virginia	Parkersburg, WV-OH	0.000	0.000	0.000	0.000	0.000	0.000	0	0
West Virginia	Wheeling, WV-OH	2.476	30.995	8.240	0.658	20.398	5.087	0	0
Wisconsin	Appleton, WI	3.322	51.022	9.681	0.630	32.160	6.293	0	0
Wisconsin	Beloit, WI-IL	3.429	53.838	6.070	0.387	20.813	5.353	0	0
Wisconsin	Eau Claire, WI	3.032	44.831	15.430	1.043	46.777	12.627	2	113,652
Wisconsin	Fond du Lac, WI	0.996	12.540	8.042	0.638	8.007	3.794	0	0
Wisconsin	Green Bay, WI	3.622	54.148	9.486	0.634	34.354	9.435	0	0
Wisconsin	Janesville, WI	3.748	57.745	7.241	0.470	27.137	7.525	0	0
Wisconsin	Kenosha, WI	5.251	76.825	10.832	0.740	56.874	15.684	1	56,826
Wisconsin	La Crosse, WI-MN	3.070	40.305	13.981	1.065	42.918	12.951	2	113,652
Wisconsin	Oshkosh, WI	3.091	48.755	16.244	1.030	50.212	16.832	3	170,478
Wisconsin	Racine, WI	4.446	56.082	9.124	0.723	40.568	11.397	0	0
Wisconsin	Sheboygan, WI	2.461	32.565	13.061	0.987	32.138	8.773	2	113,652
Wisconsin	Wausau, WI	3.614	51.849	12.441	0.867	44.964	12.942	2	113,652
Wyoming	Casper, WY	1.000	11.649	6.782	0.582	6.782	2.297	0	0
Wyoming	Cheyenne, WY	1.778	25.999	7.363	0.503	13.089	3.486	0	0
							Total	296	$16,820,536

FEDERAL TRANSIT ADMINISTRATION

TABLE 7

Prior Year Unobligated Section 5308 Clean Fuels Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
FY 2007 Unobligated Allocations				
OH/KY	E2007-CLNF-006	640	Transit Authority of Northern Kentucky-TANK Bus Replacement Project	$476,000
OH/KY	E2007-CLNF-007	641	Transit Authority of River City-New Hybrid Electric Bus	714,000
RI	E2007-CLNF-012	605	Rhode Island, Statewide Bus and Van Replacement	5,500,000
	Subtotal FY 2007 Unobligated Allocations			*$6,690,000*
FY 2008 Unobligated Allocations				
CA	D2008-CLNF-001		Alameda-Contra Costa Transit District (AC Transit) - Facility	4,000,000
CA	D2008-CLNF-002		Los Angeles County Metropolitan Transportation Authority (LACMTA) - Facility	5,500,000
CA	E2008-CLNF-001	611	San Joaquin Region Transit District,California,Hybrid Diesel-Electric Replacem	250,000
DE	E2008-CLNF-003	517	Delaware Statewide Bus and Bus Replacement (with Clean Fuel (hybrid) vehicl	1,141,483
GA	D2008-CLNF-003		Metropolitan Atlanta Rapid Transit Authority (MARTA) - Facility	4,000,000
KY	E2008-CLNF-006	640	Transit Authority of Northern Kentucky-TANK Bus Replacement Project	517,000
KY	E2008-CLNF-007	641	Transit Authority of River City-New Hybrid Electric Buses	776,000
MI	D2008-CLNF-004		Capital Area Transportation Authority (CATA) - Vehicles	1,000,000
NM	E2008-CLNF-008	612	Santa Fe,NM,Trails Bus and Bus Facilities	500,000
NV	E2008-CLNF-009	557	Lake Tahoe,NV MPO Bus Replacement	1,000,000
NY	D2008-CLNF-005		Metropolitan Suburban Bus Authority (MTA Long Island Bus) - Vehicles	3,293,000
NY	D2008-CLNF-006		Niagara Frontier Transportation Authority (NFTA) - Vehicles	2,520,000
PA	D2008-CLNF-007		Pennsylvania DOT for Centre Area Transportation Authority (CATA) - Vehicles	540,000
PA	D2008-CLNF-008		Southeastern Pennsylvania Transportation Authority (SEPTA) - Vehicles	3,000,000
RI	E2008-CLNF-012	605	Rhode Island,Statewide Bus and Van Replacement	6,200,000
TX	E2008-CLNF-014	497	City of El Paso-Sun Metro-Bus Replacements	776,000
TX	E2008-CLNF-016	638	The District,The Woodlands,TX-Bus Replacement Program	259,000
VA	D2008-CLNF-009		Hampton Roads Transit (HRT)- Facility	2,700,000
WA	D2008-CLNF-010		King County Department of Transportation - Metro Transit Division - Vehicles	2,200,000
	Subtotal FY 2008 Unobligated Allocations			*$40,172,483*
	Total Unobligated Allocations			**$ 46,862,483**

FEDERAL TRANSIT ADMINISTRATION

TABLE 8

FY 2009 SECTION 5309 FIXED GUIDEWAY MODERNIZATION APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L 110-329)

STATE	AREA	APPORTIONMENT
Alaska	Anchorage, AK - Alaska Railroad	$7,134,341
Arizona	Phoenix--Mesa, AZ	1,486,501
California	Antioch, CA	1,449,789
California	Concord, CA	7,305,434
California	Lancaster--Palmdale, CA	1,165,878
California	Los Angeles--Long Beach--Santa Ana, CA	22,815,243
California	Mission Viejo, CA	855,892
California	Oxnard, CA	635,421
California	Riverside--San Bernardino, CA	2,240,874
California	Sacramento, CA	1,881,089
California	San Diego, CA	8,144,838
California	San Francisco--Oakland, CA	36,524,130
California	San Jose, CA	7,963,049
California	Stockton, CA	864,272
California	Thousand Oaks, CA	352,697
Colorado	Denver--Aurora, CO	3,233,888
Connecticut	Hartford, CT	864,881
Connecticut	Southwestern Connecticut	19,022,344
District of Columbia	Washington, DC--VA--MD	42,566,032
Florida	Jacksonville, FL	189,959
Florida	Miami, FL	10,696,680
Florida	Orlando, FL	93,287
Florida	Tampa--St. Petersburg, FL	75,374
Georgia	Atlanta, GA	14,398,540
Hawaii	Honolulu, HI	824,513
Illinois	Chicago, IL--IN	71,547,932
Illinois	Round Lake Beach-McHenry-Grayslake, IL-WI	1,274,779
Indiana	South Bend, IN--MI	436,779
Louisiana	New Orleans, LA	1,530,177
Massachusetts	Boston, MA	37,866,686
Massachusetts	Worcester, MA-CT	553,993
Maryland	Baltimore Commuter Rail	9,905,402
Maryland	Baltimore, MD	5,503,864
Michigan	Detroit, MI	328,204
Minnesota	Minneapolis--St. Paul, MN	4,814,212
Missouri	Kansas City, MO--KS	17,218
Missouri	St. Louis, MO--IL	3,402,945
North Carolina	Charlotte, NC--SC	98,980
New Jersey	Atlantic City, NJ	624,076
New Jersey	Northeastern New Jersey	45,241,755
New Jersey	Trenton, NJ	849,332
New York	Buffalo, NY	670,532
New York	New York	188,875,016
New York	Poughkeepsie-Newburgh, NY	1,202,787
Ohio	Cleveland, OH	5,932,637
Ohio	Dayton, OH	2,736,593
Oregon	Portland, OR--WA	4,359,218
Pennsylvania	Harrisburg, PA	499,152
Pennsylvania	Lancaster, PA	1,452,393
Pennsylvania	Philadelphia, PA-NJ-DE-MD	45,733,090
Pennsylvania	Pittsburgh, PA	9,473,866
Puerto Rico	San Juan, PR	1,243,363
Rhode Island	Providence, RI--MA	1,313,187
Tennessee	Chattanooga, TN--GA	43,462
Tennessee	Memphis, TN--MS--AR	224,534
Texas	Dallas--Fort Worth--Arlington, TX	4,217,743
Texas	Houston, TX	4,649,641
Utah	Salt Lake City, UT	1,258,796
Virginia	Virginia Beach, VA	649,398
Washington	Seattle, WA	16,081,151
Wisconsin	Madison, WI	382,123
Wisconsin	Milwaukee, WI	149,580
West Virginia	Morgantown, WV	574,888
	TOTAL	**$668,504,430**

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2009 FIXED GUIDEWAY MODERNIZATION PROGRAM APPORTIONMENT FORMULA

Tier 1 First $497,700,000 to the following areas:

Baltimore	$	8,372,000
Boston	$	38,948,000
Chicago/N.W. Indiana	$	78,169,000
Cleveland	$	9,509,500
New Orleans	$	1,730,588
New York	$	176,034,461
N. E. New Jersey	$	50,604,653
Philadelphia/So. New Jersey	$	58,924,764
Pittsburgh	$	13,662,463
San Francisco	$	33,989,571
SW Connecticut	$	27,755,000

Tier 2 Next $70,000,000 as follows: Tier 2(A): 50 percent is allocated to areas identified in Tier 1; Tier 2(B): 50 percent is allocated to other urbanized areas with fixed guideway tiers in operation at least seven years. Funds are allocated by the Urbanized Area Formula Program fixed guideway tier formula factors that were used to apportion funds for the fixed guideway modernization program in FY 1997.

Tier 3 Next $5,700,000 as follows: Pittsburgh 61.76%; Cleveland 10.73%; New Orleans 5.79%; and 21.72% is allocated to all other areas in Tier 2(B) by the same fixed guideway tier formula factors used in fiscal year 1997.

Tier 4 Next $186,600,000 as follows: All eligible areas using the same year fixed guideway tier formula factors used in fiscal year 1997.

Tier 5 Next $70,000,000 as follows: 65% to the 11 areas identified in Tier 1, and 35% to all other areas using the most current Urbanized Area Formula Program fixed guideway tier formula factors. Any segment that is less than 7 years old in the year of the apportionment will be deleted from the database.

Tier 6 Next $50,000,000 as follows: 60% to the 11 areas identified in Tier 1, and 40% to all other areas using the most current Urbanized Area Formula Program fixed guideway tier formula factors. Any segment less than 7 years old in the year of the apportionment will be deleted from the database.

Tier 7 Remaining amounts as follows: 50% to the 11 areas identified in Tier 1, and 50% to all other areas using the most current Urbanized Area Formula Program fixed guideway formula factors. Any segment that is less than 7 years old in the year of the apportionment will be deleted from the database.

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
FY 2006 Extended Allocations				
ID	E2006-BUSP-369	176	Boise, ID-Multimodal facility	$456,607
ID	E2006-BUSP-374	652	Valley Regional Transit, ID-Downtown Boise Multimodal	1,315,710
	Subtotal FY 2006 Extended Allocations			*$1,772,317*
FY 2007 Unobligated Allocations				
AK	E2007-BUSP-0003	422	C Street Expanded bus facility and inter-modal parking garage, Anchorage, AK	$1,200,000
AK	E2007-BUSP-0005	541	Hoonah, AK-Intermodal Ferry Dock	476,000
AK	E2007-BUSP-0006	416	Improve marine inter-modal facilities in Ketchikan	923,800
AK	E2007-BUSP-0008	236	Juneau, Alaska-transit bus acquisition and transit center	360,000
AK	E2007-BUSP-0009	550	Juneau-Transit Bus Acquisition and Transit Center	357,000
AK	E2007-BUSP-0013	596	North Slope Borough, AK-Transit Purposes	476,000
AK	E2007-BUSP-0016	664	Wrangell, AK-Ferry Infrastructure	238,000
AL	E2007-BUSP-0017	461	Alabama Institute for Deaf and Blind-Bus project	119,000
AL	E2007-BUSP-0019	437	American Village/Montevallo, Alabama construction of closed loop Access Road, bus lanes and parking facility	80,256
AL	E2007-BUSP-0020	469	Auburn University-Intermodal Parking Garage	952,000
AL	E2007-BUSP-0025	504	City of Montgomery, AL-Montgomery Airport Intermodal Center	952,000
AL	E2007-BUSP-0028	534	Gulf Shores, AL-Community Bases	238,000
AL	E2007-BUSP-0029	582	Mobile County, AL Commission-Bus project	119,000
AL	E2007-BUSP-0030	644	University of Alabama in Birmingham Intermodal Facility	1,666,000
AR	E2007-BUSP-0035	487	Central Arkansas Transit Authority Facility Upgrades	550,000
CA	D2007-BUSP-002		San Francisco - Urban Partnership Agreement	58,000,000
CA	E2007-BUSP-0048	76	Baldwin Park, CA Construct vehicle and bicycle parking lot and pedestrian rest area at transit center	401,280
CA	E2007-BUSP-0051	396	Burbank, CA Construction of Empire Area Transit Center near Burbank Airport	50,160
CA	E2007-BUSP-0052	190	Calexico, CA Purchase new buses for the Calexico Transit System	60,192
CA	E2007-BUSP-0060	17	Davis, CA Davis Multi-Modal Station to improve entrance to Amtrak Depot and parking lot, provide additional parking and improve service	200,640
CA	E2007-BUSP-0062	339	East San Diego County, California-Bus Maintenance Facility Expansion	401,280
CA	E2007-BUSP-0067	212	Glendale, CA Construction of Downtown Streetcar Project	200,640
CA	E2007-BUSP-0070	276	Long Beach Transit, Long Beach, California, for the purchase of transit vehicles and enhancement para-transit and senior transportation serv	133,760
CA	E2007-BUSP-0071	332	Long Beach, CA Park and Ride Facility	200,640
CA	E2007-BUSP-0081	6	Los Angeles, CA, Construction of Intermodal Transit Center at California State University Los Angeles	158,506
CA	E2007-BUSP-0083	566	Los Angeles, CA, LAX Intermodal Transportation Center Rail and Bus System Expansion	550,000
CA	E2007-BUSP-0086	266	Martinez, CA Inter-modal Facility Restoration	300,960
CA	E2007-BUSP-0087	285	Metro Gold Line Foothill Extension Light Rail Transit Project from Pasadena, CA to Montclair, CA	3,009,600
CA	E2007-BUSP-0088	39	Monrovia, California-Transit Village Project	601,920
CA	E2007-BUSP-0094	92	Norwalk, CA Transit System Bus Procurement and Los Angeles World Airport Remote Fly-Away Facility Project	160,512
CA	E2007-BUSP-0104	1216	Pleasant Hill, CA Construct Diablo Valley College Bus Transit Center	300,960
CA	E2007-BUSP-0105	251	Redondo Beach, CA Capital Equipment procurement of 12 Compressed Natural Gas (CNG) Transit Vehicles for Coastal Shuttle Services by Beach Cities Tran	160,512
CA	E2007-BUSP-0108	189	Sacramento, CA Bus enhancement and improvements-construct maintenance facility and purchase clean-fuel buses to improve transit service	401,280
CA	E2007-BUSP-0109	84	Sacramento, CA Construct intermodal station and related improvements	1,404,480
CA	E2007-BUSP-0112	314	San Diego, CA Widen sidewalks and bus stop entrance, and provide diagonal parking, in the Skyline Paradise Hills neighborhood (Reo Drive)	60,192
CA	E2007-BUSP-0114	127	San Fernando, CA Purchase CNG buses and related equipment and construct facilities	609,946
CA	E2007-BUSP-0118	381	San Francisco, CA Redesign and renovate intermodal facility at Glen Park Community	827,640
CA	E2007-BUSP-0123	147	Santa Barbara, CA-Expansion of Regional Intermodal Transit Center	60,192
CA	E2007-BUSP-0124	364	Santa Monica, CA Construct intermodal park-and-ride facility at Santa Monica College campus on South Bundy Drive near Airport Avenue	200,640
CA	E2007-BUSP-0128	401	South Pasadena, CA Silent Night Grade Crossing Project	180,576
CA	E2007-BUSP-0131	315	Temecula, California-Intermodal Transit Facility	100,320
CA	E2007-BUSP-0136	83	Woodland, CA Yolobus operations, maintenance, administration facility expansion and improvements to increase bus service with alternative fuel buses	401,280
CO	E2007-BUSP-0137	449	City of Aspen, CO Bus and Bus Facilities	140,448
CO	E2007-BUSP-0138	448	City of Durango, CO Bus and Bus Facilities	50,160
CO	E2007-BUSP-0139	509	Colorado Association of Transit Agencies/Colorado Transit Coalition-Colorado Statewide Buses and Bus Facilities	1,341,187
CO	E2007-BUSP-0140	518	Denver Regional Transit District-Bus Maintenance Facility	714,000
CO	E2007-BUSP-0141	520	Denver Regional Transit District-Denver Union Station Multimodal Renovations	476,000
CO	E2007-BUSP-0143	167	Denver, CO Denver Union Station Inter-modal Center	1,103,520
CO	E2007-BUSP-0146	188	Mountain Express, Crested Butte, CO Bus and Bus Facilities	100,320
CT	E2007-BUSP-0152	44	Bridgeport, Connecticut-Greater Bridgeport Transit Authority Bus Facility	100,320
CT	E2007-BUSP-0153	478	Bridgeport, CT Facility Expansion/Improvement	400,000
CT	E2007-BUSP-0155	523	Downtown Middletown, CT, Transportation Infrastructure Improvement Project	2,150,000
CT	E2007-BUSP-0156	218	Enfield, Connecticut-intermodal station	601,920
CT	E2007-BUSP-0158	267	Middletown, CT Construct intermodal center	300,960
CT	E2007-BUSP-0160	269	New London, Connecticut-Intermodal Transportation Center and Streetscapes	100,320
CT	E2007-BUSP-0161	369	Norwalk, Connecticut-Pulse Point Joint Development inter-modal facility	100,320
CT	E2007-BUSP-0162	131	Stonington and Mystic, Connecticut-Intermodal Center parking facility and Streetscape	489,562

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
CT	E2007-BUSP-0163	32	Torrington, CT Construct bus-related facility (Northwestern Connecticut Central Transit District)	401,280
CT	E2007-BUSP-0165	657	Waterbury, CT Bus Maintenance Facility	2,300,000
FL	E2007-BUSP-0167	470	Bay County, FL - Transit Facility	476,000
FL	E2007-BUSP-0168	297	Broward County, FL - Purchase Buses and construct bus facilities	401,280
FL	E2007-BUSP-0169	69	Broward County, FL Buses & Bus Facilities	1,304,160
FL	E2007-BUSP-0170	479	Broward County-Bus and Bus Facilities	476,000
FL	E2007-BUSP-0171	117	Broward, FL Purchase new articulated buses and bus stop improvements on State Road 7. (SR 7) between Golden Glades Interchange and Glades Road	100,320
FL	E2007-BUSP-0172	439	Central Florida Commuter Rail intermodal facilities	1,003,200
FL	E2007-BUSP-0173	453	Central Florida Commuter Rail Intermodal Facilities	720,000
FL	E2007-BUSP-0175	498	City of Gainesville Regional Transit System-Facility Expansion	238,000
FL	E2007-BUSP-0177	23	Construct intermodal transportation & parking facility, City of Winter Park, Florida	100,320
FL	E2007-BUSP-0178	80	Flagler County, Florida-bus facility	60,192
FL	E2007-BUSP-0180	344	Gainesville, FL Bus Facility Expansion	802,560
FL	E2007-BUSP-0189	558	Lakeland Area Mass Transit District/Citrus Connection-Capital Funding Needs	476,000
FL	E2007-BUSP-0192	308	Miami Dade, FL N.W. 7th Avenue Transit Hub	601,920
FL	E2007-BUSP-0193	211	Miami-Dade County, Florida-buses and bus facilities	1,203,840
FL	E2007-BUSP-0194	432	Miami-Dade County, Florida-buses and bus facilities	802,560
FL	E2007-BUSP-0195	133	Miami-Dade County, Florida-Transit Security System	599,914
FL	E2007-BUSP-0196	580	Miami-Dade Transit 7th Avenue NW Transit Hub	238,000
FL	E2007-BUSP-0197	454	Miami-Dade Transit Dadeland South Intermodal Center	480,000
FL	E2007-BUSP-0205	415	Purchase Buses and construct bus facilities in Broward County, FL	451,440
FL	E2007-BUSP-0206	420	Purchase Buses and construct bus facilities in Broward County, FL	401,280
FL	E2007-BUSP-0208	623	South Florida Regional Transportation Authority-West Palm Beach Intermodal Facility	476,000
FL	E2007-BUSP-0210	31	St. Augustine, Florida-Intermodal Transportation Center and related pedestrian and landscape improvements	200,640
FL	E2007-BUSP-0211	390	St. Lucie County, FL Purchase Buses	200,640
GA	E2007-BUSP-0214	355	Albany, GA Bus replacement	60,192
GA	E2007-BUSP-0215	255	Albany, GA Multimodal Facility	160,512
GA	E2007-BUSP-0217	247	Atlanta, GA Inter-modal Passenger Facility Improvements	401,280
GA	E2007-BUSP-0221	91	Columbus, GA Bus replacement	60,192
GA	E2007-BUSP-0222	510	Columbus, Georgia/Phoenix City, Alabama-National Infantry Museum Multimodal Facility	405,000
GA	E2007-BUSP-0223	49	Columbus, Georgia-Buses & Bus Facilities	194,420
GA	E2007-BUSP-0224	530	Georgia Department of Transportation-Georgia Statewide Bus and Bus Facilities	1,817,644
GA	E2007-BUSP-0225	60	Georgia Statewide Bus Program	40,128
GA	E2007-BUSP-0228	406	Moultrie, GA Inter-modal facility	60,192
GA	E2007-BUSP-0230	256	Savannah, GA Bus and Bus Facilities-Chatham Area Transit	1,003,200
GA	E2007-BUSP-0232	206	Sylvester, GA Inter-modal Facility	40,128
IA	E2007-BUSP-0236	475	Black Hawk County, IA UNI Multimodal Project	714,000
ID	E2007-BUSP-0239	176	Boise, ID-Multimodal facility	902,880
ID	E2007-BUSP-0241	652	Valley Regional Transit, ID-Downtown Boise Multimodal	1,381,000
IL	E2007-BUSP-0242	433	Centralia, Illinois-South Central Mass Transit District Improvements	80,256
IL	E2007-BUSP-0243	226	Champaign, IL-Construct park and ride lot with attached daycare facility	300,960
IL	E2007-BUSP-0259	632	Springfield, IL, Multimodal Transit Terminal	1,100,000
IN	E2007-BUSP-0263	109	Bloomington, IN-Bus and transfer facility	965,078
IN	E2007-BUSP-0264	529	Gary, Indiana, Gary Airport Station Modernization and Shuttle Service Project	400,000
IN	E2007-BUSP-0266	235	Indianapolis, IN Construct the Ivy Tech State College Multi-Modal Facility	1,003,200
IN	E2007-BUSP-0267	5	Indianapolis, IN Downtown Transit Center	2,808,960
IN	E2007-BUSP-0268	220	Indianapolis, IN IndySMART program to relieve congestion, improve safety and air quality	401,280
IN	E2007-BUSP-0271	546	Ivy Tech State College, Indiana Multimodal Center	200,000
KY	E2007-BUSP-0280	639	Transit Authority of Lexington, KY-Rehabilitation of Building for Maintenance and Administration	952,000
LA	E2007-BUSP-0281	484	Capital Area Transit System-Baton Rouge BRT	714,000
LA	E2007-BUSP-0287	170	Louisiana-Construct pedestrian walkways between Caddo St. and Milam St. along Edwards St. in Shreveport, LA	203,640
MA	E2007-BUSP-0298	59	Beverly, MA Design and Construct Beverly Deport Intermodal Transportation Center	401,280
MA	E2007-BUSP-0302	124	Haverhill, MA Design and Construct Inter-modal Transit Parking Improvements	1,123,584
MA	E2007-BUSP-0303	21	Hingham, MA Hingham Marine Intermodal Center Improvements· Enhance public transportation infrastructure/parking	1,805,760
MA	E2007-BUSP-0307	42	Medford, MA Downtown revitalization featuring construction of a 200 space Park and Ride Facility	401,280
MA	E2007-BUSP-0308	257	Newburyport, MA Design and Construct Intermodal Facility	401,280
MA	E2007-BUSP-0310	161	Revere, MA Inter-modal transit improvements in the Wonderland station (MBTA) area	361,152
MA	E2007-BUSP-0311	88	Rockport, MA Rockport Commuter Rail Station Improvements	551,760
MA	E2007-BUSP-0312	370	Salem, MA Design and Construct Salem Intermodal Transportation Center	401,280
MA	E2007-BUSP-0313	205	Woburn, MA Construction of an 89 space park and ride facility to be located on Magazine Hill, in the Heart of Woburn Square	361,152
MA	E2007-BUSP-0647		Massachusetts Bay Transportation Authority Ferry System	1,603,000
MD	E2007-BUSP-0314	122	Baltimore, MD Construct Intercity Bus Intermodal Terminal	1,003,200
MD	E2007-BUSP-0318	573	Maryland Statewide Bus Facilities and Buses	1,568,416
MD	E2007-BUSP-0320	214	Mount Rainier, MD Intermodal and Pedestrian Project	90,288
MI	E2007-BUSP-0330	319	Detroit Bus Maintenance Facility	1,805,760
MI	E2007-BUSP-0335	9	Detroit, MI Enclosed heavy-duty maintenance facility with full operational functions for up to 300 buses	902,880
MN	E2007-BUSP-0349	577	Metro Transit/Metropolitan Council, MN-Bus/Bus Capital	1,714,217
MN	E2007-BUSP-0350	185	St Paul to Hinckley, MN Construct bus amenities along Rush Line Corridor	216,160

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
MS	E2007-BUSP-0357	130	Coahoma County, Mississippi Purchase buses for the Aaron E. Henry Community Health Services Center, Inc./DARTS transit service	30,096
MS	E2007-BUSP-0358	547	Jackson State University, MS-Busing Project	1,190,000
NC	E2007-BUSP-0362	490	Charlotte Area Transit System/City of Charlotte-Charlotte Multimodal Station	2,380,000
NC	E2007-BUSP-0363	217	Charlotte, NC Construct Charlotte Multimodal Station	1,564,992
NC	E2007-BUSP-0365	228	Charlotte, North Carolina-Multimodal Station	802,560
NC	E2007-BUSP-0366	154	City of Greenville, NC Expansion Buses and Greenville Intermodal Center	715,081
NC	E2007-BUSP-0368	302	Greensboro, North Carolina-Piedmont Authority for Regional Transportation Multimodal Transportation Center	2,512,013
NC	E2007-BUSP-0369	52	Greensboro, North Carolina-Replacement buses	1,159,699
ND	E2007-BUSP-0376	595	North Dakota Department of Transportation/Statewide Bus	786,036
NE	E2007-BUSP-0378	160	Kearney, Nebraska-RYDE Transit Bus Maintenance and Storage Facility	401,280
NE	E2007-BUSP-0379	586	Nebraska Department of Roads-Bus Maintenance and Storage Facility for RYDE in Kearney, NE	476,000
NE	E2007-BUSP-0380	587	Nebraska Department of Roads-Statewide Vehicles, Facilities, and Related Equipment Purchases	952,000
NH	E2007-BUSP-0383	418	Windham, New Hampshire--Construction of Park and Ride Bus facility at Exit 3	742,368
NJ	E2007-BUSP-0386	28	Camden, NJ Construction of the Camden County Intermodal Facility in Cramer Hill	200,640
NJ	E2007-BUSP-0391	38	Monmouth County, NJ Construction of main bus facility for Freehold Township, including a terminal and repair shop	401,280
NJ	E2007-BUSP-0399	618	South Brunswick, NJ Transit System	1,000,000
NJ	E2007-BUSP-0402	181	Trenton, NJ Development of Trenton Trolley System	200,640
NJ	E2007-BUSP-0650		Camden, NJ Ferry System	1,000,000
NM	E2007-BUSP-0405	562	Las Cruces, NM, Road Runner Bus and Bus Facilities	58,730
NY	E2007-BUSP-0416	20	Bronx, NY Establish an intermodal transportation facility at the Wildlife Conservation Society Bronx Zoo	200,640
NY	E2007-BUSP-0417	279	Bronx, NY Establish an intermodal transportation facility at the Wildlife Conservation Society Bronx Zoo	200,640
NY	E2007-BUSP-0419	338	Bronx, NY Intermodal Facility near Exit 6. of the Bronx River Parkway	50,160
NY	E2007-BUSP-0421	10	Bronx, NY Wildlife Conservation Society intermodal transportation facility at the Bronx Zoo	87,780
NY	E2007-BUSP-0427	192	Buffalo, NY Inter-modal Center Parking Facility	200,640
NY	E2007-BUSP-0428	245	Bus to provide York-town, New York internal circulator to provide transportation throughout the Town	37,118
NY	E2007-BUSP-0429	230	Construction of Third Bus Depot on Staten Island	2,407,680
NY	E2007-BUSP-0430	146	Cooperstown, New York-Intermodal Transit Center	1,003,200
NY	E2007-BUSP-0431	363	Corning, New York-Transportation Center	1,003,200
NY	E2007-BUSP-0432	512	Transportation Center Enhancements, Corning, NY	450,000
NY	E2007-BUSP-0434	300	Geneva, New York-Multimodal facility-Construct passenger rail center	100,320
NY	E2007-BUSP-0435	317	Jamestown, NY Rehabilitation of Intermodal Facility and associated property	141,994
NY	E2007-BUSP-0437	368	Nassau County, NY Conduct planning and engineering for transportation system (HUB)	1,404,480
NY	E2007-BUSP-0438	585	Nassau County, NY, Conduct planning, engineering, and construction for transportation system (HUB)	1,200,000
NY	E2007-BUSP-0441	590	New York City, NY, Bronx Zoo Intermodal Facility	450,000
NY	E2007-BUSP-0444	593	New York, Improvements to Moynihan Station	1,200,000
NY	E2007-BUSP-0446	373	Niagara Frontier Transportation Authority, NY Replacement Buses	200,640
NY	E2007-BUSP-0448	379	Ramapo, NY Transportation Safety Field Bus	50,160
NY	E2007-BUSP-0449	252	Rochester, New York-Renaissance Square transit center	902,880
NY	E2007-BUSP-0450	430	Rochester, New York-Renaissance Square Transit Center	451,440
NY	E2007-BUSP-0451	607	Rochester, NY, Renaissance Square Intermodal Facility, Design and Construction	1,400,000
NY	E2007-BUSP-0453	386	Suffolk County, NY Design and construction of intermodal transit facility in Wyandanch	922,944
NY	E2007-BUSP-0454	353	Suffolk County, NY Purchase four handicapped accessible vans to transport veterans to and from the VA facility in Northport	56,179
NY	E2007-BUSP-0457	289	Town of Warwick, NY Bus Facility Warwick Transit System	110,352
NY	E2007-BUSP-0458	451	Utica, New York Transit Multimodal Facilities	1,200,000
NY	E2007-BUSP-0652		Staten Island Ferry	1,000,000
OH	E2007-BUSP-0468	89	Cincinnati, Ohio-Metro Regional Transit Hub Network Eastern Neighborhoods	185,592
OH	E2007-BUSP-0471	179	Cleveland, OH Construct passenger inter-modal center near Dock 32	172,550
OH	E2007-BUSP-0472	411	Cleveland, OH Construction of an inter-modal facility and related improvements at University Hospitals facility on Euclid Avenue	200,640
OH	E2007-BUSP-0475	198	Cleveland, Ohio-Euclid Avenue University Hospital intermodal facility	902,880
OH	E2007-BUSP-0483	309	Elyria, OH Construct the New York Central Train Station into an intermodal transportation hub	410,911
OH	E2007-BUSP-0484	349	Kent, OH Construct Kent State University Intermodal Facility serving students and the general public	200,640
OH	E2007-BUSP-0485	104	Marietta, Ohio Construction of transportation hub to accommodate regional bus traffic	100,320
OH	E2007-BUSP-0487	87	Niles, OH Acquisition of bus operational and service equipment of Niles Trumbull Transit	40,128
OH	E2007-BUSP-0490	64	Zanesville, OH-bus system signage and shelters	16,302
OR	E2007-BUSP-0500	168	Lane Transit District, Bus Rapid Transit Progressive Corridor Enhancements	594,621
PA	E2007-BUSP-0510	456	Altoona Multimodal Transportation Facility Parking Garage	240,000
PA	E2007-BUSP-0514	481	Butler Township, PA-Cranbury Area Transit Service	626,980
PA	E2007-BUSP-0519	513	County of Lackawanna Transit System-Scranton Intermodal Transportation Center	238,000
PA	E2007-BUSP-0521	81	Easton, Pennsylvania-Design and construct Intermodal Transportation Center	401,280
PA	E2007-BUSP-0522	524	Erie, PA Metropolitan Transit Authority-Bus Acquisitions	238,000
PA	E2007-BUSP-0523	431	Erie, PA-EMTA Vehicle Acquisition	401,280
PA	E2007-BUSP-0524	331	Gettysburg, Pennsylvania-transit transfer center	180,375
PA	E2007-BUSP-0533	201	Philadelphia, PA Cruise Terminal Transportation Ctr Phila Naval Shipyard	702,240
PA	E2007-BUSP-0534	137	Philadelphia, PA Improvements to the existing Penns Landing Ferry Terminal	802,560
PA	E2007-BUSP-0535	413	Philadelphia, PA Penns Landing water shuttle parking lot expansion and water shuttle ramp infrastructure construction	220,704

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
PA	E2007-BUSP-0536	22	Philadelphia, PA Philadelphia Zoo Intermodal Transportation project w/parking consolidation, pedestrian walkways, public transportation complements &	1,003,200
PA	E2007-BUSP-0537	274	Philadelphia, PA SEPTAs Market St. Elevated Rail project in conjunction with Philadelphia Commercial Development Corporation for improvements	280,896
PA	E2007-BUSP-0538	316	Philadelphia, Pennsylvania-SEPTA Market Street Elevated Line parking facility	802,560
PA	E2007-BUSP-0540	397	Pottsville, PA Union Street Trade and Transfer Center Intermodal Facility	401,280
PA	E2007-BUSP-0543	424	Sharon, PA-Bus Facility Construction	100,320
PA	E2007-BUSP-0546	628	Southeastern Pennsylvania Transportation Authority-Villanova-SEPTA Intermodal	586,930
PA	E2007-BUSP-0547	642	Transit Authority of Warren County, PA-Impact Warren	238,000
PA	E2007-BUSP-0551	662	Williamsport, PA Bureau of Transportation-Williamsport Trade and Transit Centre Expansion	714,000
PA	E2007-BUSP-0552	65	York, Pennsylvania-Rabbit Transit facilities and communications equipment	555,873
PA	E2007-BUSP-0653		Philadelphia Penn's Landing Ferry System	1,000,000
PR	E2007-BUSP-0553	128	Bayamon, Puerto Rico-bus terminal	120,384
PR	E2007-BUSP-0554	421	Bayamon, Puerto Rico-Purchase of Trolley Cars	170,544
PR	E2007-BUSP-0559	58	Yabucoca, Puerto Rico-Trolley Buses	35,112
RI	E2007-BUSP-0562	115	Rhode Island Statewide Bus Fleet	1,203,840
SC	E2007-BUSP-0564	619	South Carolina Department of Transportation-Transit Facilities Construction Program	476,000
SD	E2007-BUSP-0566	621	South Dakota Department of Transportation-Statewide Buses and Bus Facilities	431,872
TN	E2007-BUSP-0573	30	Sevier County, Tennessee-US. 441 bus rapid transit	50,160
TN	E2007-BUSP-0574	636	Tennessee Department of Transportation-Statewide Tennessee Transit ITS and Bus Replacement Project	2,147,723
TX	E2007-BUSP-0576	426	Abilene, TX Vehicle replacement and facility improvements for transit system	80,256
TX	E2007-BUSP-0581	455	Carrollton, Texas Downtown Regional Multimodal Transit Hub	240,000
TX	E2007-BUSP-0585	515	Dallas Area Rapid Transit-Bus passenger Facilities	238,000
TX	E2007-BUSP-0586	336	Dallas, TX Bus Passenger Facilities	2,568,192
TX	E2007-BUSP-0590	561	Laredo-North Laredo Transit Hub-Bus Maintenance Facility	714,000
TX	E2007-BUSP-0591	24	Roma, TX Bus Facility	105,336
UT	E2007-BUSP-0597	651	Utah Statewide Bus and Bus Facilities	1,273,777
VA	E2007-BUSP-0599	232	Alexandria, VA Royal Street Bus Garage Replacement	100,320
VA	E2007-BUSP-0603	157	Bealeton, Virginia-Intermodal Station Depot Refurbishment	55,176
VA	E2007-BUSP-0604	492	City of Alexandria, VA-City-Wide Transit Improvements	238,000
VA	E2007-BUSP-0606	494	City of Alexandria, VA-Replace Royal Street Bus Garage	714,000
VA	E2007-BUSP-0608	511	Commonwealth of Virginia-Statewide Bus Capital Program	1,465,060
VA	E2007-BUSP-0614	535	Hampton Roads Transit, VA-Southside Bus Facility	238,000
VA	E2007-BUSP-0615	391	Hampton Roads, VA Final design and construction for a Hampton Roads Transit Southside Bus Facility	401,280
VA	E2007-BUSP-0616	354	Norfolk, Virginia-Final Design and Construction Southside Bus Facility	351,120
VA	E2007-BUSP-0617	68	Northern Neck and Middle Peninsula, Virginia-Bay Transit Multimodal Facilities	652,080
VA	E2007-BUSP-0621	434	Roanoke, VA-Bus restoration in the City of Roanoke	50,160
VA	E2007-BUSP-0622	312	Roanoke, Virginia-Improve Virginian Railway Station	50,160
VA	E2007-BUSP-0623	305	Roanoke, Virginia-Intermodal Facility	40,128
VA	E2007-BUSP-0624	361	Roanoke, Virginia-Roanoke Railway and Link Passenger facility	100,320
VT	E2007-BUSP-0625	477	Brattleborough, VT, Intermodal Center	200,000
WA	E2007-BUSP-0630	337	Island Transit, WA Operations Base Facilities Project	481,536
WA	E2007-BUSP-0633	333	Oak Harbor, WA Multimodal Facility	200,640
WA	E2007-BUSP-0638	655	Washington, King Street Transportation Center-Intercity Bus Terminal Component	60,000
WV	E2007-BUSP-0643	73	West Virginia Construct Beckley Intermodal Gateway pursuant to the eligibility provisions for projects listed under section 3030(d)(3) of P L.. 105-17	4,815,360
WY	E2007-BUSP-0645	665	Wyoming Department of Transportation-Wyoming Statewide Bus and Bus Related Facilities	420,386
	Subtotal FY 2007 Unobligated Allocations			*$197,666,184*
FY 2008 Unobligated Allocations				
AK	E2008-BUSP-0002	466	Anchorage-Transit Needs	$259,000
AK	E2008-BUSP-0003	422	C Street Expanded bus facility and inter-modal parking garage, Anchorage, AK	1,300,000
AK	E2008-BUSP-0005	541	Hoonah, AK-Intermodal Ferry Dock	517,000
AK	E2008-BUSP-0006	416	Improve marine dry-dock in Ketchikan	3,640,000
AK	E2008-BUSP-0008	236	Juneau, Alaska-transit bus acquisition and transit center	390,000
AK	E2008-BUSP-0009	550	Juneau-Transit Bus Acquisition and Transit Center	388,000
AK	E2008-BUSP-0013	596	North Slope Borough, AK-Transit Purposes	517,000
AK	E2008-BUSP-0014	597	North Star Borough, AK-Transit Purposes	259,000
AK	E2008-BUSP-0015	616	Sitka, Alaska-Transit Needs	5,000
AK	E2008-BUSP-0016	664	Wrangell, AK-Ferry Infrastructure	259,000
AK	E2008-BUSP-0653		Statewide Bus and Bus Facilities Enhancements	367,500
AL	E2008-BUSP-0017	461	Alabama Institute for Deaf and Blind-Bus project	129,000
AL	E2008-BUSP-0019	437	American Village/Montevallo, Alabama construction of closed loop Access Road, bus lanes and parking facility	86,944
AL	E2008-BUSP-0020	469	Auburn University-Intermodal Parking Garage	1,035,000
AL	E2008-BUSP-0025	504	City of Montgomery, AL-Montgomery Airport Intermodal Center	1,035,000
AL	E2008-BUSP-0028	534	Gulf Shores, AL-- Bus and Bus facilities	259,000
AL	E2008-BUSP-0029	582	Mobile County, AL Commission-Bus project	129,000
AL	E2008-BUSP-0030	644	University of Alabama in Birmingham Intermodal Facility	1,811,000
AL	E2008-BUSP-0034	650	US Space and Rocket Center, AL-Tramway Expansion	259,000
AL	E2008-BUSP-0654		Alabama Senior Transportation Program	686,000
AL	E2008-BUSP-0655		Birmingham Intermodal Transit Facility	392,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
AL	E2008-BUSP-0656		City of Mobiles Transit System	1,372,000
AL	E2008-BUSP-0657		Huntsville, AL Multimodal Dallas Branch	1,225,000
AR	E2008-BUSP-0035	487	Central Arkansas Transit Authority, Bus Acquisition	750,000
AZ	D2008-BUSP-001		City of Tucson	3,000,000
AZ	D2008-BUSP-002		Regional Public Transportation Authority, Valley Metro (Phoenix)	3,000,000
AZ	E2008-BUSP-0040	47	Phoenix, AZ Construct City of Phoenix para-transit facility (Dial-A-Ride)	217,360
AZ	E2008-BUSP-0041	346	Phoenix, AZ Construct metro bus facility in Phoenix's West Valley	1,086,800
AZ	E2008-BUSP-0042	150	Phoenix, AZ Construct regional heavy bus maintenance facility	217,360
AZ	E2008-BUSP-0043	26	Scottsdale, Arizona-Plan, design, and construct intermodal center	543,400
AZ	E2008-BUSP-0044	203	Tempe, Arizona-Construct East Valley Metro Bus Facility	1,412,840
AZ	E2008-BUSP-0659		Bus Expansion--Phoenix, Avondale, Glendale	245,000
AZ	E2008-BUSP-0660		Buses and Bus Maintenance Facility, Tucson	980,000
AZ	E2008-BUSP-0661		Construction of Intermodal Center, Scottsdale	196,000
AZ	E2008-BUSP-0662		East Valley Bus Maintenance Facility, Tempe	392,000
AZ	E2008-BUSP-0663		Main Street Bus Rapid Transit Buses, Mesa	490,000
AZ	E2008-BUSP-0664		Phoenix Regional Heavy Bus Maintenance Facility	490,000
AZ	E2008-BUSP-0665		Phoenix/Glendale West Valley Operating Facility	735,000
CA	E2008-BUSP-0046	288	Alameda County, CA AC Transit Bus Rapid Transit Corridor Project	434,720
CA	E2008-BUSP-0048	76	Baldwin Park, CA Construct vehicle and bicycle parking lot and pedestrian rest area at transit center	434,720
CA	E2008-BUSP-0051	396	Burbank, CA Construction of Empire Area Transit Center near Burbank Airport	54,340
CA	E2008-BUSP-0052	190	Calexico, CA Purchase new buses for the Calexico Transit System	65,208
CA	E2008-BUSP-0059	207	Culver City, CA Purchase compressed natural gas buses and expand natural gas fueling facility	154,922
CA	E2008-BUSP-0060	17	Davis, CA Davis Multi-Modal Station to improve entrance to Amtrak Depot and parking lot, provide additional parking and improve service	217,360
CA	E2008-BUSP-0061	11	Development of Gold Country Stage Transit Transfer Center, Nevada County, CA	202,214
CA	E2008-BUSP-0062	339	East San Diego County, California-Bus Maintenance Facility Expansion	434,720
CA	E2008-BUSP-0063	101	Emeryville, CA Expand & Improve Inter-modal Transit Center at Amtrak Station	217,360
CA	E2008-BUSP-0064	222	Escondido, CA-Construct Bus Maintenance Facility	108,680
CA	E2008-BUSP-0066	260	Gardena, CA Purchase of alternative fuel buses for service expansion, on-board security system and bus facility training equipment	1,332,417
CA	E2008-BUSP-0067	212	Glendale, CA Construction of Downtown Streetcar Project	217,360
CA	E2008-BUSP-0070	276	Long Beach Transit, Long Beach, California, for the purchase of transit vehicles and enhancement para-transit and senior transportation service	144,906
CA	E2008-BUSP-0071	332	Long Beach, CA Park and Ride Facility	217,360
CA	E2008-BUSP-0076	223	Los Angeles, CA Design and construct improved transit and pedestrian linkages between Los Angeles Community College and nearby MTA rail stop and bus l	326,040
CA	E2008-BUSP-0077	307	Los Angeles, CA Improve safety, mobility and access between LATTC, Metro line and nearby bus stops on Grand Ave between Washington and 23rd	108,680
CA	E2008-BUSP-0081	6	Los Angeles, CA, Construction of Intermodal Transit Center at California State University Los Angeles	171,714
CA	E2008-BUSP-0082	567	Los Angeles, CA, Fly-Away Bus System Expansion	600,000
CA	E2008-BUSP-0083	566	Los Angeles, CA, LAX Intermodal Transportation Center Rail and Bus System Expansion	600,000
CA	E2008-BUSP-0086	266	Martinez, CA Inter-modal Facility Restoration	326,040
CA	E2008-BUSP-0087	285	Metro Gold Line Foothill Extension Light Rail Transit Project from Pasadena, CA to Montclair, CA	3,260,400
CA	E2008-BUSP-0088	39	Monrovia, California-Transit Village Project	652,080
CA	E2008-BUSP-0089	200	Montebello, CA Bus Lines Bus Fleet Replacement Project	152,152
CA	E2008-BUSP-0090	321	Monterey Park, CA Catch Basins at Transit Stop Installation	69,555
CA	E2008-BUSP-0091	191	Monterey Park, CA Safety improvements at a bus stop including creation of bus loading areas and street improvements	347,776
CA	E2008-BUSP-0092	375	Monterey, CA Purchase bus equipment	217,360
CA	E2008-BUSP-0093	43	Needles, California-El Garces Intermodal Facility	434,720
CA	E2008-BUSP-0094	92	Norwalk, CA Transit System Bus Procurement and Los Angeles World Airport Remote Fly-Away Facility Project	173,888
CA	E2008-BUSP-0097	173	Ontario, CA Construct Omnitrans Transcenter	217,360
CA	E2008-BUSP-0101	45	Palm Springs, California-Sunline Transit bus purchase	108,680
CA	E2008-BUSP-0102	70	Palm Springs, California-Sunline Transit· CalStrat-Weststart fuel cell bus program	217,360
CA	E2008-BUSP-0104	116	Pleasant Hill, CA Construct Diablo Valley College Bus Transit Center	326,040
CA	E2008-BUSP-0105	251	Redondo Beach, CA Capital Equipment procurement of 12 Compressed Natural Gas (CNG) Transit Vehicles for Coastal Shuttle Services by Beach Cities Tran	173,888
CA	E2008-BUSP-0107	171	Riverside, California-RTA Advanced Traveler Information System	108,680
CA	E2008-BUSP-0108	189	Sacramento, CA Bus enhancement and improvements-construct maintenance facility and purchase clean-fuel buses to improve transit service	434,720
CA	E2008-BUSP-0109	84	Sacramento, Improvements to the existing Sacramento Intermodal Facility (Sacramento Valley Station)	1,521,520
CA	E2008-BUSP-0110	253	San Bernardino, CA Implement Santa Fe Depot improvements in San Bernardino	108,680
CA	E2008-BUSP-0111	282	San Diego, CA Completion of San Diego Joint Transportation Operations Center (JTOC)	434,720
CA	E2008-BUSP-0112	314	San Diego, CA Widen sidewalks and bus stop entrance, and provide diagonal parking, in the Skyline Paradise Hills neighborhood (Reo Drive)	65,208
CA	E2008-BUSP-0114	127	San Fernando, CA Purchase CNG buses and related equipment and construct facilities	660,774
CA	E2008-BUSP-0118	381	San Francisco, CA Redesign and renovate intermodal facility at Glen Park Community	896,610
CA	E2008-BUSP-0123	147	Santa Barbara, CA-Expansion of Regional Intermodal Transit Center	65,208
CA	E2008-BUSP-0124	364	Santa Monica, CA Construct intermodal park-and-ride facility at Santa Monica College campus on South Bundy Drive near Airport Avenue	217,360
CA	E2008-BUSP-0128	401	South Pasadena, CA Silent Night Grade Crossing Project	195,624

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
CA	E2008-BUSP-0129	383	South San Francisco, CA Construction of Ferry Terminal at Oyster Point in South San Francisco to the San Francisco Bay Water Transit Authority	1,032,460
CA	E2008-BUSP-0131	315	Temecula, California-Intermodal Transit Facility	108,608
CA	E2008-BUSP-0132	85	Torrance Transit System, CA Acquisition of EPA and CARB-certified low emission replacement buses	652,080
CA	E2008-BUSP-0134	35	Union City, CA Inter-modal Station, Phase 1. Modify BART station	923,780
CA	E2008-BUSP-0135	195	Woodland Hills, CA Los Angeles Pierce College Bus Rapid Transit Station Extension	217,360
CA	E2008-BUSP-0136	83	Woodland, CA Yolobus operations, maintenance, administration facility expansion and improvements to increase bus service with alternative fuel buses	434,720
CA	E2008-BUSP-0645		San Francisco Water Transit Authority	2,500,000
CA	E2008-BUSP-0666		Anaheim Regional Intermodal Center, Orange County	588,000
CA	E2008-BUSP-0668		Beach Cities Transit Equipment, Redondo Beach	490,000
CA	E2008-BUSP-0669		Bus Shelters for Bellflower	490,000
CA	E2008-BUSP-0671		Clean Air Bus Purchase Program, Baldwin Park	392,000
CA	E2008-BUSP-0672		Culver City Multi-Modal Light Rail Station	656,600
CA	E2008-BUSP-0673		East County Bus Maintenance Facility, El Cajon	343,000
CA	E2008-BUSP-0675		Fairfield/Vacaville Intermodal Station	196,000
CA	E2008-BUSP-0676		Foothill Transit Oriented Neighborhood	490,000
CA	E2008-BUSP-0677		Inter-County Express Bus, Orange County	490,000
CA	E2008-BUSP-0678		Los Angeles Southwest College Transit Center	392,000
CA	E2008-BUSP-0679		Monrovia Transit Village	490,000
CA	E2008-BUSP-0680		Monterey Salinas Transit Bus Financing	196,000
CA	E2008-BUSP-0682		Municipal Transit Operators Coalition (MTOC)	1,078,000
CA	E2008-BUSP-0684		Palmdale Transportation Center - Parking Lot	245,000
CA	E2008-BUSP-0685		Palo Alto Intermodal Transit Center	392,000
CA	E2008-BUSP-0687		Rio Hondo College Buses - Los Angeles	490,000
CA	E2008-BUSP-0688		Riverside and Corona Transit Centers	686,000
CA	E2008-BUSP-0689		SamTrans Revenue Collection System	490,000
CA	E2008-BUSP-0690		San Diego Balboa Park Trolleys	328,300
CA	E2008-BUSP-0691		San Joaquin Regional Transit District	735,000
CA	E2008-BUSP-0692		San Luis Rey Transit Center	245,000
CA	E2008-BUSP-0693		Santa Maria Intermodal Transit Center	490,000
CA	E2008-BUSP-0694		Street Shuttle Buses for Artesia	588,000
CA	E2008-BUSP-0695		Transit Access Passenger Integration, Los Angeles	735,000
CA	E2008-BUSP-0696		Transit Center, California State Univ, Northridge	392,000
CA	E2008-BUSP-0698		Venice/Robertson Multi-Modal Station	490,000
CA	E2008-BUSP-0699		VTA Zero Emission Bus Demonstration Program	392,000
CA	E2008-BUSP-0700		Yolo County Bus Maintenance Facility Improvements	392,000
CA	E2008-BUSP-0701		Union City Intermodal Station, Union City	392,000
CO	E2008-BUSP-0137	449	City of Aspen, CO Bus and Bus Facilities	152,152
CO	E2008-BUSP-0138	448	City of Durango, CO Bus and Bus Facilities	54,340
CO	E2008-BUSP-0139	509	Colorado Association of Transit Agencies/Colorado Transit Coalition-Colorado Statewide Buses and Bus Facilities	4,076,713
CO	E2008-BUSP-0140	518	Denver Regional Transit District-Bus Maintenance Facility	776,000
CO	E2008-BUSP-0141	520	Denver Regional Transit District-Denver Union Station Multimodal Renovations	517,000
CO	E2008-BUSP-0142	521	Denver Regional Transit District-US 36 Corridor BRT	1,811,000
CO	E2008-BUSP-0143	167	Denver, CO Denver Union Station Inter-modal Center	1,195,480
CO	E2008-BUSP-0146	188	Mountain Express, Crested Butte, CO Bus and Bus Facilities	108,680
CO	E2008-BUSP-0148	445	Roaring Fork Transit Authority, CO Bus and Bus Facilities	163,020
CO	E2008-BUSP-0150	450	Town of Snowmass Village, CO Bus and Bus Facilities	65,208
CO	E2008-BUSP-0702		Colorado Transit Coalition Statewide Request	2,231,784
CT	E2008-BUSP-0152	44	Bridgeport, Connecticut-Greater Bridgeport Transit Authority Bus Facility	108,680
CT	E2008-BUSP-0153	478	Bridgeport, CT Facility Expansion/Improvement	500,000
CT	E2008-BUSP-0154	90	Buses and bus related facilities throughout the State of Connecticut	1,304,160
CT	E2008-BUSP-0155	523	Downtown Middletown, CT, Transportation Infrastructure Improvement Project	2,500,000
CT	E2008-BUSP-0156	218	Enfield, Connecticut-intermodal station	652,080
CT	E2008-BUSP-0158	267	Middletown, CT Construct intermodal center	326,040
CT	E2008-BUSP-0160	269	New London, Connecticut-Intermodal Transportation Center and Streetscapes	108,680
CT	E2008-BUSP-0161	369	Norwalk, Connecticut-Pulse Point Joint Development inter-modal facility	108,680
CT	E2008-BUSP-0162	131	Stonington and Mystic, Connecticut-Intermodal Center parking facility and Streetscape	530,358
CT	E2008-BUSP-0163	32	Torrington, CT Construct bus-related facility (Northwestern Connecticut Central Transit District)	434,720
CT	E2008-BUSP-0164	270	Vernon, Connecticut-Intermodal Center, Parking and Streetscapes	1,651,936
CT	E2008-BUSP-0165	657	Waterbury, CT Bus Maintenance Facility	2,800,000
CT	E2008-BUSP-0703		Bridgeport Intermodal Center	4,307,100
CT	E2008-BUSP-0704		Intermodal Center, Mansfield	490,000
CT	E2008-BUSP-0705		Norwalk Pulse Point Facility Safety Improvements	147,000
CT	E2008-BUSP-0706		Norwich Intermodal Transportation Center	1,969,800
CT	E2008-BUSP-0708		South Norwalk Intermodal Facility Phase 2	490,000
CT	E2008-BUSP-0709		West Haven Intermodal Station	588,000
DC	E2008-BUSP-0710		Union Station Intermodal Transportation Facility	490,000
DC/MD/VA	E2008-BUSP-0711		WMATA Bus and Bus Facilities	1,117,200
DE	E2008-BUSP-0713		Replacement of Fixed Route Transit Buses	656,600
FL	E2008-BUSP-0168	470	Bay County, FL - Transit Facility	517,000
FL	E2008-BUSP-0169	297	Broward County, FL - Purchase Buses and construct bus facilities	434,720

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
FL	E2008-BUSP-0170	69	Broward County, FL Buses & Bus Facilities	1,412,840
FL	E2008-BUSP-0171	479	Broward County-Bus and Bus Facilities	517,000
FL	E2008-BUSP-0172	117	Broward, FL Purchase new articulated buses and bus stop improvements on State Road 7. (SR 7) between Golden Glades Interchange and Glades Road	108,680
FL	E2008-BUSP-0173	439	Design, engineering, right-of-way acquisition, and construction Central Florida Commuter Rail intermodal facilities	1,086,800
FL	E2008-BUSP-0174	453	Central Florida Commuter Rail Intermodal Facilities	780,000
FL	E2008-BUSP-0176	498	City of Gainesville Regional Transit System-Facility Expansion	259,000
FL	E2008-BUSP-0178	23	Design, engineering, right-of-way acquisition and construction intermodal transportation & parking facility, City of Winter Park, Florida	108,680
FL	E2008-BUSP-0179	80	Flagler County, Florida-bus facility	65,208
FL	E2008-BUSP-0181	344	Gainesville, FL Bus Facility Expansion	869,440
FL	E2008-BUSP-0184	538	Hillsborough Area Regional Transit-Bus Rapid Transit Improvements	517,000
FL	E2008-BUSP-0185	539	Hillsborough, FL, Hillsborough Area regional Transit Authority	1,000,000
FL	E2008-BUSP-0188	107	Jacksonville, FL Paratransit Vehicles	24,907
FL	E2008-BUSP-0189	558	Lakeland Area Mass Transit District/Citrus Connection-Capital Funding Needs	517,000
FL	E2008-BUSP-0192	308	Miami Dade, FL N W 7th Avenue Transit Hub	652,080
FL	E2008-BUSP-0193	211	Miami-Dade County, Florida-buses and bus facilities	1,304,160
FL	E2008-BUSP-0194	432	Miami-Dade County, Florida-buses and bus facilities	869,440
FL	E2008-BUSP-0195	133	Miami-Dade County, Florida-Transit Security System	649,906
FL	E2008-BUSP-0196	580	Miami-Dade Transit 7th Avenue NW Transit Hub	259,000
FL	E2008-BUSP-0197	454	Miami-Dade Transit Dadeland South Intermodal Center	520,000
FL	E2008-BUSP-0204	600	Pinellas County Metropolitan Planning Organization-Pinellas Mobility Initiative· BRT and Guide way	259,000
FL	E2008-BUSP-0205	415	Purchase Buses and construct bus facilities in Broward County, FL	489,060
FL	E2008-BUSP-0206	420	Purchase Buses and construct bus facilities in Broward County, FL	434,720
FL	E2008-BUSP-0208	623	South Florida Regional Transportation Authority-West Palm Beach Intermodal Facility	517,000
FL	E2008-BUSP-0210	31	St. Augustine, Florida-Intermodal Transportation Center and related pedestrian and landscape improvements	217,360
FL	E2008-BUSP-0211	390	St. Lucie County, FL Purchase Buses	217,360
FL	E2008-BUSP-0212	402	Tampa, FL Establish Transit Emphasis Corridor Project	163,020
FL	E2008-BUSP-0213	148	Tampa, FL Purchase buses and construct bus facilities	489,060
FL	E2008-BUSP-0714		7th Avenue Transit Hub	490,000
FL	E2008-BUSP-0715		Basic Transit Infrastructure, Hillsborough	294,000
FL	E2008-BUSP-0716		Broward Bus Procurement	196,000
FL	E2008-BUSP-0717		Broward County Southwest Transit Facility	490,000
FL	E2008-BUSP-0718		Flagler County Bus and Bus Facilities	490,000
FL	E2008-BUSP-0719		HART Bus and Paratransit Van Acquisition	294,000
FL	E2008-BUSP-0720		Jacksonville Intermodal Center	490,000
FL	E2008-BUSP-0721		Jacksonville Transportation Authority, Bus and Bus Facilities	490,000
FL	E2008-BUSP-0722		Lakeland Area Mass Transit District, Lakeland	294,000
FL	E2008-BUSP-0723		Lower Keys Shuttle, Key West	294,000
FL	E2008-BUSP-0725		Miami Lakes Transit Program	294,000
FL	E2008-BUSP-0726		Miami-Dade Transit Bus Procurement Plan	686,000
FL	E2008-BUSP-0727		Multi-Modal Transportation Program Boca Raton	343,000
FL	E2008-BUSP-0728		North Orange/South Seminole ITS Enhanced Circulator, City of Orlando	1,149,050
FL	E2008-BUSP-0730		Pasco County Public Transportation (Bus Purchase)	294,000
FL	E2008-BUSP-0734		StarMetro Intelligent Transpo System, Tallahassee	490,000
FL	E2008-BUSP-0736		Town Center Transit Hub in Miramar	392,000
GA	E2008-BUSP-0214	355	Albany, GA Bus replacement	65,208
GA	E2008-BUSP-0215	255	Albany, GA Multimodal Facility	173,888
GA	E2008-BUSP-0216	357	Athens, GA Buses and Bus Facilities	308,651
GA	E2008-BUSP-0217	247	Atlanta, GA Inter-modal Passenger Facility Improvements	434,720
GA	E2008-BUSP-0221	91	Columbus, GA Bus replacement	65,208
GA	E2008-BUSP-0222	510	Columbus, Georgia/Phoenix City, Alabama-National Infantry Museum Multimodal Facility	440,000
GA	E2008-BUSP-0223	49	Columbus, Georgia-Buses & Bus Facilities	210,622
GA	E2008-BUSP-0224	530	Georgia Department of Transportation-Georgia Statewide Bus and Bus Facilities	2,328,000
GA	E2008-BUSP-0225	60	Georgia Statewide Bus Program	43,472
GA	E2008-BUSP-0226	275	Jesup, Georgia-Train Depot intermodal center	217,360
GA	E2008-BUSP-0228	406	Moultrie, GA Inter-modal facility	65,208
GA	E2008-BUSP-0230	256	Savannah, GA Bus and Bus Facilities-Chatham Area Transit	1,086,800
GA	E2008-BUSP-0232	206	Sylvester, GA Inter-modal Facility	43,472
GA	E2008-BUSP-0739		Chatham County, Savannah Bus Facility	392,000
GA	E2008-BUSP-0740		City of Moultrie Intermodal Facility	343,000
HI	E2008-BUSP-0741		Honolulu Bus and Paratransit Replacement Program	196,000
HI	E2008-BUSP-0742		Public Transportation Vehicle Enhancement Project	392,000
HI	E2008-BUSP-0743		Rural Bus Program for Hawaii, Maui and Kauai Counties	1,528,800
IA	D2008-BUSP-004		University of Iowa/Cambus	1,000,000
IA	E2008-BUSP-0235	440	Ames, Iowa-Expansion of CyRide Bus Maintenance Facility	434,720
IA	E2008-BUSP-0236	475	Black Hawk County, IA UNI Multimodal Project	776,000
IA	E2008-BUSP-0744		Coralville Intermodal Facility	656,600
ID	E2008-BUSP-0239	176	Boise, ID-Multimodal facility	978,120
ID	E2008-BUSP-0240	543	Idaho Department of Transportation - Idaho Statewide ITS for Public Transportation	388,000
ID	E2008-BUSP-0241	652	Valley Regional Transit, ID-Downtown Boise Multimodal	1,500,000
ID	E2008-BUSP-0746		Idaho Transit Coalition Buses and Bus Facilities	2,697,546

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
ID	E2008-BUSP-0747		Treasure Valley Transit Facilities	282,240
IL	E2008-BUSP-0242	433	Centralia, Illinois-South Central Mass Transit District Improvements	86,944
IL	E2008-BUSP-0243	226	Champaign, IL-Construct park and ride lot with attached daycare facility	326,040
IL	E2008-BUSP-0249	296	Elgin to Rockford, Illinois-Intermodal stations along planned Metra Union Pacific West Line extension alignment, including necessary alternatives anal	108,680
IL	E2008-BUSP-0254	429	Normal, Illinois-Multimodal Transportation Center	434,720
IL	E2008-BUSP-0255	163	Normal, Illinois-Multimodal Transportation Center, including facilities for adjacent public and nonprofit uses	1,086,800
IL	E2008-BUSP-0259	632	Springfield, IL, Multimodal Transit Terminal	1,300,000
IL	E2008-BUSP-0707		Pace Bus Park-N-Ride Facility, Plainfield	245,000
IL	E2008-BUSP-0748		Berwyn Intermodal Transit Facility	392,000
IL	E2008-BUSP-0751		Downstate Illinois Replacement Buses	2,940,000
IL	E2008-BUSP-0752		Bus and Bus Facilities in Bloomington, Galesburg, Macomb, Peoria, and Rock Island	2,450,000
IL	E2008-BUSP-0753		Macomb Maintenance Facility	245,000
IL	E2008-BUSP-0756		Mobile Data Terminal/Chicago Paratransit Vehicles	196,000
IL	E2008-BUSP-0757		Mobile data terminals for Pace, Arlington Hts	392,000
IL	E2008-BUSP-0758		Multimodal Center, Normal	245,000
IN	E2008-BUSP-0263	109	Bloomington, IN-Bus and transfer facility	1,045,502
IN	E2008-BUSP-0264	529	Gary, Indiana, Gary Airport Station Modernization and Shuttle Service Project	450,000
IN	E2008-BUSP-0265	544	Indianapolis Downtown Transit Center	1,100,000
IN	E2008-BUSP-0266	235	Indianapolis, IN Construct the Ivy Tech State College Multi-Modal Facility	1,086,800
IN	E2008-BUSP-0267	5	Indianapolis, IN Downtown Transit Center	3,043,040
IN	E2008-BUSP-0268	220	Indianapolis, IN IndySMART program to relieve congestion, improve safety and air quality	434,720
IN	E2008-BUSP-0271	546	Ivy Tech State College, Indiana Multimodal Center	250,000
IN	E2008-BUSP-0763		City of Anderson	392,000
IN	E2008-BUSP-0765		Statewide Electric Hybrid Bus Initiative by the Indiana Transit Association	1,760,000
KY	D2008-BUSP-006		Kentucky Transportation Cabinet	4,587,354
KY	E2008-BUSP-0280	639	Transit Authority of Lexington, KY-Rehabilitation of Building for Maintenance and Administration	1,035,000
KY	E2008-BUSP-0771		Bus Replacement Program, TANK, FT. Wright	245,000
KY	E2008-BUSP-0772		Fulton County Transit Authority	392,000
KY	E2008-BUSP-0773		Paducah Area Transit System	1,960,000
KY	E2008-BUSP-0775		Transit Authority of Northern Kentucky Bus Replacement Project	980,000
KY	E2008-BUSP-0776		Transportation to Wellness, Covington	196,000
KS	E2008-BUSP-0767		Bus Fleet Replacement, Topeka Metropolitan Transit	294,000
KS	E2008-BUSP-0768		Bus Replacement for Unified Government of Wyandotte County	686,000
LA	E2008-BUSP-0281	639	Capital Area Transit System-Baton Rouge BRT	776,000
LA	E2008-BUSP-0287	484	Louisiana-Construct pedestrian walkways between Caddo St. and Milam St. along Edwards St. in Shreveport, LA	220,360
LA	E2008-BUSP-0290	170	New Orleans, LA Regional Planning Commission, bus and bus facilities	108,680
LA	E2008-BUSP-0779	243	SporTran Buses for the City of Shreveport	245,000
MA	E2008-BUSP-0296	118	Attleboro, MA Construction, engineering and site improvements at the Attleboro Intermodal Center	434,720
MA	E2008-BUSP-0298	59	Beverly, MA Design and Construct Beverly Deport Intermodal Transportation Center	434,720
MA	E2008-BUSP-0299	273	Boston, MA Harbor Park Pavilion & Inter-modal Station	271,700
MA	E2008-BUSP-0302	124	Haverhill, MA Design and Construct Inter-modal Transit Parking Improvements	1,217,216
MA	E2008-BUSP-0303	21	Hingham, MA Hingham Marine Intermodal Center Improvements: Enhance public transportation infrastructure/parking	1,956,240
MA	E2008-BUSP-0307	42	Medford, MA Downtown revitalization featuring construction of a 200 space Park and Ride Facility	434,720
MA	E2008-BUSP-0308	257	Newburyport, MA Design and Construct Intermodal Facility	434,720
MA	E2008-BUSP-0310	161	Revere, MA Inter-modal transit improvements in the Wonderland station (MBTA) area	391,248
MA	E2008-BUSP-0311	88	Rockport, MA Rockport Commuter Rail Station Improvements	597,740
MA	E2008-BUSP-0312	370	Salem, MA Design and Construct Salem Intermodal Transportation Center	434,720
MA	E2008-BUSP-0313	205	Woburn, MA Construction of an 89 space park and ride facility to be located on Magazine Hill, in the Heart of Woburn Square	391,248
MA	E2008-BUSP-0646		Massachusetts Bay Transportation Authority Ferry System	2,500,000
MA	E2008-BUSP-0780		Attleboro Intermodal Center, Attleboro	490,000
MA	E2008-BUSP-0782		Bus Fleet Replacement Project, WRTA, Worcester	196,000
MA	E2008-BUSP-0783		Commonwealth Avenue Green Line Station	656,600
MA	E2008-BUSP-0784		Construction of Amesbury Bus Facility	245,000
MA	E2008-BUSP-0787		Intermodal Stations in Salem and Beverly	245,000
MA	E2008-BUSP-0788		MART Bus Commuter Facilities	735,000
MA	E2008-BUSP-0789		MART Commuter Parking and Facilities	735,000
MA	E2008-BUSP-0790		MBTA Commuter Rail Station Improvements, Melrose	686,000
MA	E2008-BUSP-0791		Merrimack Valley RTA Buses	392,000
MA	E2008-BUSP-0792		Newton Rapid Transit Handicap Accessibility	392,000
MA/GA/CA	E2008-BUSP-0953		Fuel Cell Bus Program	9,550,000
MD	E2008-BUSP-0314	122	Baltimore, MD Construct Intercity Bus Intermodal Terminal	1,086,800
MD	E2008-BUSP-0315	303	Howard County, MD Construct Central Maryland Transit Operations and Maintenance Facility	1,086,800
MD	E2008-BUSP-0316	542	Howard County, MD Construct Central Maryland Transit Operations and Maintenance Facility	200,000
MD	E2008-BUSP-0318	573	Maryland Statewide Bus Facilities and Buses	6,500,000
MD	E2008-BUSP-0319	224	Montgomery County, MD Wheaton CBD Intermodal Access Program	108,680
MD	E2008-BUSP-0320	214	Mount Rainier, MD Intermodal and Pedestrian Project	97,812
MD	E2008-BUSP-0323	629	Southern Maryland Commuter Initiative	3,000,000
MD	E2008-BUSP-0793		Bi-County Transit Center, Langley Park	818,300
MD	E2008-BUSP-0794		Central MD Transit Operations Facility, Anne Arundel County	656,600

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
MD	E2008-BUSP-0795		Maryland Statewide Bus and Bus Facility Program	735,000
MD	E2008-BUSP-0796		Southern Maryland Commuter Bus Park and Ride Lots	1,274,000
MI	E2008-BUSP-0327	204	Boysville of Michigan Transportation System	730,330
MI	E2008-BUSP-0329	319	Detroit Bus Maintenance Facility	1,956,240
MI	E2008-BUSP-0330	522	Detroit Department of Transportation Bus Replacement	2,200,000
MI	E2008-BUSP-0331	2	Detroit Fare Collection System	869,440
MI	E2008-BUSP-0332	156	Detroit Replacement Buses	1,086,800
MI	E2008-BUSP-0333	320	Detroit, MI Bus Replacement	1,630,200
MI	E2008-BUSP-0334	9	Detroit, MI Enclosed heavy-duty maintenance facility with full operational functions for up to 300 buses	978,120
MI	E2008-BUSP-0341	572	Marquette County, Michigan Transit Authority Bus passenger facility	300,000
MI	E2008-BUSP-0342	581	Michigan Department of Transportation (MDOT) Bus Replacement	439,832
MI	E2008-BUSP-0344	601	Port Huron, Michigan, Blue Water Area Transportation Commission, Bus Maintenance Facility	1,500,000
MI	E2008-BUSP-0798		1st District Bus Replacement and Facilities	1,602,438
MI	E2008-BUSP-0800		Ann Arbor Transportation Authority Transit Center	735,000
MI	E2008-BUSP-0803		Bus Component Overhaul, Detroit	245,000
MI	E2008-BUSP-0804		Bus Maintenance Facility, Detroit	735,000
MI	E2008-BUSP-0813		Midland Dial-a-Ride (Midland County)	40,220
MI	E2008-BUSP-0815		Replacement Buses, Detroit	245,000
MI	E2008-BUSP-0345		Suburban Mobility Authority for Regional Transportation (SMART) Bus Maintenance Facility	2,000,000
MN	E2008-BUSP-0346	40	Duluth, MN Downtown Duluth Area Transit facility improvements	434,720
MN	E2008-BUSP-0347	177	Fond du Lac Reservation, MN Purchase buses	32,604
MN	E2008-BUSP-0348	577	Metro Transit/Metropolitan Council, MN-Bus/Bus Capital	2,457,000
MN	E2008-BUSP-0349	185	St. Paul to Hinckley, MN Construct bus amenities along Rush Line Corridor	326,040
MN	E2008-BUSP-0350	342	St. Paul, MN Union Depot Multi Modal Transit Facility	434,720
MN	E2008-BUSP-0819		Albert Lea Transit Facility Rehabilitation	294,000
MN	E2008-BUSP-0820		Greater Minnesota Transit Bus and Bus Facilities	454,000
MN	E2008-BUSP-0822		Transit Bus Facilities, Duluth	392,000
MN	E2008-BUSP-0823		Union Depot Multi-Modal Hub, St. Paul	656,600
MN	E2008-BUSP-0824		White Earth Tribal Nation SMART Transit and Buses	392,000
MO	E2008-BUSP-0351	473	Bi-State Development Agency-St Louis Bridge Repair/Reconstruction, for any activity eligible under section 5309	1,293,000
MO	E2008-BUSP-0352	474	Bi-State Development Agency-St. Louis Metro Bus Fare Collection Program	4,139,000
MO	E2008-BUSP-0353	345	Kansas City, MO Bus Transit Infrastructure	217,360
MO	E2008-BUSP-0354	598	OATS, Incorporated, MO-ITS Information and Billing System and Bus Facilities	2,920,672
MO	E2008-BUSP-0355	624	Southeast Missouri Transportation Service-Bus Project	225,023
MO	E2008-BUSP-0826		Forest Park Circulator/I-64 Closure Alleviation	735,000
MO	E2008-BUSP-0827		Franklin County Transit	172,480
MO	E2008-BUSP-0828		Kansas City Area Transportation Authority Bus Replacement (KCATA)	735,000
MO	E2008-BUSP-0829		Southeast Missouri Transportation Service (SMTS)	735,000
MO	E2008-BUSP-0830		St. Louis Metro Bus & Paratransit Rolling Stock	490,000
MS	E2008-BUSP-0356	130	Coahoma County, Mississippi Purchase buses for the Aaron E. Henry Community Health Services Center, Inc /DARTS transit service	32,604
MS	E2008-BUSP-0357	547	Jackson State University, MS-Busing Project	1,293,000
MS	E2008-BUSP-0832		Coast Transit Authority Bus	2,940,000
MS	E2008-BUSP-0834		LOU Public Transit System, Oxford	857,500
MT	E2008-BUSP-0358	129	Bozeman, Montana-Vehicular Parking Facility	869,440
MT	E2008-BUSP-0359	476	Bozeman, MT, Intermodal and parking facility	175,000
MT	E2008-BUSP-0360	584	Montana Department of Transportation-Statewide Bus Facilities and Buses	776,000
MT	E2008-BUSP-0835		Bus and Bus Facilities	656,600
MT	E2008-BUSP-0836		CSKT Reservation Transportation Program	229,810
NC	D2008-BUSP-010		Chapel Hill Transit	3,000,000
NC	D2008-BUSP-012		Durham Area Transit Authority	3,000,000
NC	E2008-BUSP-0361	490	Charlotte Area Transit System/City of Charlotte-Charlotte Multimodal Station	2,587,000
NC	E2008-BUSP-0362	217	Charlotte, NC Construct Charlotte Multimodal Station	1,695,408
NC	E2008-BUSP-0364	228	Charlotte, North Carolina-Multimodal Station	869,440
NC	E2008-BUSP-0365	154	City of Greenville, NC Expansion Buses and Greenville Intermodal Center	774,671
NC	E2008-BUSP-0367	302	Greensboro, North Carolina-Piedmont Authority for Regional Transportation Multimodal Transportation Center	2,721,347
NC	E2008-BUSP-0371	594	North Carolina Department of Transportation-North Carolina Statewide Bus and Bus Facilities	3,770,606
NC	E2008-BUSP-0373	134	Town of Chapel Hill, NC Park and Ride Lot	326,040
NC	E2008-BUSP-0837		Asheville Replacement Buses, Asheville	294,000
NC	E2008-BUSP-0838		North Carolina Statewide Bus and Bus Facilities	1,101,270
NC	E2008-BUSP-0840		Intermodal Transportation Facility, Winston-Salem	392,000
ND	E2008-BUSP-0375	595	North Dakota Department of Transportation/Statewide Bus	679,500
ND	E2008-BUSP-0841		North Dakota Statewide Transit	1,134,330
NE	E2008-BUSP-0377	160	Kearney, Nebraska-RYDE Transit Bus Maintenance and Storage Facility	434,720
NE	E2008-BUSP-0378	586	Nebraska Department of Roads-Bus Maintenance and Storage Facility for RYDE in Kearney, NE	517,000
NE	E2008-BUSP-0379	587	Nebraska Department of Roads-Statewide Vehicles, Facilities, and Related Equipment Purchases	1,035,000
NE	E2008-BUSP-0380	240	Nebraska-statewide transit vehicles, facilities, and related equipment	869,440
NH	D2008-BUSP-013		New Hampshire Department of Transportation	1,772,800
NH	E2008-BUSP-0382	418	Windham, New Hampshire--Construction of Park and Ride Bus facility at Exit 3	804,232
NH	E2008-BUSP-0843		I-89 Park and Ride/Bus Terminal	490,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
NJ	E2008-BUSP-0384	86	Burlington County, NJ-BurLink and Burlington County Transportation System vehicles and equipment	869,440
NJ	E2008-BUSP-0385	28	Camden, NJ Construction of the Camden County Intermodal Facility in Cramer Hill	217,360
NJ	E2008-BUSP-0386	12	Hoboken, NJ Rehabilitation of Hoboken Inter-modal Terminal	825,968
NJ	E2008-BUSP-0388	389	Lakewood, NJ-Ocean County Bus service and parking facilities	652,080
NJ	E2008-BUSP-0389	138	Long Branch, NJ Determine scope, engineering, design and construct facilities for ferry service from Long Branch, NJ to New York City	869,440
NJ	E2008-BUSP-0390	38	Monmouth County, NJ Construction of main bus facility for Freehold Township, including a terminal and repair shop	434,720
NJ	E2008-BUSP-0391	209	Morristown, New Jersey-Intermodal Historic Station	217,360
NJ	E2008-BUSP-0394	328	New Jersey Transit Community Shuttle Buses	108,680
NJ	E2008-BUSP-0395	13	Newark, NJ Penn Station Intermodal Improvements including the rehabilitation of boarding areas	217,360
NJ	E2008-BUSP-0397	393	South Amboy, NJ Construction of improvements to facilities at South Amboy Station under S Amboy, NJ Regional Intermodal Initiative	1,738,880
NJ	E2008-BUSP-0398	618	South Brunswick, NJ Transit System	1,000,000
NJ	E2008-BUSP-0399	643	Trenton Intermodal Station	4,000,000
NJ	E2008-BUSP-0400	61	Trenton, New Jersey-Trenton Train Station Rehabilitation	326,040
NJ	E2008-BUSP-0401	181	Trenton, NJ Development of Trenton Trolley System	217,360
NJ	E2008-BUSP-0402	62	Trenton, NJ Reconstruction and rehabilitation of the Trenton Train Station	1,521,520
NJ	E2008-BUSP-0649		Camden, NJ Ferry System	1,000,000
NJ	E2008-BUSP-0844		Bus Shuttle Project for Seniors, Irvington	392,000
NJ	E2008-BUSP-0845		Hudson County Intermodal Station Pedestrian Bridge	294,000
NJ	E2008-BUSP-0846		Lakewood Multimodal Facility, Phase I	1,313,200
NJ	E2008-BUSP-0847		Morris County Intermodel Park and Ride	490,000
NJ	E2008-BUSP-0848		Newark Penn Station Intermodel Improvement	1,313,200
NJ	E2008-BUSP-0849		Northern New Jersey Intermodal Stations & Park-N-Ride	196,000
NJ	E2008-BUSP-0850		Northwest NJ Intermodal Transit Improvements	588,000
NJ	E2008-BUSP-0851		Passaic/Bergen Intermodal Facilities	490,000
NJ	E2008-BUSP-0852		South Amboy Intermodal Transportation Initiative	490,000
NJ	E2008-BUSP-0853		West Orange Township Senior Citizen & Handicap Shuttle Bus	196,000
NM	E2008-BUSP-0404	562	Las Cruces, NM, Road Runner Bus and Bus Facilities	300,000
NM	E2008-BUSP-0855		Bus and Bus Facilities, City of Roswell	294,000
NM	E2008-BUSP-0856		Bus and Bus Facilities, Grant County	984,900
NM	E2008-BUSP-0857		Fleet and Capital Items Los Alamos County Transit System	588,000
NM	E2008-BUSP-0858		New Mexico Commuter Rail, Santa Fe/Bernalillo Intermodal Facility	1,082,900
NM	E2008-BUSP-0859		Para-Transit Van Replacement, Las Cruces	146,700
NM	E2008-BUSP-1000	460	Mid-Region Council of Governments 0, Mexico, public transportation buses, bus-related equipment and facilities, and intermodal terminals in Albuquerque	500,000
NV	E2008-BUSP-0866		Statewide Bus and Bus Facilities	735,000
NY	D2008-BUSP-016		New York Metropolitan Transportation Authority, New York City Transit	7,000,000
NY	E2008-BUSP-0412	74	Albany-Schenectady, NY Bus Rapid Transit Improvements in NY Route 5. Corridor.	217,360
NY	E2008-BUSP-0413	463	Albany-Schenectady, NY, Bus Rapid Transit Improvements in NY Route 5	1,200,000
NY	E2008-BUSP-0414	271	Bronx, NY Botanical Garden metro North Rail station Intermodal Facility	217,360
NY	E2008-BUSP-0415	20	Bronx, NY Establish an intermodal transportation facility at the Wildlife Conservation Society Bronx Zoo	217,360
NY	E2008-BUSP-0416	279	Bronx, NY Establish an intermodal transportation facility at the Wildlife Conservation Society Bronx Zoo	217,360
NY	E2008-BUSP-0418	338	Bronx, NY Intermodal Facility near Exit 6. of the Bronx River Parkway	54,340
NY	E2008-BUSP-0420	10	Bronx, NY Wildlife Conservation Society intermodal transportation facility at the Bronx Zoo	95,095
NY	E2008-BUSP-0421	197	Brooklyn, NY Construct a multi-modal transportation facility	304,304
NY	E2008-BUSP-0422	408	Brooklyn, NY Construct a multi-modal transportation facility in the vicinity of Downstate Medical Center	217,360
NY	E2008-BUSP-0423	41	Brooklyn, NY New Urban Center-Broadway Junction Intermodal Center	208,666
NY	E2008-BUSP-0426	192	Buffalo, NY Inter-modal Center Parking Facility	217,360
NY	E2008-BUSP-0427	245	Bus to provide York-town, New York internal circulator to provide transportation throughout the Town	40,212
NY	E2008-BUSP-0428	230	Construction of Third Bus Depot on Staten Island	2,608,320
NY	E2008-BUSP-0429	146	Cooperstown, New York-Intermodal Transit Center	1,086,800
NY	E2008-BUSP-0430	363	Corning, New York-Transportation Center	1,086,800
NY	E2008-BUSP-0431	512	Transportation Center Enhancements, Corning, NY	550,000
NY	E2008-BUSP-0433	300	Geneva, New York-Multimodal facility-Construct passenger rail center	108,680
NY	E2008-BUSP-0434	317	Jamestown, NY Rehabilitation of Intermodal Facility and associated property	434,720
NY	E2008-BUSP-0435	343	Kings County, NY Construct a multi-modal transportation facility	217,360
NY	E2008-BUSP-0436	368	Nassau County, NY Conduct planning and engineering for transportation system (HUB)	1,521,520
NY	E2008-BUSP-0437	585	Nassau County, NY, Conduct planning, engineering, and construction for transportation system (HUB)	1,300,000
NY	E2008-BUSP-0439	376	New York City, NY Purchase Handicapped-Accessible Livery Vehicles	217,360
NY	E2008-BUSP-0440	590	New York City, NY, Bronx Zoo Intermodal Facility	550,000
NY	E2008-BUSP-0441	591	New York City, NY, Enhance Transportation Facilities Near W. 65th Street and Broadway	550,000
NY	E2008-BUSP-0443	593	New York, Improvements to Moynihan Station	1,300,000
NY	E2008-BUSP-0445	373	Niagara Frontier Transportation Authority, NY Replacement Buses	217,360
NY	E2008-BUSP-0447	379	Ramapo, NY Transportation Safety Field Bus	54,340
NY	E2008-BUSP-0448	252	Rochester, New York-Renaissance Square transit center	978,120
NY	E2008-BUSP-0449	430	Rochester, New York-Renaissance Square Transit Center	489,060
NY	E2008-BUSP-0450	607	Rochester, NY, Renaissance Square Intermodal Facility, Design and Construction	1,600,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
NY	E2008-BUSP-0451	609	Rockland County, NY Express Bus	800,000
NY	E2008-BUSP-0452	386	Suffolk County, NY Design and construction of intermodal transit facility in Wyandanch	999,856
NY	E2008-BUSP-0453	353	Suffolk County, NY Purchase four handicapped accessible vans to transport veterans to and from the VA facility in Northport	60,831
NY	E2008-BUSP-0454	635	Syracuse, New York, Syracuse University Connective Corridor Transit Project	1,100,000
NY	E2008-BUSP-0456	289	Town of Warwick, NY Bus Facility Warwick Transit System	119,548
NY	E2008-BUSP-0457	451	Utica, New York Transit Multimodal Facilities	1,300,000
NY	E2008-BUSP-0651	666	Staten Island Ferry	1,000,000
NY	E2008-BUSP-0868		Bronx Zoo Intermodal Transportation Facility	588,000
NY	E2008-BUSP-0869		Bus Replacement/Service Expansion, Suffolk Co.	245,000
NY	E2008-BUSP-0870		Central New York Regional Transportation Authority	1,568,000
NY	E2008-BUSP-0871		City of Poughkeepsie Transit Hub	764,400
NY	E2008-BUSP-0872		CNYRTA Transit Garage - Oneida County, Utica	392,000
NY	E2008-BUSP-0873		Intermodal Transit Center, Port Chester	686,000
NY	E2008-BUSP-0874		Jamaica Intermodal Facilities, Jamaica	490,000
NY	E2008-BUSP-0875		Lincoln Center Corridor Redevelopment Project	490,000
NY	E2008-BUSP-0877		Nassau County Hub	1,528,800
NY	E2008-BUSP-0878		NFTA, Purchase Hybrid Buses	294,000
NY	E2008-BUSP-0879		Preliminary Design of a Saratoga Bus Facility	245,000
NY	E2008-BUSP-0880		Replacement Buses for the Westchester County Bee-Line Bus Systems	764,400
NY	E2008-BUSP-1001		New York City, NY rehabilitation of subway stations to include passenger access improvements including escalators or installation of infrastructure for	50,000
OH	E2008-BUSP-0467	89	Cincinnati, Ohio-Metro Regional Transit Hub Network Eastern Neighborhoods	201,058
OH	E2008-BUSP-0470	179	Cleveland, OH Construct passenger inter-modal center near Dock 32	186,930
OH	E2008-BUSP-0471	411	Cleveland, OH Construction of an inter-modal facility and related improvements at University Hospitals facility on Euclid Avenue	217,360
OH	E2008-BUSP-0474	198	Cleveland, Ohio-Euclid Avenue University Hospital intermodal facility	978,120
OH	E2008-BUSP-0478	292	Cuyahoga County, Ohio-Ohio Department of Transportation transit improvements	32,604
OH	E2008-BUSP-0482	309	Elyria, OH Construct the New York Central Train Station into an intermodal transportation hub	445,153
OH	E2008-BUSP-0483	349	Kent, OH Construct Kent State University Intermodal Facility serving students and the general public	217,360
OH	E2008-BUSP-0484	104	Marietta, Ohio Construction of transportation hub to accommodate regional bus traffic	108,680
OH	E2008-BUSP-0486	87	Niles, OH Acquisition of bus operational and service equipment of Niles Trumbull Transit	43,472
OH	E2008-BUSP-0487	385	Springfield, OH-City of Springfield Bus Transfer Station and Associated Parking	54,340
OH	E2008-BUSP-0489	64	Zanesville, OH-bus system signage and shelters	17,661
OH	E2008-BUSP-0881		Bus Purchase, Portage Area Transit, Kent	490,000
OH	E2008-BUSP-0882		Central Ohio Transit Authority Bus Replacement	588,000
OH	E2008-BUSP-0883		Greater Dayton RTA Bus Replacement	490,000
OH	E2008-BUSP-0884		Kent State Geauga, Regional Transit Shelter	441,000
OH	E2008-BUSP-0885		Kent State Multimodal Transportation Facility	196,000
OH	E2008-BUSP-0886		Senior Transportation Connection	1,197,560
OH	E2008-BUSP-0888		West Price Hill Park and Ride	196,000
OR	D2008-BUSP-018		Lane Transit District (Eugene)	1,000,000
OR	E2008-BUSP-0496	159	Eugene, OR Lane Transit District, Vehicle Replacement	225,662
OR	E2008-BUSP-0499	168	Lane Transit District, Bus Rapid Transit Progressive Corridor Enhancements	644,172
OR	E2008-BUSP-0506	216	Wilsonville, OR South Metro Area Rapid Transit, bus and bus facilities	54,340
PA	E2008-BUSP-0509	456	Altoona Multimodal Transportation Facility Parking Garage	260,000
PA	E2008-BUSP-0510	465	AMTRAN Altoona, PA-Buses and Transit System Improvements	776,000
PA	E2008-BUSP-0512	471	Beaver County, PA Transit Authority Bus Replacement/ Related Equipment Replacement	259,000
PA	E2008-BUSP-0513	481	Butler Township, PA-Cranbury Area Transit Service	905,000
PA	E2008-BUSP-0515	482	Cambria County, PA Transit Authority-Bus Replacements	776,000
PA	E2008-BUSP-0518	513	County of Lackawanna Transit System-Scranton Intermodal Transportation Center	259,000
PA	E2008-BUSP-0520	81	Easton, Pennsylvania-Design and construct Intermodal Transportation Center	434,720
PA	E2008-BUSP-0521	524	Erie, PA Metropolitan Transit Authority-Bus Acquisitions	259,000
PA	E2008-BUSP-0522	431	Erie, PA-EMTA Vehicle Acquisition	434,720
PA	E2008-BUSP-0523	331	Gettysburg, Pennsylvania-transit transfer center	195,407
PA	E2008-BUSP-0524	458	Hershey, Pennsylvania Intermodal Center and Parking Garage	65,000
PA	E2008-BUSP-0527	37	Lancaster, PA-bus replacement	206,492
PA	E2008-BUSP-0528	559	Lancaster, PA-Intermodal Project	181,000
PA	E2008-BUSP-0530	583	Monroe Township, PA-Clarion County Buses	136,654
PA	E2008-BUSP-0532	201	Philadelphia, PA Cruise Terminal Transportation Ctr. Phila. Naval Shipyard	760,760
PA	E2008-BUSP-0533	137	Philadelphia, PA Improvements to the existing Penns Landing Ferry Terminal	869,440
PA	E2008-BUSP-0534	413	Philadelphia, PA Penns Landing water shuttle parking lot expansion and water shuttle ramp infrastructure construction	239,096
PA	E2008-BUSP-0535	22	Philadelphia, PA Philadelphia Zoo Intermodal Transportation project w/parking consolidation, pedestrian walkways, public transportation complements &	1,086,800
PA	E2008-BUSP-0536	274	Philadelphia, PA SEPTAs Market St. Elevated Rail project in conjunction with Philadelphia Commercial Development Corporation for improvements	304,304
PA	E2008-BUSP-0537	316	Philadelphia, Pennsylvania-SEPTA Market Street Elevated Line parking facility	869,440
PA	E2008-BUSP-0539	397	Pottsville, PA Union Street Trade and Transfer Center Intermodal Facility	434,720
PA	E2008-BUSP-0542	424	Sharon, PA-Bus Facility Construction	108,680
PA	E2008-BUSP-0545	628	Southeastern Pennsylvania Transportation Authority-Villanova-SEPTA Intermodal	776,000
PA	E2008-BUSP-0546	642	Transit Authority of Warren County, PA-Impact Warren	259,000
PA	E2008-BUSP-0548	660	Westmoreland County Transit Authority, PA-Bus Replacement	259,000
PA	E2008-BUSP-0550	662	Williamsport, PA Bureau of Transportation-Williamsport Trade and Transit Centre Expansion	776,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
PA	E2008-BUSP-0551	65	York, Pennsylvania-Rabbit Transit facilities and communications equipment	602,196
PA	E2008-BUSP-0652		Philadelphia Penn's Landing Ferry Terminal	1,000,000
PA	E2008-BUSP-0893		69th Street Terminal Parking Facility, Upper Darby Township	490,000
PA	E2008-BUSP-0894		Advanced CNG Buses Fleet Replacement - CATA	735,000
PA	E2008-BUSP-0895		Altoona, PA Intermodal Transportation Center	328,300
PA	E2008-BUSP-0896		Bethlehem Transit Transfer Center	490,000
PA	E2008-BUSP-0898		Church Street Transportation Center	2,352,000
PA	E2008-BUSP-0899		Expansion of the Scranton Electric Trolley System	196,000
PA	E2008-BUSP-0900		Franklin Street Station Intermodal, Reading	1,225,000
PA	E2008-BUSP-0904		Replacement Buses, Centre Area Transportation Authority (CATA)	686,000
PA	E2008-BUSP-0906		SEPTA Interoperability Communications Initiative	656,600
PA	E2008-BUSP-0907		Vehicle Replacement - DuFAST	588,000
PA	E2008-BUSP-0908		Union Station Intermodal Trade and Transit Center	392,000
PR	E2008-BUSP-0552	128	Bayamon, Puerto Rico-bus terminal	130,416
PR	E2008-BUSP-0553	421	Bayamon, Puerto Rico-Purchase of Trolley Cars	184,756
PR	E2008-BUSP-0556	152	San Juan, Puerto Rico Metropolitan Bus Authority -- -bus security equipment	652,080
PR	E2008-BUSP-0557	71	San Juan, Puerto Rico Metropolitan Bus Authority	217,360
PR	E2008-BUSP-0558	58	Yabucoca, Puerto Rico-Trolley Buses	38,038
RI	E2008-BUSP-0560	115	Rhode Island Statewide Bus Fleet	1,304,160
RI	E2008-BUSP-0909		Rhode Island Public Transit Authority Intelligent Transportation Systems	1,341,522
SC	E2008-BUSP-0562	533	Greensville, SC Transit Authority-City of Greenville Multimodal Transportation Center Improvements	39,790
SC	E2008-BUSP-0563	619	South Carolina Department of Transportation-Transit Facilities Construction Program	517,000
SC	E2008-BUSP-0564	620	South Carolina Department of Transportation-Vehicle Acquisition Program	2,069,000
SC	E2008-BUSP-0910		Columbia Transit Facility	735,000
SD	D2008-BUSP-020		Prairie Hills Transit (Spearfish)	1,598,000
SD	E2008-BUSP-0565	621	South Dakota Department of Transportation-Statewide Buses and Bus Facilities	2,215,000
TN	E2008-BUSP-0566	237	Knoxville, Tennessee-Central Station Transit Center	2,217,072
TN	E2008-BUSP-0567	554	Knoxville, TN-Central Station	647,000
TN	E2008-BUSP-0572	30	Sevier County, Tennessee-U.S 441 bus rapid transit	54,340
TN	E2008-BUSP-0573	636	Tennessee Department of Transportation-Statewide Tennessee Transit ITS and Bus Replacement Project	3,104,000
TN	E2008-BUSP-0912		Memphis Area Transit Authority	490,000
TN	E2008-BUSP-0913		MTSU Intermodal Transportation Hub	196,000
TN	E2008-BUSP-0914		Tennessee DOT, Bus and Bus Facilities Replacement	3,880,242
TX	D2008-BUSP-023		Texas Department of Transportation	11,628,120
TX	D2008-BUSP-024		VIA Metropolitan Transit Authority (San Antonio)	2,000,000
TX	E2008-BUSP-0575	426	Abilene, TX Vehicle replacement and facility improvements for transit system	86,944
TX	E2008-BUSP-0578	153	Bryan, TX The District-Bryan Intermodal Transit Terminal and Parking Facility	652,080
TX	E2008-BUSP-0579	485	Capital Metropolitan Transportation Authority, TX-Bus Replacements	2,587,000
TX	E2008-BUSP-0580	455	Carrollton, Texas Downtown Regional Multimodal Transit Hub	260,000
TX	E2008-BUSP-0581	506	City of Round Rock, TX-Downtown Intermodal Transportation Terminal	259,000
TX	E2008-BUSP-0582	111	Construct West Houston and Fort Bend County, Texas-bus transit corridor	434,720
TX	E2008-BUSP-0584	515	Dallas Area Rapid Transit-Bus passenger Facilities	259,000
TX	E2008-BUSP-0585	336	Dallas, TX Bus Passenger Facilities	2,782,208
TX	E2008-BUSP-0586	196	Design Downtown Carrollton, Texas Regional Multi-Modal Transit Hub Station	434,720
TX	E2008-BUSP-0588	536	Harris County-West Houston-Fort Bend Bus Transit Corridor: Uptown Westpark Terminal	259,000
TX	E2008-BUSP-0589	561	Laredo-North Laredo Transit Hub-Bus Maintenance Facility	776,000
TX	E2008-BUSP-0590	24	Roma, TX Bus Facility	114,114
TX	E2008-BUSP-0915		Abilene Paratransit Vehicle Replacement	431,200
TX	E2008-BUSP-0917		Capital Metropolitan Transportation Authority, Austin	254,800
TX	E2008-BUSP-0918		City of El Paso Paratransit Van Replacement	490,000
TX	E2008-BUSP-0919		City of El Paso, Neighborhood Circulator	392,000
TX	E2008-BUSP-0921		Concho Valley Multi-modal Terminal Building	245,000
TX	E2008-BUSP-0923		Fort Bend County Sienna Plantation Park and Ride	294,000
TX	E2008-BUSP-0925		Greater Southeast District Transit Facility	196,000
TX	E2008-BUSP-0926		Houston Downtown Clean Fuel Transit Initiative	1,470,000
TX	E2008-BUSP-0928		Rio Metro Intercity Transit, Hidalgo County	490,000
TX	E2008-BUSP-0929		The Woodlands Capital Cost of Contracting	294,000
TX	E2008-BUSP-0930		Urban Commuter Rail Circulator Vehicles	245,000
UT	E2008-BUSP-0596	651	Utah Statewide Bus and Bus Facilities	923,749
VA	D2008-BUSP-026		Transportation District Commission of Hampton Roads	2,000,000
VA	E2008-BUSP-0597	409	Alexandria, VA Eisenhower Avenue Inter-modal Station improvements, including purchase of buses and construction of bus shelters	543,400
VA	E2008-BUSP-0598	232	Alexandria, VA Royal Street Bus Garage Replacement	108,680
VA	E2008-BUSP-0601	359	Arlington County, VA Pentagon City Multimodal Improvements	434,720
VA	E2008-BUSP-0602	157	Bealeton, Virginia-Intermodal Station Depot Refurbishment	59,774
VA	E2008-BUSP-0603	492	City of Alexandria, VA-City-Wide Transit Improvements	259,000
VA	E2008-BUSP-0604	493	City of Alexandria, VA-Potomac Yard Transit Improvements	259,000
VA	E2008-BUSP-0605	494	City of Alexandria, VA-Replace Royal Street Bus Garage	776,000
VA	E2008-BUSP-0606	495	City of Alexandria, VA-Valley Pedestrian & Transit	259,000
VA	E2008-BUSP-0607	511	Commonwealth of Virginia-Statewide Bus Capital Program	3,880,000
VA	E2008-BUSP-0608	15	Fairfax County, VA Richmond Highway (U.S. Route1) Public Transportation Improvements	434,720
VA	E2008-BUSP-0609	525	Fairfax County, Virginia-Richmond Highway Initiative	517,000
VA	E2008-BUSP-0610	281	Falls Church, VA Falls Church Intermodal Transportation Center	434,720

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

Prior Year Unobligated Section 5309 Bus and Bus Related Facilities Allocations

State	Earmark ID	SAFETEA-LU Project No.	Project Location and Description	Unobligated Allocation
VA	E2008-BUSP-0613	535	Hampton Roads Transit, VA-Southside Bus Facility	259,000
VA	E2008-BUSP-0614	391	Hampton Roads, VA Final design and construction for a Hampton Roads Transit Southside Bus Facility	434,720
VA	E2008-BUSP-0615	354	Norfolk, Virginia-Final Design and Construction Southside Bus Facility	380,380
VA	E2008-BUSP-0616	68	Northern Neck and Middle Peninsula, Virginia-Bay Transit Multimodal Facilities	706,420
VA	E2008-BUSP-0620	434	Roanoke, VA-Bus restoration in the City of Roanoke	54,340
VA	E2008-BUSP-0621	312	Roanoke, Virginia-Improve Virginian Railway Station	54,340
VA	E2008-BUSP-0622	305	Roanoke, Virginia-Intermodal Facility	43,472
VA	E2008-BUSP-0623	361	Roanoke, Virginia-Roanoke Railway and Link Passenger facility	108,680
VA	E2008-BUSP-0935		HRT Southside Bus Facility Replacement, Norfolk	686,000
VA	E2008-BUSP-0936		PRTC Bus Facilities	980,000
VA	E2008-BUSP-0937		Southside Bus Facility Replacement in Hampton Roads	1,176,000
VA	E2008-BUSP-0938		WMATA Bus Safety Initiative	196,000
VI	E2008-BUSP-0939		VITRAN Purchase USVI	392,000
VT	E2008-BUSP-0624	477	Brattleborough, VT, Intermodal Center	200,000
VT	E2008-BUSP-0626	633	State of Vermont Buses, Facilities and Equipment	256,587
VT	E2008-BUSP-0940		Bennington Multi-Modal Facility	328,300
VT	E2008-BUSP-0941		Bus Replacement for Rural Community Transportation of St Johnsbury	328,300
VT	E2008-BUSP-0943		Vans for Vermont Senior Centers	196,000
VT	E2008-BUSP-0944		Vermont Statewide Buses, Facilities and Equipment	656,600
WA	E2008-BUSP-0629	337	Island Transit, WA Operations Base Facilities Project	521,664
WA	E2008-BUSP-0632	333	Oak Harbor, WA Multimodal Facility	217,360
WA	E2008-BUSP-0633	613	Seattle, WA Multimodal Terminal Redevelopment & Expansion	1,000,000
WA	E2008-BUSP-0634	113	Snohomish County, WA Community Transit bus purchases and facility enhancement	652,080
WA	E2008-BUSP-0636	654	Washington Southworth Terminal Redevelopment	1,350,000
WA	E2008-BUSP-0637	655	Washington, King Street Transportation Center-Intercity Bus Terminal Component	70,000
WA	E2008-BUSP-0949		C-TRAN Vehicle Replacement	480,200
WA	E2008-BUSP-0950		Everett Transit Vehicle Replacement	588,000
WA	E2008-BUSP-0952		Hybrid Bus Program	294,000
WA	E2008-BUSP-0955		Intercity Transit Multimodal Facility Olympia	343,000
WA	E2008-BUSP-0958		Link Transit Vehicle Replacement	539,000
WA	E2008-BUSP-0961		Pierce Transit Peninsula Park & Ride	1,029,000
WA	E2008-BUSP-0962		Port Angles International Gateway Project	343,000
WA	E2008-BUSP-0963		Pullman Transit Maintenance Facility Expansion	784,000
WA	E2008-BUSP-0965		Spokane Transit Smart Bus Technology Modernization	686,000
WA	E2008-BUSP-0966		University Place Intermodal Transit Facility	735,000
WI	E2008-BUSP-0638	350	Milwaukee, WI Rehabilitate Intermodal transportation facility at downtown Milwaukee's Amtrak Station, increase parking for bus passengers	978,120
WI	E2008-BUSP-0639	100	State of Wisconsin buses and bus facilities	3,553,836
WI	E2008-BUSP-0640	452	Design, engineering, right-of-way acquisition, and construction State of Wisconsin Transit Intermodal Facilities	1,300,000
WI	E2008-BUSP-0641	663	Wisconsin, Statewide Buses and Bus Facilities	650,000
WI	E2008-BUSP-0968		Janesville City Transit System	735,000
WI	E2008-BUSP-0970		Wisconsin Statewide Bus and Bus Facilities	1,220,412
WV	E2008-BUSP-0642	73	West Virginia Construct Beckley Intermodal Gateway pursuant to the eligibility provisions for projects listed under section 3030(d)(3) of P.L.. 105-17	5,216,640
WY	E2008-BUSP-0644	665	Wyoming Department of Transportation-Wyoming Statewide Bus and Bus Related Facilities	776,000
	Subtotal FY 2008 Unobligated Allocations			*$465,593,451*
	Total Unobligated Allocations			**$665,031,952**

FEDERAL TRANSIT ADMINISTRATION

TABLE 11

FY 2009 SECTION 5309 NEW STARTS ALLOCATIONS

(Allocation amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

STATE	EARMARK ID	PROJECT LOCATION AND DESCRIPTION	ALLOCATION
AZ	E2009-NWST-001	Phoenix-Central Phoenix East Valley Corridor	37,555,472
CA	E2009-NWST-002	Los Angeles - East Side (FFGA)	33,382,642
CO	E2009-NWST-003	Denver- Southeast Corridor LRT	1,020,898
DC	E2009-NWST-004	Washington,DC-Largo Metrorail Extension	14,604,906
IL	E2009-NWST-005	Chicago-Ravenswood	16,691,321
MN	E2009-NWST-006	Minneapolis-Northstar Corridor Rail	22,950,566
NJ	E2009-NWST-007	Northern NJ- Hudson-Bergen LRT- MOS-2	1,092,821
NY	E2009-NWST-008	New York - East Side Access	89,715,849
NY	E2009-NWST-009	New York-Second Avenue Subway MOS	71,453,458
OR	E2009-NWST-010	Portland-South Corridor I-205/Portland Mall LRT	33,382,642
PA	E2009-NWST-011	Pittsburgh-North Shore LRT	664,176
TX	E2009-NWST-012	Dallas-Northwest Southeast LRT MOS	35,990,660
UT	E2009-NWST-013	Salt Lake-Weber County to Salt Lake City Commuter Rail	33,382,642
VA	E2009-NWST-014	Norfolk-Norfolk LRT	9,806,151
WA	E2009-NWST-015	Seattle-Central Link LRT-Initial Segment	28,558,268
TOTAL ALLOCATION			**$430,252,472**

FEDERAL TRANSIT ADMINISTRATION

TABLE 12

Prior Year Unobligated Section 5309 New Starts Allocations

State	Earmark ID	Project Location and Description	Unobligated Allocation
FY 2007 Unobligated Allocations			
IL	D2007-NWST-012	Union-Pacific West Line Extension	$1,255,978
CA	D2007-NWST-030	Oakland Airport Connector (Public-Private Partnership Pilot Program)	24,999,999
CO	D2007-NWST-009	West Corridor LRT	35,000,000
AK/HI	D2007-NWST-002	Alaska and Hawaii Ferry	1,456,406
	Subtotal FY 2007 Unobligated Allocations		*$62,712,383*
FY 2008 Unobligated Allocations			
AK	E2008-NWST-001	Denali Commission	$5,000,000
AK, HI	E2008-NWST-002	Alaska and Hawaii ferry projects	14,400,000
CA	E2008-NWST-004	AC Transit BRT Corridor - Alameda County	490,000
CA	E2008-NWST-006	Metro Rapid Bus System Gap Closure	16,347,380
CA	E2008-NWST-008	Rapid Transit (BRT) project, Livermore	2,940,000
CA	E2008-NWST-010	Smart EIS and PE	1,960,000
CA	E2008-NWST-011	South Sacramento Corridor, Phase 2	4,410,000
CA	E2008-NWST-012	Telegraph Ave./International Blvd./E 14th St. BRT Corridor Improvements	1,960,000
CO	E2008-NWST-015	West Corridor LRT Project	39,200,000
CT	E2008-NWST-016	New Britain-Hartford Busway	3,271,632
FL	E2008-NWST-018	JTA Bus Rapid Transit	9,329,600
FL	E2008-NWST-019	Metrorail Orange Line Expansion	1,960,000
HI	E2008-NWST-020	Honolulu High Capacity Transit Corridor	15,190,000
IL	E2008-NWST-021	METRA Connects Southeast Service	7,227,500
IL	E2008-NWST-022	METRA Star Line	7,227,500
IL	E2008-NWST-023	Metra Union Pacific Northwest Line	7,227,500
IL	E2008-NWST-024	Metra Union Pacific West Line	7,227,500
KS	E2008-NWST-027	State Avenue BRT Corridor, Wyandotte County	1,470,000
MA	E2008-NWST-029	MBTA Fitchburg to Boston Rail Corridor Project	5,880,000
MA	E2008-NWST-030	North Shore Corridor and Blue Line Extension	1,960,000
MS	E2008-NWST-033	I-69 Mississippi HOV/BRT	7,546,000
NJ	E2008-NWST-036	Monmouth-Ocean-Middlesex County Passenger Rail	980,000
NJ	E2008-NWST-038	Trans-Hudson Midtown Corridor	14,700,000
OR	E2008-NWST-042	Lane Transit District, Pioneer Parkway EmX BRT Corridor	14,504,000
PA	E2008-NWST-044	Bus Rapid Transit, Cumberland County	294,000
PA	E2008-NWST-045	CORRIDORone Regional Rail Project	10,976,000
RI	E2008-NWST-047	Pawtucket/Central Falls Commuter Rail Station	1,960,000
RI	E2008-NWST-048	South County Commuter Rail Wickford Junction Station	12,269,449
TX	E2008-NWST-049	DCTA Fixed Guideway/Engineering	245,000
TX	E2008-NWST-050	Galveston Rail Trolley	1,960,000
TX	E2008-NWST-051	North Corridor, Houston and Southeast Corridor	19,600,000
UT	E2008-NWST-055	Provo Orem BRT	4,018,000
VA	E2008-NWST-059	Route 1 BRT, Potomac Yard - Crystal City, Alexandria and Arlington	980,000
VA	E2008-NWST-060	Virginia Railway Express Extension - Gainesville/Haymarket, VA	490,000
VA	E2008-NWST-061	VRE Rolling Stock	3,920,000
WA	E2008-NWST-063	Pacific Highway South BRT. King County	13,794,480
	Subtotal FY 2008 Unobligated Allocations		*$262,915,541*
	Total Unobligated Allocations		**$325,627,924**

FEDERAL TRANSIT ADMINISTRATION

TABLE 13

FY 2009 SECTION 5310 SPECIAL NEEDS FOR ELDERLY INDIVIDUALS AND INDIVIDUALS WITH DISABILITIES APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

STATE	APPORTIONMENT
Alabama	$948,032
Alaska	124,488
American Samoa	27,693
Arizona	990,921
Arkansas	608,797
California	5,797,448
Colorado	688,622
Connecticut	669,383
Delaware	193,611
District of Columbia	166,651
Florida	3,697,197
Georgia	1,385,199
Guam	73,531
Hawaii	269,151
Idaho	256,651
Illinois	2,140,042
Indiana	1,125,050
Iowa	578,736
Kansas	518,496
Kentucky	873,760
Louisiana	869,904
Maine	304,076
Maryland	925,063
Massachusetts	1,229,262
Michigan	1,779,735
Minnesota	814,978
Mississippi	610,545
Missouri	1,074,318
Montana	212,927
N. Mariana Islands	28,251
Nebraska	342,980
Nevada	419,917
New Hampshire	257,930
New Jersey	1,564,391
New Mexico	378,984
New York	3,713,291
North Carolina	1,549,638
North Dakota	167,684
Ohio	2,081,733
Oklahoma	718,303
Oregon	665,622
Pennsylvania	2,457,884
Puerto Rico	835,650
Rhode Island	261,089
South Carolina	825,561
South Dakota	185,215
Tennessee	1,151,618
Texas	3,439,370
Utah	340,411
Vermont	157,687
Virgin Islands	69,571
Virginia	1,214,716
Washington	1,032,682
West Virginia	458,186
Wisconsin	942,806
Wyoming	134,150
TOTAL	**$54,349,587**

FEDERAL TRANSIT ADMINISTRATION

TABLE 14

FY 2009 SECTION 5311 AND SECTION 5340 NONURBANIZED APPORTIONMENTS AND SECTION 5311(b)(3) RURAL TRANSIT ASSISTANCE PROGRAM (RTAP) APPORTIONMENTS

(Apportionment amount is based on funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

(Note In accordance with language in the SAFETEA-LU conference report apportionments for Section 5311 and Section 5340 were combined to show a single amount The State's apportionment under the column heading "Section 5311 and 5340 Apportionment" includes Section 5311 and Growing States funds)

STATE	SECTIONS 5311 AND 5340 APPORTIONMENT	SECTION 5311(b)(3) APPORTIONMENT
Alabama	$5,397,105	$77,326
Alaska	2,462,941	34,838
American Samoa	92,314	5,430
Arizona	3,840,969	52,041
Arkansas	4,116,144	63,669
California	9,237,151	103,847
Colorado	3,388,074	49,398
Connecticut	1,101,006	38,932
Delaware	513,138	32,933
Florida	5,537,949	77,452
Georgia	6,967,099	90,535
Guam	249,522	7,351
Hawaii	798,552	35,357
Idaho	2,370,836	41,554
Illinois	5,764,877	80,792
Indiana	5,528,643	80,551
Iowa	4,121,697	63,647
Kansas	3,817,136	57,127
Kentucky	5,222,780	76,718
Louisiana	4,130,048	66,047
Maine	2,208,333	46,889
Maryland	2,022,540	47,639
Massachusetts	1,419,268	42,023
Michigan	7,036,140	94,151
Minnesota	5,176,555	71,452
Mississippi	4,690,811	70,605
Missouri	5,629,629	77,300
Montana	3,058,594	41,118
N. Mariana Islands	14,211	4,449
Nebraska	2,665,395	45,809
Nevada	1,992,720	34,300
New Hampshire	1,422,006	41,432
New Jersey	1,318,743	40,971
New Mexico	3,327,224	46,805
New York	7,132,357	96,357
North Carolina	8,969,626	112,445
North Dakota	1,616,718	36,062
Ohio	8,125,201	107,587
Oklahoma	4,600,500	66,710
Oregon	3,971,344	56,431
Pennsylvania	8,227,335	108,143
Puerto Rico	571,203	34,496
Rhode Island	236,116	30,325
South Carolina	4,510,072	70,082
South Dakota	2,000,286	38,995
Tennessee	5,755,313	81,635
Texas	13,726,498	147,267
Utah	1,961,090	37,514
Vermont	1,069,583	37,876
Virginia	5,047,660	74,555
Washington	3,882,417	59,288
West Virginia	2,736,253	53,437
Wisconsin	5,477,023	77,628
Wyoming	1,890,317	35,204
TOTAL	**$208,147,062**	**$3,202,525**

FEDERAL TRANSIT ADMINISTRATION
TABLE 15

Prior Year Unobligated Section 5311(c) Tribal Transit Program Competitive Allocations

State	Earmark ID	Project Location and Description	Unobligated Allocation
FY 2007 Unobligated Allocations			
AK	D2007-TRTR-001	Asa Carsarmiut Tribal Council	$165,366
AK	D2007-TRTR-017	Healy Lake Village	25,000
AK	D2007-TRTR-021	Kenaitze Indian Tribe	25,000
AK	D2007-TRTR-034	Northway Village	25,000
IA	D2007-TRTR-046	Sac and Fox Tribe of the Mississippi in Iowa	24,963
ME	D2007-TRTR-018	Houlton Band of Maliseet Indians	57,017
MI	D2007-TRTR-025	Little Traverse Bay Bands of Odawa Indians	25,000
MN	D2007-TRTR-014	Grand Portage Band of Chippewa Indians	60,000
MN	D2007-TRTR-041	Red Lake Band of Chippewa Indians	200,000
MS	D2007-TRTR-030	Mississippi Band of Choctaw Indians	25,000
MT	D2007-TRTR-006	Confederated Salish and Kootenai Tribes	250,000
MT	D2007-TRTR-013	Fort Belknap Indian Community	218,000
MT	D2007-TRTR-056	The Blackfeet Tribe	107,820
NC	D2007-TRTR-012	Eastern Band of Cherokee Nations	172,900
NE	D2007-TRTR-036	Omaha Tribe of Nebraska	25,000
NE	D2007-TRTR-038	Ponca Tribe Nebraska	216,500
NM	D2007-TRTR-063	Walatowa Pueblo of Jemez	25,000
OK	D2007-TRTR-045	Sac and Fox Nation	25,000
OK	D2007-TRTR-059	The Miami Tribe of Oklahoma	154,760
OK	D2007-TRTR-003	Choctaw Nation of Oklahoma	158,000
OK	D2007-TRTR-045	Sac and Fox Nation	25,000
OK	D2007-TRTR-059	The Miami Tribe of Oklahoma	154,760
SC	D2007-TRTR-002	Catawba Indian Nation	225,000
SD	D2007-TRTR-026	Lower Brule Sioux Tribe call	150,000
SD	D2007-TRTR-035	Oglala Sioux Tribe	150,000
SD	D2007-TRTR-044	Rosebud Sioux Tribe	25,000
WI	D2007-TRTR-024	Lac Courte Oreilles Tribe	161,632
	Total Unobligated Allocations		**$2,876,718**

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
200,000 or more in Population	$40,257,360
50,000-199,999 in Population	13,419,120
Nonurbanized	13,419,120
National Total	$67,095,600

Amounts Apportioned to Urbanized Areas 200,000 or more in Population:

Aguadilla--Isabela--San Sebastian, PR	$260,725
Akron, OH	122,217
Albany, NY	113,359
Albuquerque, NM	160,252
Allentown--Bethlehem, PA--NJ	106,286
Anchorage, AK	41,237
Ann Arbor, MI	59,547
Antioch, CA	41,616
Asheville, NC	56,013
Atlanta, GA	659,625
Atlantic City, NJ	47,697
Augusta-Richmond County, GA--SC	94,039
Austin, TX	199,449
Bakersfield, CA	156,317
Baltimore, MD	427,800
Barnstable Town, MA	36,893
Baton Rouge, LA	144,734
Birmingham, AL	174,903
Boise City, ID	47,767
Bonita Springs--Naples, FL	36,009
Boston, MA--NH--RI	674,795
Bridgeport--Stamford, CT--NY	127,948
Buffalo, NY	238,020
Canton, OH	55,447
Cape Coral, FL	72,451
Charleston--North Charleston, SC	107,911
Charlotte, NC--SC	136,519
Chattanooga, TN--GA	82,947
Chicago, IL--IN	1,737,669
Cincinnati, OH--KY--IN	284,465
Cleveland, OH	381,830
Colorado Springs, CO	83,229
Columbia, SC	94,140
Columbus, GA--AL	73,265
Columbus, OH	239,612
Concord, CA	49,422
Corpus Christi, TX	98,481
Dallas--Fort Worth--Arlington, TX	976,154
Davenport, IA--IL	61,837
Dayton, OH	149,076

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Daytona Beach--Port Orange, FL	67,061
Denton--Lewisville, TX	40,913
Denver--Aurora, CO	343,058
Des Moines, IA	62,583
Detroit, MI	827,540
Durham, NC	74,878
El Paso, TX--NM	314,704
Eugene, OR	65,325
Evansville, IN--KY	48,790
Fayetteville, NC	74,694
Flint, MI	101,768
Fort Collins, CO	42,124
Fort Wayne, IN	59,038
Fresno, CA	235,639
Grand Rapids, MI	101,797
Greensboro, NC	56,841
Greenville, SC	76,032
Gulfport--Biloxi, MS	57,326
Harrisburg, PA	58,129
Hartford, CT	154,541
Honolulu, HI	145,408
Houston. TX	1,093,262
Huntsville, AL	44,745
Indianapolis, IN	227,362
Indio--Cathedral City--Palm Springs, CA	82,352
Jackson, MS	92,426
Jacksonville, FL	194,316
Kansas City, MO--KS	255,662
Knoxville, TN	103,363
Lancaster, PA	53,620
Lancaster--Palmdale, CA	80,425
Lansing, MI	74,036
Las Vegas, NV	300,125
Lexington-Fayette, KY	61,433
Lincoln, NE	46,139
Little Rock, AR	95,082
Los Angeles--Long Beach--Santa Ana, CA	3,933,572
Louisville, KY--IN	197,913
Lubbock, TX	70,305
Madison, WI	65,909
McAllen, TX	327,825
Memphis, TN--MS--AR	286,068
Miami, FL	1,374,567
Milwaukee, WI	287,989
Minneapolis--St. Paul, MN	350,601
Mission Viejo, CA	54,400
Mobile, AL	113,154
Modesto, CA	101,405
Nashville-Davidson, TN	163,762
New Haven, CT	98,373

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
New Orleans, LA	366,937
New York--Newark, NY--NJ--CT	4,446,201
Ogden--Layton, UT	69,084
Oklahoma City, OK	208,756
Omaha, NE--IA	126,730
Orlando, FL	269,823
Oxnard, CA	91,395
Palm Bay--Melbourne, FL	79,857
Pensacola, FL--AL	87,463
Peoria, IL	58,276
Philadelphia, PA--NJ--DE--MD	1,069,377
Phoenix--Mesa, AZ	705,955
Pittsburgh, PA	370,876
Port St. Lucie, FL	65,865
Portland, OR--WA	320,170
Poughkeepsie--Newburgh, NY	67,898
Providence, RI--MA	270,303
Provo--Orem, UT	81,374
Raleigh, NC	82,364
Reading, PA	53,300
Reno, NV	66,500
Richmond, VA	159,655
Riverside--San Bernardino, CA	503,692
Rochester, NY	148,497
Rockford, IL	54,727
Round Lake Beach--McHenry--Grayslake, IL--WI	22,674
Sacramento, CA	361,320
Salem, OR	100,557
Salt Lake City, UT	158,929
San Antonio, TX	422,786
San Diego, CA	688,130
San Francisco--Oakland, CA	614,189
San Jose, CA	226,733
San Juan, PR	1,559,757
Santa Rosa, CA	51,665
Sarasota--Bradenton, FL	110,112
Savannah, GA	66,083
Scranton, PA	94,704
Seattle, WA	472,364
Shreveport, LA	98,162
South Bend, IN--MI	59,921
Spokane, WA--ID	87,770
Springfield, MA--CT	135,603
Springfield, MO	58,267
St. Louis, MO--IL	419,157
Stockton, CA	129,269
Syracuse, NY	100,362
Tallahassee, FL	65,119
Tampa--St. Petersburg, FL	480,361
Temecula--Murrieta, CA	42,792

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Thousand Oaks, CA	23,130
Toledo, OH--MI	123,863
Trenton, NJ	48,642
Tucson, AZ	216,799
Tulsa, OK	140,117
Victorville--Hesperia--Apple Valley, CA	64,235
Virginia Beach, VA	303,262
Washington, DC--VA--MD	585,470
Wichita, KS	89,343
Winston-Salem, NC	64,946
Worcester, MA--CT	88,073
Youngstown, OH--PA	107,536
TOTAL	$40,257,360

Amounts Apportioned to State Governors for Urbanized Areas 50,000 to 199,999 in Population

Alabama	$375,505
Alaska	16,921
Arizona	135,353
Arkansas	241,363
California	1,397,865
Colorado	225,063
Connecticut	137,232
Delaware	23,096
Florida	782,258
Georgia	428,545
Hawaii	25,367
Idaho	145,239
Illinois	308,570
Indiana	330,267
Iowa	198,548
Kansas	90,821
Kentucky	123,466
Louisiana	389,816
Maine	118,548
Maryland	147,426
Massachusetts	126,002
Michigan	418,106
Minnesota	113,455
Mississippi	69,950
Missouri	139,873
Montana	107,191
N. Mariana Islands	38,895
Nebraska	7,152
Nevada	18,519
New Hampshire	107,473
New Jersey	68,820
New Mexico	132,879
New York	252,107

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
North Carolina	428,210
North Dakota	81,305
Ohio	314,705
Oklahoma	85,227
Oregon	108,885
Pennsylvania	412,314
Puerto Rico	1,262,894
South Carolina	240,823
South Dakota	60,870
Tennessee	279,881
Texas	1,505,431
Utah	61,958
Vermont	32,132
Virginia	286,112
Washington	372,365
West Virginia	255,022
Wisconsin	341,404
Wyoming	47,891
TOTAL	$13,419,120

Amounts Apportioned to State Governors for Nonurbanized Areas Less than 50,000 in Population

Alabama	$449,145
Alaska	43,746
American Samoa	40,362
Arizona	241,480
Arkansas	338,661
California	683,551
Colorado	127,016
Connecticut	32,729
Delaware	29,825
Florida	387,687
Georgia	531,945
Guam	40,417
Hawaii	53,392
Idaho	115,921
Illinois	302,466
Indiana	270,651
Iowa	193,091
Kansas	192,340
Kentucky	489,453
Louisiana	419,015
Maine	129,446
Maryland	83,513
Massachusetts	52,179
Michigan	360,132
Minnesota	230,496
Mississippi	485,481
Missouri	394,932

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2009 SECTION 5316 JOB ACCESS AND REVERSE COMMUTE APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Montana	116,880
N. Mariana Islands	22,963
Nebraska	119,924
Nevada	35,977
New Hampshire	56,065
New Jersey	44,562
New Mexico	226,186
New York	430,355
North Carolina	676,571
North Dakota	61,798
Ohio	460,540
Oklahoma	364,417
Oregon	184,503
Pennsylvania	489,113
Puerto Rico	173,958
Rhode Island	7,656
South Carolina	375,018
South Dakota	92,711
Tennessee	437,184
Texas	1,070,630
Utah	65,952
Vermont	59,641
Virgin Islands	40,578
Virginia	314,645
Washington	226,806
West Virginia	265,074
Wisconsin	228,857
Wyoming	51,484
TOTAL	$13,419,120

FEDERAL TRANSIT ADMINISTRATION

TABLE 17

Prior Year Unobligated Section 5316 JARC Allocations

State	Earmark ID	Project Description	Unobligated Allocation
FY 2002 Unobligated Allocations			
CA	E2002-JARC-008	Del Norte County, California	$73,400
NY	E2002-JARC-054	Columbia County, New York	100,000
VA	E2002-JARC-082	Winchester, Virginia	1,000,000
	Subtotal FY 2002 Unobligated Allocations		*$1,173,400*
FY 2003 Unobligated Allocations			
OH	E2003-JARC-078	STEP-UP Job Access Project Dayton	$123,834
NY	E2003-JARC-065	Chemung County Transit	74,300
NY	E2003-JARC-066	Columbia County	99,067
	Subtotal FY 2003 Unobligated Allocations		*$297,201*
FY 2004 Unobligated Allocations			
AK	E2004-JARC-000	Craig Transit Service JARC Program	$49,563
NY	E2004-JARC-070	Ulster County Area Transit Rural Feeder Service	49,563
VA	E2004-JARC-101	Virginia Beach Paratransit Services	198,252
SD	E2004-JARC-083	Cheyenne River Sioux Tribe Public Bus System	247,815
NY	E2004-JARC-050	New Jersey Community Development Corporation Transportation Opportunity Center	297,378
CA	E2004-JARC-013	City of Irwindale Senior Transportation Services	64,432
CA	E2004-JARC-014	Guaranteed Ride Home Santal Clarita	396,504
MD	E2004-JARC-040	VoxLinx Voice-Enabled Transit Trip Planner	1,288,638
TN	E2204-JARC-087	Monroe County Job Access and Reverse Commute Program	99,126
	Subtotal FY 2004 Unobligated Allocations		*$2,691,271*
FY 2005 Unobligated Allocations			
OH	E2005-JARC-066	Western Reserve Transit Job Access Program, Ohio	$79,734
GA	E2005-JARC-026	Dooly-Crisp Unified Transportation System, Georgia	198,236
MI	E2005-JARC-042	DCC Community Health & Safety Transport Project, Michigan	297,354
PA	E2005-JARC-071	Philadelphia Unemployment Project (PUP), Pennsylvania	306,772
WI	E2005-JARC-095	Wisconsin Statewide JARC	2,747,662
	Subtotal FY 2005 Unobligated Allocations		*$3,629,758*
	Total Unobligated Allocations		**$7,791,630**

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
UZAs 200,000 or more in Population	$22,580,250
UZAs 50,000-199,999 in Population	7,526,750
Nonurbanized	7,526,750
National Total	$37,633,750

Amounts Apportioned to Urbanized Areas 200,000 or more in Population:

Aguadilla--Isabela--San Sebastian, PR	$58,588
Akron, OH	75,581
Albany, NY	72,649
Albuquerque, NM	84,899
Allentown--Bethlehem, PA--NJ	72,488
Anchorage, AK	24,223
Ann Arbor, MI	28,528
Antioch, CA	28,156
Asheville, NC	36,015
Atlanta, GA	413,029
Atlantic City, NJ	34,302
Augusta-Richmond County, GA--SC	50,252
Austin, TX	92,382
Bakersfield, CA	60,901
Baltimore. MD	295,234
Barnstable Town, MA	36,671
Baton Rouge, LA	65,193
Birmingham, AL	100,792
Boise City, ID	29,711
Bonita Springs--Naples, FL	34,005
Boston, MA--NH--RI	522,063
Bridgeport--Stamford, CT--NY	110,422
Buffalo, NY	140,336
Canton, OH	34,561
Cape Coral, FL	54,503
Charleston--North Charleston, SC	60,318
Charlotte, NC--SC	89,710
Chattanooga, TN--GA	53,180
Chicago, IL--IN	1,060,090
Cincinnati, OH--KY--IN	187,076
Cleveland, OH	239,952
Colorado Springs, CO	50,508
Columbia, SC	53,858
Columbus, GA--AL	37,044
Columbus, OH	133,537
Concord, CA	56,580
Corpus Christi, TX	43,151
Dallas--Fort Worth--Arlington, TX	526,811
Davenport, IA--IL	34,249

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Dayton, OH	93,910
Daytona Beach--Port Orange, FL	44,901
Denton--Lewisville, TX	24,240
Denver--Aurora, CO	236,112
Des Moines, IA	43,032
Detroit, MI	553,817
Durham, NC	33,364
El Paso, TX--NM	94,121
Eugene, OR	29,359
Evansville, IN--KY	31,857
Fayetteville, NC	36,282
Flint, MI	56,349
Fort Collins, CO	20,022
Fort Wayne, IN	35,230
Fresno, CA	84,904
Grand Rapids, MI	62,334
Greensboro, NC	35,059
Greenville, SC	45,658
Gulfport--Biloxi, MS	33,994
Harrisburg, PA	42,846
Hartford, CT	114,736
Honolulu, HI	92,605
Houston, TX	491,784
Huntsville, AL	26,010
Indianapolis, IN	160,213
Indio--Cathedral City--Palm Springs, CA	41,526
Jackson, MS	41,009
Jacksonville, FL	126,883
Kansas City, MO--KS	173,248
Knoxville, TN	61,910
Lancaster, PA	39,355
Lancaster--Palmdale, CA	35,012
Lansing, MI	36,387
Las Vegas, NV	198,411
Lexington-Fayette, KY	32,199
Lincoln, NE	23,915
Little Rock, AR	53,908
Los Angeles--Long Beach--Santa Ana, CA	1,681,436
Louisville, KY--IN	125,672
Lubbock, TX	27,652
Madison, WI	31,803
McAllen, TX	76,072
Memphis, TN--MS--AR	142,222
Miami, FL	779,468
Milwaukee, WI	164,560
Minneapolis--St. Paul, MN	243,652
Mission Viejo, CA	50,304
Mobile, AL	54,145

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Modesto, CA	48,850
Nashville-Davidson, TN	100,569
New Haven, CT	69,927
New Orleans, LA	160,779
New York--Newark, NY--NJ--CT	2,655,582
Ogden--Layton, UT	42,793
Oklahoma City, OK	109,639
Omaha, NE--IA	70,261
Orlando, FL	163,222
Oxnard, CA	47,576
Palm Bay--Melbourne, FL	62,249
Pensacola, FL--AL	48,349
Peoria, IL	32,208
Philadelphia, PA--NJ--DE--MD	697,524
Phoenix--Mesa, AZ	379,732
Pittsburgh, PA	231,287
Port St. Lucie, FL	47,592
Portland, OR--WA	196,093
Poughkeepsie--Newburgh, NY	42,357
Providence, RI--MA	177,099
Provo--Orem, UT	24,099
Raleigh, NC	50,647
Reading, PA	32,593
Reno, NV	42,458
Richmond, VA	106,086
Riverside--San Bernardino, CA	210,004
Rochester, NY	89,292
Rockford, IL	36,088
Round Lake Beach--McHenry--Grayslake, IL--WI	21,527
Sacramento, CA	196,533
Salem, OR	28,524
Salt Lake City, UT	101,975
San Antonio, TX	194,785
San Diego, CA	336,528
San Francisco--Oakland, CA	441,480
San Jose, CA	185,585
San Juan, PR	421,504
Santa Rosa, CA	37,211
Sarasota--Bradenton, FL	93,602
Savannah, GA	32,840
Scranton, PA	63,636
Seattle, WA	334,066
Shreveport, LA	41,446
South Bend, IN--MI	37,726
Spokane, WA--ID	47,456
Springfield, MA--CT	88,562
Springfield, MO	28,699
St. Louis, MO--IL	264,707

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Stockton, CA	50,493
Syracuse, NY	53,416
Tallahassee, FL	19,867
Tampa--St. Petersburg, FL	348,702
Temecula--Murrieta, CA	27,512
Thousand Oaks, CA	21,358
Toledo, OH--MI	71,256
Trenton, NJ	37,069
Tucson, AZ	103,767
Tulsa, OK	78,681
Victorville--Hesperia--Apple Valley, CA	29,412
Virginia Beach, VA	174,116
Washington, DC--VA--MD	428,019
Wichita, KS	54,957
Winston-Salem, NC	38,919
Worcester, MA--CT	62,277
Youngstown, OH--PA	62,046
TOTAL	**$22,580,250**

Amounts Apportioned to State Governors for Urbanized Areas 50,000 to 199,999 in Population

Alabama	$198,406
Alaska	9,287
Arizona	64,291
Arkansas	132,516
California	770,513
Colorado	127,783
Connecticut	122,352
Delaware	15,201
Florida	577,865
Georgia	209,239
Hawaii	21,663
Idaho	75,292
Illinois	170,443
Indiana	193,460
Iowa	112,710
Kansas	53,119
Kentucky	72,576
Louisiana	204,099
Maine	82,959
Maryland	131,769
Massachusetts	89,659
Michigan	279,158
Minnesota	66,239
Mississippi	32,158
Missouri	78,697
Montana	54,764
N. Mariana Islands	11,798

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Nebraska	3,285
Nevada	14,970
New Hampshire	102,846
New Jersey	54,802
New Mexico	58,566
New York	153,111
North Carolina	310,380
North Dakota	47,079
Ohio	212,667
Oklahoma	36,322
Oregon	55,623
Pennsylvania	250,211
Puerto Rico	337,121
South Carolina	171,841
South Dakota	41,450
Tennessee	175,383
Texas	661,884
Utah	23,559
Vermont	19,716
Virginia	172,331
Washington	238,633
West Virginia	150,373
Wisconsin	246,541
Wyoming	30,040
TOTAL	**$7,526,750**

Amounts Apportioned to State Governors for Nonurbanized Areas Less than 50,000 in Population

Alabama	$255,130
Alaska	20,702
American Samoa	3,631
Arizona	108,709
Arkansas	183,932
California	316,454
Colorado	71,325
Connecticut	34,091
Delaware	21,938
Florida	245,802
Georgia	290,648
Guam	10,594
Hawaii	30,058
Idaho	49,567
Illinois	194,023
Indiana	212,697
Iowa	126,293
Kansas	109,987
Kentucky	266,858
Louisiana	178,785

FEDERAL TRANSIT ADMINISTRATION

TABLE 18

FY 2009 SECTION 5317 NEW FREEDOM APPORTIONMENTS

(Apportionment amount is based funding made available under the Continuing Appropriations Resolution, 2009 - P.L. 110-329)

URBANIZED AREA/STATE	APPORTIONMENT
Maine	81,170
Maryland	71,671
Massachusetts	45,123
Michigan	254,659
Minnesota	145,525
Mississippi	216,731
Missouri	210,848
Montana	48,466
N. Mariana Islands	349
Nebraska	63,532
Nevada	26,324
New Hampshire	54,957
New Jersey	34,333
New Mexico	82,859
New York	265,143
North Carolina	414,842
North Dakota	29,252
Ohio	305,541
Oklahoma	185,501
Oregon	125,069
Pennsylvania	307,467
Puerto Rico	38,641
Rhode Island	8,034
South Carolina	210,786
South Dakota	38,634
Tennessee	271,563
Texas	516,442
Utah	30,189
Vermont	37,652
Virgin Islands	7,321
Virginia	212,287
Washington	126,727
West Virginia	137,882
Wisconsin	164,684
Wyoming	25,322
TOTAL	**$7,526,750**

FEDERAL TRANSIT ADMINISTRATION

TABLE 19

Prior Year Unobligated Section 5339 Alternatives Analysis Allocations

State	Earmark ID	Project Location and Description	Unobligated Allocation
FY 2006 Unobligated Allocations			
CA	D2006-ALTA-004	San Jose - BRT treatments to increase ridership	480,000
	Subtotal FY 2006 Unobligated Allocations		*$480,000*

State	Earmark ID	Project Location and Description	Unobligated Allocation
FY 2007 Unobligated Allocations			
CA	E2007-ALTA-001	San Gabriel Valley-Gold Line Foothill Extension Corridor Study	1,250,000
IL	E2007-ALTA-002	Metra BNSF Naperville to Aurora Corridor Study	1,250,000
MS	E2007-ALTA-006	Madison-Ridgeland Transportation Commission, Mississippi, Madison LRT Corridor Study	350,000
NC	E2007-ALTA-007	Piedmont Authority Regional Transportation East-West Corridor Study	1,000,000
NJ	E2007-ALTA-008	Trans-Hudson Midtown Corridor Study	1,500,000
NJ	E2007-ALTA-010	New Jersey Transit Midtown Project Study	2,500,000
OK	D2007-ALTA-018	Tulsa to Broken Arrow	137,600
SC	E2007-ALTA-014	South Carolina Department of Transportation Light Rail Study	300,000
TN	E2007-ALTA-015	Sevierville County Transportation Board, Sevier County BRT Study	500,000
WI	D2007-ALTA-026	Madison - Madison Area	200,000
	Subtotal FY 2007 Unobligated Allocations		*$8,987,600*
FY 2008 Unobligated Allocations			
CA	E2008-ALTA-004	Bus Rapid Transit Alternative Analysis, San Jose	245,000
CA	E2008-ALTA-005	Red Car Trolley Engineering Study	98,000
CT	E2008-ALTA-012	Southeastern Connecticut Bus Rapid Transit System	1,313,200
FL	E2008-ALTA-013	Bus Rapid Transit Improvements, Broward County	686,000
FL	E2008-ALTA-014	Downtown Orlando East-West Circulator System, Orlando	686,000
FL	E2008-ALTA-015	Downtown Transit Circulator, Fort Lauderdale	656,600
FL	E2008-ALTA-017	Miami-Dade County Metrorail Orange Line Expansion	1,372,000
GA	E2008-ALTA-018	I-285 Bus Rapid Transit Project, Atlanta	490,000
IA	E2008-ALTA-019	DART Alternative Analysis Design, Des Moines	245,000
IL	E2008-ALTA-011	Illinois Valley Commuter Rail, Ottawa	245,000
NC	E2008-ALTA-023	Charlotte Rapid Transit Extension-Northeast Corridor LRT Project	2,695,000
NJ	E2008-ALTA-021	Northern Branch Rail Service Restoration	490,000
OH	E2008-ALTA-024	West Shore Corridor Alternative Analysis	343,000
PA	E2008-ALTA-026	East West Corridor Rapid Transit, Allegheny County	980,000
PA	E2008-ALTA-027	Northwest New Jersey/Northeast Pennsylvania Commuter Rail Service	1,313,200
PA	E2008-ALTA-028	Philadelphia Navy Yard Transit Extension Study	392,000
VA	E2008-ALTA-029	Commuter Rail Station at Carmel Church	490,000
VA	E2008-ALTA-030	I-66 Bus Rapid Transit Study	980,000
WA	E2008-ALTA-031	Spokane Streetcar Study, Spokane	294,000
	Subtotal FY 2008 Unobligated Allocations		*$14,014,000*
	Total Unobligated Allocations		**$23,481,600**

The SAFETEA-LU Technical Corrections Act, 2008 rescinded FY 2006 and FY 2007 funding for the Middle Rio Grande Coalition of Governments, Albuquerque to Santa Fe Corridor Study in the amount of $500,000 each year.

The SAFETEA-LU Technical Corrections Act, 2008 made funding for the FY 2006 and FY 2007 Lane County, Oregon Bus Rapid Transit Phase II Corridor Study available to all phases of the project All funding has been obligated.

[FR Doc. E8–29645 Filed 12–17–08; 8:45 am]

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Thursday,
December 18, 2008

Part V

Department of Justice

28 CFR Part 75

Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct; Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performance; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 75

[Docket No. CRM 104; CRM 105; AG Order No. 3025–2008___]

RIN 1105–AB18; RIN 1105–AB19

Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct; Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performance

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule finalizes two proposed rules and amends the record-keeping, labeling, and inspection requirements to account for changes in the underlying statute made by Congress in enacting the Adam Walsh Child Protection and Safety Act of 2006.

DATES: This rule is effective January 20, 2009. *Compliance date:* The requirements of this rule apply to producers of visual depictions of the lascivious exhibition of the genitals or pubic area of a person and producers of simulated sexually explicit conduct as of March 18, 2009.

FOR FURTHER INFORMATION CONTACT: Andrew Oosterbaan, Chief, Child Exploitation and Obscenity section, Criminal Division, United States Department of Justice, Washington, DC 20530; (202) 514–5780. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The Child Protection and Obscenity Enforcement Act of 1988, Public Law 100–690, codified at 18 U.S.C. 2257, imposes certain name- and age-verification, record-keeping, and labeling requirements on producers of visual depictions of actual human beings engaged in sexually explicit conduct. Specifically, section 2257 requires producers of such material to ''ascertain, by examination of an identification document containing such information, the performer's name and date of birth,'' to ''ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name,'' and to record and maintain this information. 18 U.S.C. 2257(b). Violations of these record-keeping requirements are criminal offenses punishable by imprisonment of not more than five years for a first offense and not more than 10 years for subsequent offenses. *See id.* 2257(i). Any matter containing such visual depictions must be labeled with a statement indicating where the records are located, and those records are subject to inspection by the government. *See id.* 2257(c), (e). These provisions supplement the federal statutory provisions criminalizing the production and distribution of materials visually depicting minors engaged in sexually explicit conduct. *See id.* 2251, 2252.

The regulations in 28 CFR part 75 implement section 2257. On May 24, 2005, the Department of Justice (''the Department'') published a final rule that updated those regulations to account for changes in technology, particularly the Internet, and to implement the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Public Law 108–21. *See* Inspection of Records Relating to Depiction of Sexually Explicit Performances, 70 FR 29607 (May 24, 2005) (CRM 103; RIN 1105–AB05).

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act, Public Law 109–248 (''the Adam Walsh Act'' or ''the Act''). As described in more detail below, the Act made a number of changes to section 2257 and added section 2257A to title 18, imposing similar record-keeping requirements on producers of visual depictions of simulated sexually explicit conduct. Furthermore, the Act created a certification regime for producers of such conduct and for producers of depictions of one type of actual sexually explicit conduct to exempt them from the detailed regulatory requirements.

This final rule amends the regulations in part 75 to comport with these statutory changes. As described in more detail below, the Department published two separate proposed rules, one to implement the revision to section 2257 and the other to implement the requirements of section 2257A with regard to simulated sexually explicit conduct and its certification regime. This rule finalizes both proposed rules in one rulemaking in order to simplify and coordinate implementation of the Adam Walsh Act. Most importantly, this approach ensures that the requirements of revised section 2257 go into effect in coordination with the effectiveness of the certification regime applicable to it. The final rule also makes numerous changes to the proposed rules that will simplify the regulatory process and lessen the burden on businesses covered by the Act.

Background

Protecting children from sexual exploitation is one of government's most important responsibilities. Children are incapable of giving voluntary and knowing consent to perform in pornography. Furthermore, children often are forced to engage in sexually explicit conduct for the purpose of producing pornography. For these reasons, visual depictions of sexually explicit conduct that involve persons under the age of 18 constitute child pornography under federal law. *See* 18 U.S.C. 2256(8). Producers of such depictions are subject to appropriately severe penalties. *See id.* 2251.

Establishing the identity of every performer in a depiction of sexually explicit conduct is critical to ensuring that no performer is a minor and that, hence, the depiction is not child pornography. Section 2257 has facilitated identification and age-verification efforts by requiring producers to ascertain the identity and age of performers in their depictions and to maintain records evidencing such compliance. Producers are less likely as a result of these requirements to exploit children and to create child pornography through carelessness, recklessness, or deliberate indifference. As for those who intentionally produce material depicting minors engaged in sexually explicit conduct, the statute and regulations provide an additional basis for prosecuting such individuals besides the applicable child-exploitation statutes. In addition, the statute and the regulations ''deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the persons depicted were adults at the time they were photographed or videotaped.'' *Am. Library Ass'n* v. *Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994).

In the Adam Walsh Act, Congress filled two gaps in section 2257 by amending it to cover lascivious exhibition of the genitals or pubic area (''lascivious exhibition'') and by enacting section 2257A to cover simulated sexually explicit conduct, while at the same time creating an exception from these new record-keeping requirements in certain circumstances.

With regard to lascivious exhibition, the Act corrected an anomaly in the definition of ''sexually explicit conduct'' to which section 2257's requirements apply. Prior to the enactment of the Act, section 2257 referenced the definition of ''sexually explicit conduct'' for purposes of Chapter 110 of the U.S. Code in section 2256(2)(A) and listed four of the five categories of conduct included in that section. Section 2257 did not include ''lascivious exhibition of the genitals or

pubic area of any person.'' 18 U.S.C. 2256(2)(A)(v). The Act revised section 2257 to include that category along with the others. *See* Adam Walsh Act, Public Law 109–248 § 502(a)(4). Because part 75 defines ''sexually explicit conduct'' by referencing that term in section 2256(2)(A), part 75 will apply to depictions of ''lascivious exhibition.''

With regard to simulated sexually explicit conduct, it is crucial to note that Chapter 110 of title 18 of the U.S. Code (''Sexual Exploitation and Other Abuse of Children'') already covers both actual and simulated sexually explicit conduct. Specifically, it defines ''sexually explicit conduct'' as:

> (A) * * * actual or *simulated*—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person;
>
> (B) For purposes of subsection 8(B) of this section [part of the definition of ''child pornography''], ''sexually explicit conduct'' means—(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious *simulated* sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or *simulated* lascivious exhibition of the genitals or pubic area of any person * * *.

18 U.S.C. 2256(2) (emphases added).

Numerous States' child-exploitation statutes refer to both simulated and actual sexual conduct. *See* Alaska Stat. § 11.41.455; Ariz. Rev. Stat. § 13–3551; Ark. Code Ann. § 5–27–302; Cal. Penal Code § 311.11; Colo. Rev. Stat. § 18–6–403; Conn. Gen. Stat. § 53a–193; Fla. Stat. § 827.071; Ga. Code Ann. § 16–12–100; Idaho Code Ann. § 18–1507; 720 Ill. Comp. Stat. Ann. 5/11–20.1; Kan. Stat. Ann. § 21–3516; Ky. Rev. Stat. Ann. § 531.300; La. Rev. Stat. Ann. § 14:81.1; Mass. Ann. Laws ch. 272 § 29C; Mich. Comp. Laws Serv. § 750.145c; Minn. Stat. § 617.246; Miss. Code Ann. § 97–5–33; Mo. Rev. Stat. § 573.010; Mont. Code Ann. § 45–5–625; Nev. Rev. Stat. § 200.725; N.H. Rev. Stat. Ann. § 649–A:2; N.M. Stat. Ann. § 30–6A–3; N.Y. Penal § 263.00; N.D. Cent. Code § 12.1–27.2–01; Okla. Stat. tit. 21 § 1024.1; Or. Rev. Stat. § 163.665; S.D. Codified Laws § 22–24A–2 to –3; Tenn. Code Ann. § 39–17–1003; Tex. Penal Code Ann. § 43.25; Utah Code Ann. § 76–5a–2; Va. Code Ann. § 18.2–390; Wash. Rev. Code § 9.68A.011; W. Va. Code § 61–8C–1; Wis. Stat. § 948.01; Wyo. Stat. Ann. § 6–4–303. Accordingly, ''simulated'' in the context of sexually explicit conduct is neither a novel nor an uncommon term.

These statutes recognize that a child may be harmed both physically and psychologically in the production of visual depictions of simulated sexually explicit conduct, even if no sexually explicit conduct actually takes place. Furthermore, producers of visual depictions of actual sexually explicit conduct often substitute a visual depiction of simulated sexually explicit conduct (so-called ''soft-core'' pornography) in place of the actual sexually explicit conduct; then the soft-core pornography is often distributed more widely than the unedited version of the same production. In such cases, the protection of children from exploitation in the production of a visual depiction of actual sexually explicit conduct necessitates that producers of visual depictions of simulated sexually explicit conduct also be required to maintain records and label their products.

Sections 2257 and 2257A thus operate in tandem to protect children from exploitation in visual depictions of sexually explicit conduct. Part 75 implementing those statutes has undergone significant public comment, and several courts have found it to be a constitutional exercise of governmental authority. *See Am. Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994); *Free Speech Coalition* v. *Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005) (''*Free Speech I*'') (upholding certain aspects of part 75, although preliminarily enjoining others); *Free Speech Coalition* v. *Gonzales*, 483 F. Supp. 2d 1069 (D. Colo. 2007) (''*Free Speech II*''); *but see also Connection Distrib. Co.* v. *Gonzales*, 2006 WL 1305089, 2006 U.S. Dist. LEXIS 29506 (N.D. Ohio, May 10, 2006) (upholding the constitutionality of part 75), *rev'd and remanded sub nom. Connection Distrib. Co.* v. *Keisler*, 505 F.3d 545 (6th Cir. 2007) (striking down section 2257, but not directly addressing the constitutionality of part 75), *vacated and rehearing en banc granted sub nom. Connection Distrib. Co.* v. *Mukasey*, 2008 U.S. App. LEXIS 9032 (6th Cir. Apr. 10, 2008). Although one court invalidated part 75 as ultra vires to the extent it regulated those whose activity ''does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted,'' *see Sundance Assocs., Inc.* v. *Reno*, 139 F.3d 804, 808 (10th Cir. 1998) (quotation marks omitted; alteration in original), Congress subsequently amended the statute, see Adam Walsh Act, Public Law 109–248 section 502(a)(4), and adopted the Attorney General's interpretation of section 2257. Cf. *Free Speech Coalition II*, 483 F. Supp. 2d at 1075 (suggesting that the enactment of section 502 of the Act moots the plaintiff's *ultra vires* challenge to part 75).

The Proposed Rules

Revisions to Section 2257

The Department issued a proposed rule to implement the revisions to section 2257 on July 12, 2007. *See* Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct, 72 FR 38033 (July 12, 2007) (CRM 104; RIN 1105–AB18). The proposed rule reflected the change to the definition of ''actual sexually explicit conduct'' to include lascivious exhibition by adding to the definitional section of the regulations at § 75.1(n). Although proposed part 75 applied to the ''lascivious exhibition of the genitals or pubic area of a person,'' it did not define this term beyond the language of section 2256(2)(A). Case law provides guidance as to the types of depictions that federal courts have considered to be lascivious exhibition of the genitals or pubic area, and the Department will rely on such precedent in the context of section 2257 investigations and prosecutions.

The leading case is *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States* v. *Weigand*, 812 F.2d 1239 (9th Cir. 1987), which provides a list of factors for determining whether a visual depiction constitutes lascivious exhibition:

(1) Whether the focal point of the visual depiction is on the child's genitalia or pubic area;

(2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

(3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(4) whether the child is fully or partially clothed, or nude;

(5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832. Several courts of appeals have relied upon the Dost factors. *See, e.g., United States* v. *Grimes*, 244 F.3d 375 (5th Cir. 2001); *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994); *United States* v. *Wolf*, 890 F.2d 241 (10th Cir. 1989).

The July 2007 proposed rule noted that, although these factors have been used to determine whether visual

depictions of children constituted lascivious exhibition for purposes of criminal prosecution for violations of sections 2251, 2252, and 2252A of title 18, only the third factor is necessarily dependent on the age of the person depicted. The other factors provide guidance as to the types of depictions that would constitute lascivious exhibition for purposes of section 2257 and part 75, as well, even though those sections apply to any performers regardless of age.

The July 2007 proposed rule noted that the applicability of part 75 was to be prospective from the effective date of the Adam Walsh Act. It therefore contemplated that the rule applied only to depictions whose original production date was on or after July 27, 2006. That is, under the proposed rule, records would not be required to be maintained either by a primary producer or by a secondary producer for a visual depiction of lascivious exhibition, the original production date of which was prior to July 27, 2006. In the case of a secondary producer, the proposed rule stated that even if the secondary producer ''produces'' (as defined in the regulation) such a depiction on or after July 27, 2006, he need not maintain records if the original production date of the depiction is prior to that date.

Second, the Adam Walsh Act revised the exclusions in the statute for the operations of Internet companies. Specifically, the Act amended section 2257 by excluding from the definition of ''produces'' the ''provision of a telecommunications service, or of an Internet access service or Internet information location tool * * * or the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication.'' These exclusions are based on the definitions in section 231 of the Communications Act of 1934, 47 U.S.C. 231.

Third, the Adam Walsh Act made several changes in the terminology of the statute. In subsection 2257(e)(1), it added at the end the following: ''In this paragraph, the term 'copy' includes every page of a Web site on which matter described in subsection (a) appears.'' That change was reflected in the proposed rule at §§ 75.1(e)(3), 75.6(a), and 75.8(d). The change materially affects the regulation's labeling requirement as applied to Web sites. Section 75.8(d) of the current regulations permits a producer of a computer site of service or Web site to affix the label stating where the records required under the regulations are located ''on its homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, '18 U.S.C. 2257 RecordKeeping Requirements Compliance Statement.' '' Because of the change in the statute, the proposed rule eliminated that portion of the current regulations. The proposed rule required, per the statute, that the statement describing the location of the records required by this part be affixed to every page of a Web site (controlled by the producer) on which visual depictions of sexually explicit conduct appear.

Finally, the Adam Walsh Act confirmed that the statute applies to secondary producers as currently (and previously) defined in the regulations. Specifically, the Act defines any of the following activities as ''produces'' for purposes of section 2257:

> (i) Actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;
>
> (ii) Digitizing an image[ ] of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or
>
> (iii) Inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content[ ] of a computer site or service that contains a visual depiction of, sexually explicit conduct * * *

18 U.S.C. 2257(h)(2)(A).

It excludes from the definition of ''produces,'' however, the following activities, in pertinent part:

> (i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication.
>
> (ii) Distribution;
>
> (iii) Any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers * * *

Id. 2257(h)(2)(B), as amended.

This language replaces the previous definition of ''produces'' in the statute, which stated, in pertinent part, as follows:

> [T]he term ''produces'' means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted * * *

18 U.S.C. 2257(h) (2000 ed. & Supp. V) (former version).

In enacting the revised language, Congress upheld the Department's consistently held position that the rule's requirements for secondary producers have been in effect since the rule's original publication. As explained by the sponsor of the Act in the House of Representatives:

> Congress previously enacted the PROTECT Act of 2003 against the background of Department of Justice regulations applying section 2257 to both primary and secondary producers. That fact, along with the Act's specific reference to the regulatory definition that existed at the time, reflected Congress's agreement with the Department of Justice's view that it already had the authority to regulate secondary procedures [sic] under the applicable law.
>
> A federal court in Colorado, however, recently enjoined the Department from enforcing the statute against secondary producers, relying on an earlier Tenth Circuit precedent holding that Congress had not authorized the Department to regulate secondary producers. These decisions conflicted with an earlier DC Circuit decision upholding Congress's authority to regulate secondary producers. Section 502 of the bill is meant to eliminate any doubt that section 2257 applies both to primary and secondary producers, and to reflect Congress's agreement with the regulatory approach adopted by the Department of Justice in enforcing the statute.

152 Cong. Rec. H5705, H5725 (2006) (statement of Rep. Pence).

Congress thus rejected the interpretation adopted by the court in *Sundance Associates* v. *Reno*, 139 F.3d 804 (10th Cir. 1998), in favor of the DC Circuit's decision upholding the application of the statute to secondary producers. *Am. Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994). In upholding the constitutionality of the secondary-producer requirements, the D.C. Circuit both recognized the importance of these requirements and effectively rejected the argument that Congress lacked the authority to regulate secondary producers.

In accordance with the current law, the proposed rule retained July 3, 1995, as the effective date of the rule's requirements for secondary producers. (The current regulations, published in 2005, adopted July 3, 1995, as the effective date of enforcement of section 2257 based on the court's order in *American Library Association* v. *Reno*, No. 91–0394 (SS) (D.D.C. July 28, 1995). The one exception was that the proposed rule would not have penalized

secondary producers for failing to maintain required records in connection with those acts of production that occurred prior to the effective date of the Act. While the law would permit the Department to apply the statute and regulations to actions that occurred prior to that date, the Department determined that the proposed rule would not apply in such circumstances to avoid any conceivable *ex post facto* concern.

In addition to implementing the changes in the statute described above, the July 2007 proposed rule clarified several other issues. First, it clarified that primary producers may redact non-essential information from copies of records provided to secondary producers, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm name and age—such as drivers' license number or passport number—may not be redacted, so that its validity may be confirmed. Second, the proposed rule clarified that producers of visual depictions performed live on the Internet need not maintain a copy of the full running-time of every such depiction. Rather, they may maintain a copy that contains running-time sufficient to identify each and every performer with the records needed to confirm his or her age.

Third, the proposed rule clarified that, with regard to the government-issued photo identification required for records, a foreign-government-issued picture identification is acceptable if the performer providing it is a foreign citizen and the producer maintaining the records produces the visual depiction of the performer in a foreign country, no matter whether the producer is a U.S. or foreign citizen. That is, a U.S. producer who produces a depiction of sexually explicit conduct while located in a foreign country may rely on a foreign-government-issued picture identification card of a performer in that depiction who is a foreign citizen. All other requirements of the regulations continue to apply mutatis mutandis—i.e., the producer must examine and maintain a legible copy of the foreign-government-issued picture identification card in his records. Furthermore, a foreign-government-issued picture identification card is not sufficient to comply with the regulations for U.S. citizens, even when abroad. That is, if a U.S. producer travels to a foreign country to produce a depiction of sexually explicit conduct, all U.S. citizens performing in the depiction must have a U.S.-government-issued picture identification card, even though a foreign citizen performing in the same depiction may provide a foreign-government-issued picture identification card. And, as is the case in the current regulation, only a U.S.-government-issued picture identification card complies with the regulations relating to productions in the United States, no matter whether the performer is a U.S. or foreign citizen. The regulation also states that producers of visual depictions made after July 3, 1995, the effective date of the regulations published in 1992, and before June 23, 2005, the effective date of the current regulations published in 2005, may rely on picture identification cards issued by private entities such as schools or private employers that were valid forms of required identification under the provisions of part 75 in effect on the original production date. Finally, although it was not necessary to change the text of the regulations for this purpose, the Department clarified at the time that it issued the proposed rule that a producer need not keep a copy of a URL hosting a depiction that the producer produced but over which he exercises no control.

Section 2257A

As noted above, on June 6, 2008, the Department published a proposed rule making additional amendments to part 75 to implement section 2257A. *See* Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performances, 73 FR 32262 (June 6, 2008) (CRM. 105; RIN 1105–AB19). The June 2008 proposed rule contained two key elements—a definition of ''simulated sexually explicit conduct'' and the details of the certification regime.

As to the definition of ''simulated sexually explicit conduct,'' as noted above, ''sexually explicit conduct'' is defined in section 2256(2)(A) with reference to certain physical acts and with reference to both ''actual'' and ''simulated'' performance of those acts. No definition of ''actual'' or ''simulated'' is contained in section 2256, or anywhere else in chapter 110. When first published in 1990, amended in 2005, and proposed to be amended in 2007, part 75 did not adopt a definition of ''actual,'' because the Department believed that in the context of the acts described, the meaning of the term was sufficiently precise for regulatory purposes. Public comments on the previous versions of part 75 did not address the definition of ''actual,'' nor has the meaning of that term arisen in litigation regarding the regulations.

With the extension of part 75 to cover simulated conduct, however, and with the statutory provision for a certification regime for simulated conduct, the Department believed that a definition of the term ''simulated sexually explicit conduct'' was necessary. A definition would make clear to the public what types of conduct come within the ambit of the regulation, as distinct from conduct not covered at all, and what types of conduct will be eligible for the certification regime.

The Department started its analysis of the proper definition of the term for regulatory purposes with the term's plain meaning. The word ''simulated'' is typically defined as ''made to look genuine.'' *Merriam-Webster's Collegiate Dictionary* 1162 (11th ed. 2003).

The Department believes that an objective standard—that is, one defined in terms of a reasonable person viewing the depiction—is appropriate to add to this basic definition. The proposed rule's definition of ''simulated sexually explicit conduct'' thus read as follows: ''[S]imulated sexually explicit conduct means conduct engaged in by performers in a visual depiction that is intended to appear as if the performers are engaged in actual sexually explicit conduct, and does so appear to a reasonable viewer.''

The June 2008 proposed rule's definition was based on the plain meaning of the term and is supported by extrinsic sources of meaning. Chapter 110 was created by the Protection of Children Against Sexual Exploitation Act of 1977, which defined ''sexually explicit conduct'' to include both ''actual or simulated'' acts. See Protection of Children Against Sexual Exploitation Act of 1977, Public Law 95–225, section 2(a), 92 Stat. 7, 8 (1978). That statute did not define ''simulated,'' however, and the legislative history of the act does not indicate that Congress considered defining that term. *See* S. Rep. No. 438, 95th Cong., 1st Sess. (1977); H.R. Report No. 696, 95th Cong., 1st Sess. (1977). When Congress amended chapter 110 in 1984, it considered defining ''simulated'' but ultimately did not do so, thereby leaving the definition of that term to the discretion of the Attorney General.

As noted above, most States have laws similar to the federal statute criminalizing production, distribution, and possession of simulated sexually explicit conduct involving a minor. A number of those States' statutes, in contrast to section 2257A, define ''simulated,'' and therefore may inform the federal definition of that term in part

75. State definitions of ''simulated'' generally fall into three categories:

(1) Definitions based on giving the appearance of actual sexually explicit conduct. For example: ''An act is simulated when it gives the appearance of being sexual conduct.'' Cal. Penal Code section 311.4(d)(1); 14 V.I. Code section 1027(b). '' 'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.'' Utah Code Ann. section 76–5a–2(9). ''Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted.'' Mass. Ann. Laws ch. 272, section 31; N.H. Rev. Stat. Ann. section 649–A:2(III).

(2) Definitions based on depiction of genitals that gives the impression of actual sexually explicit conduct, such as: '' 'Simulated' means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.'' Ariz. Rev. Stat. section 13–3551(10); Miss. Code Ann. section 97–5–31(f); Mont. Code Ann. section 45–5–625(5)(c).

(3) Definitions based on (a) the depiction of uncovered portions of the body and (b) that gives the impression of actual sexually explicit conduct, such as: '' 'Simulated' means the explicit depiction of [sexual] conduct * * * which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.'' Fla. Stat. § 827.071(1)(i). '' 'Simulated' means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks.'' Tex. Penal Code § 43.25(a)(6). '' 'Simulated' means the explicit depiction of any [sexual] conduct * * * which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.'' N.Y. Penal L. § 263.00(6).

The definitions categorized above as ''based on giving the appearance of actual sexually explicit conduct'' are closest to that proposed by the Department in the proposed rule. The other two definitions, which require the actual depiction of nudity, are overly restrictive in that a child may be exploited in the production of a visual depiction of simulated sexually explicit conduct even if no nudity is present in the final version of the visual depiction. The producer of the depiction may arrange the camera or the body positions to avoid depicting uncovered genitals, breasts, or buttocks yet still cause harm to the child by having him or her otherwise realistically appear to be engaging in sexually explicit conduct.

It is also important to note that ''simulated'' in this context does not mean ''virtual.'' For purposes of chapter 110, including sections 2256, 2257, and 2257A, and for purposes of part 75, ''simulated sexual explicit conduct'' means conduct engaged in by real human beings, not conduct engaged in by computer-generated images that only appear to be real human beings. Although Congress did attempt to criminalize production, distribution, and possession of ''virtual'' child pornography on the basis that it contributed to the market in child pornography involving real children, the Supreme Court held that the child-protection rationale for the criminalization of child pornography under *Ferber* did not apply to images in which no real children were harmed. *See Ashcroft* v. *Free Speech Coalition,* 535 U.S. 234, 250–51 (2002). Section 2257A does not cover such ''virtual'' child pornography, but rather ''simulated'' sexually explicit conduct, the production of which, as noted above, can exploit a real child. The Court's decision in *Ashcroft* is thus not relevant to sections 2257 or 2257A, or part 75, which, for clarity's sake, consistently refers to sexually explicit conduct engaged in by an ''actual human being.''

The second key element of the proposed rule was the crafting of the certification regime. In enacting section 2257A, Congress determined it would be appropriate, in certain circumstances, to exempt producers of visual depictions of lascivious exhibition (for which records must be kept under section 2257, as amended by the Act) and producers of visual depictions of simulated sexually explicit conduct (for which records must be kept under section 2257A) from statutory requirements otherwise applicable to such visual depictions. *See* 18 U.S.C. 2257A(h).

The safe harbor provision in the statute in essence permits certain producers of visual depictions of lascivious exhibition or of simulated sexually explicit conduct to certify that in the normal course of business they collect and maintain records to confirm that performers in those depictions are not minors, while not necessarily collected and maintained in the format required by part 75. Where a producer makes the required certification, matter containing such visual depictions is not subject to the labeling requirements of the statute.

In the June 2008 proposed rule, the Department crafted a certification regime that would have implemented the safe harbor in such a way as to permit such producers, in accordance with the statute, to be subject to lesser record-keeping burdens than those in part 75 while still protecting children from sexual exploitation. The proposed rule would have required producers to include the following information in certifications: (1) The legal basis for the exemption and basic evidence in support; (2) a statement that they collect and maintain the requisite individually identifiable information concerning their employees; (3) a list of the producer's materials depicting simulated sexually explicit conduct or lascivious exhibition that show non-employee performers; (4) a list of the producer's materials depicting simulated sexually explicit conduct or lascivious exhibition produced since the last certification; (5) with respect to foreign-produced material, a statement that the foreign producer of that material either collects and maintains the requisite records or itself has made a certification, or, with respect to material depicting sexually explicit conduct only, a statement that the producer took reasonable steps to confirm that the performers depicted in that material are not minors; (6) if applicable, a list of the foreign-produced material depicting simulated sexually explicit conduct that the producer took reasonable steps to confirm did not depict minors; and (7) if applicable, a statement that the primary producer of material secondarily produced by the certifying producer either collects and maintains the requisite records or itself has made a certification. The proposed rule would also have required that the certification be submitted every two years.

Changes From the Proposed Rules

This final rule makes a number of changes in the proposed rules in response to commenters' concerns. The Department believes that the changes, while still enabling the Department to enforce the statutes, will considerably lessen the burdens on the regulated industries.

Most significantly, as described in more detail below in response to specific comments, the Department has done the following:

- Consolidated the publication of the final versions of the two proposed rules into one final rule;

• Ensured that the regulatory requirements applicable to depictions of actual sexually explicit conduct consisting of lascivious exhibition apply starting on the date of availability of the statutorily provided safe harbor;
• Permitted the use of third-party custodians of records;
• Permitted records to be maintained digitally;
• Clarified the definition of ''simulated sexually explicit conduct'';
• Clarified the exemption from the record-keeping requirements for those engaged in distribution;
• Clarified that, for purposes of the requirement that every page of a Web page contain the disclosure statement, a hyperlink or ''mouseover'' is permitted;
• Eliminated the requirement that statements on the location of records contain a date of production (or any other date), although added a requirement that primary producers create a record of the date of production;
• Clarified the application of the requirements regarding location of the statement to DVDs; and
• Eliminated the detailed information required by the certification regime, and replaced it with a significantly simpler certification.

Comments on the Proposed Rules

The following section reviews comments to the proposed rules and how, if at all, the Department has changed the final rule in response to them. Comments on both proposed rules are included in this section, organized according to the subsections of the rule.

Definitions

The proposed rule outlined several changes to definitions of terms that are contained in 28 CFR 75.1. The Department received a number of comments regarding the proposed definitions.

Picture Identification Card

The proposed rule requires in § 75.1(b) that a producer of actual sexually explicit conduct check a picture identification card issued by a United States or State government entity for a performer who is an American citizen, whether the production occurs in the United States or abroad. Under the proposed rule, a producer abroad may rely on foreign government identification cards for foreign performers, but must maintain a copy of that identification, and a producer may not rely on a foreign identification card for a foreign citizen when production occurs in the United States, but must check a United States identification card in that circumstance. The Department received three comments on this proposal, all of which voiced opposition.

One comment noted that a producer cannot hire a foreign adult performer to work in the United States who lacks American documents, but that if the producer took her across the border, then she could work with foreign documents, a situation the commenter suggested would not help children. The commenter also states that because the proposed rule lacked a good faith exception, a producer operating outside the United States would need to make sure that a performer using foreign documents was not in fact an American citizen. Moreover, the commenter claims that the goal of avoiding errors in immigration status that the proposed rule would therefore achieve did not help children.

The Department declines to adopt this comment. Protecting American citizens is a top priority of the Department, and given the more stringent standards for issuing government identification documents in recent years, the Department believes that children will be best protected by a requirement that American identification documents be provided before an American is hired to engage in sexually explicit conduct. It further believes that conduct within American borders should necessitate that the producer check for American issued identification documents even if the performer is a foreign citizen, so that all producers in this country check the age and identification of all performers. It is true that the rules will differ if the production occurs in foreign countries with foreign performers. Given the Department's resources and concerns regarding comity, the Department continues to believe that the proposed rule best addresses this issue.

One comment expressed the belief that the Department should not always require that a producer obtain a copy of a picture identification card before creating an actual sexually explicit depiction. It hypothesizes the existence of a recording of a sexual act by a Congressman in a public place. It argues that a news organization could not air this recording under the proposed rule in the absence of the checking of a picture identification card, even though the Congressman by constitutional operation must be at least 25 years old.

The Department declines to adopt this comment. Regardless of the apparent age or identity of an individual, the rule appropriately requires that identification be checked to determine that the performer is of legal age. The individual pictured in this hypothetical may only appear to be a Congressman, for instance. Moreover, an entity regulated by the FCC, which the comment presupposes for airing such a depiction, may well be able to utilize the exemption provisions of section 2257A.

The Department has also clarified that a picture identification card must include the performer's date of birth. Such a requirement was implicit in the proposed rule in that picture identification documents issued by government agencies, such as a passport or driver's license, normally contain the individual's date of birth. The final rule makes this requirement explicit.

Producer

The Department received thousands of comments that appear to be part of an orchestrated campaign that opposes the requirement in the proposed rule that adult social-networking sites obtain and maintain personal information concerning their users, including obtaining and maintaining users' photo identification, as well the ability of the Department to inspect such records and invade user privacy without safeguarding the information once observed. They state that it is not feasible to have adult networking sites for thousands of users under the rule, and they note that users of such sites already certify that they are over 18.

The Department does not adopt these comments. First, most social networking sites would appear not to be covered by the statute and the rule under the definition of ''produces'' in section 2257(h)(2)(B)(v) and § 75.1(c)(4)(v), respectively. The statutory definition excludes from ''produces'': ''the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication.'' *See also* 28 CFR 75.1(c)(4)(v) (excluding ''[a] provider of an electronic communication service or remote computing service who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service''). Therefore, the Department does not accept that such sites cannot operate under the proposed rule, or that such sites must maintain information concerning their users, much less that the Department must be able to inspect such data. However, one who posts sexually explicit activity on ''adult'' networking sites may well be a primary or secondary producer. Users of social networking sites may therefore be subject to the proposed rule, depending on their conduct. That such users may certify without penalty or effective

monitoring that they are over 18 is irrelevant to compliance with the proposed rule, since they may not in fact be above 18. Moreover, depictions such users put on the sites may feature not only themselves but other people who have not even made the unverifiable certification required by a social networking site.

One comment states that the Department must clarify the distinction between secondary producers and distributors. The comment notes that the Act amended the statutory definition of ''produces'' to broaden the distribution exclusion from ''mere distribution'' to ''distribution.'' *See* 18 U.S.C. 2257(h)(2)(B)(ii). The comment states that this means ''distribution'' is not meant to be narrowly construed, and that the Department should thus state that ''unless an entity that disseminates a depiction of sexually explicit conduct is responsible for creating or materially altering its content, or for its physical construction, the entity is engaged in 'distribution' and is exempt from the statute and rules.'' The comment goes on to note that ''non-material alteration'' should include removing or pixilating depictions of sexually explicit conduct.

The Department adopts this comment in part. The Department cannot adopt the comment in toto because doing so would conflict with the statute in that sections 2257(h)(2)(A)(ii) and (iii) include several activities under the definition of ''produces,'' such as digitizing an image, inserting an image on a computer site or service, or managing the sexually explicit content of a computer site or service, that would fall under the comment's proposed definition of ''distribution.'' The Department, however, states in the final rule that, unless activities are described in section 2257(h)(2)(A), an entity whose activities are limited to the dissemination of a depiction of sexually explicit conduct without having created it or altered its content is excluded from the definition of ''producer.''

The Department cannot adopt the suggestion as to ''non-material alteration'' of depictions for two reasons: First, pixilating an image would appear to constitute ''creating a digitally- or computer-manipulated image of an actual human being,'' and thus would fall under the definition of ''produces'' in section 2257(h)(2)(A)(i); second, to the extent images are posted on Web sites, alteration (and subsequent posting on a Web site) of an image would appear to constitute ''inserting * * * [such image] on a computer site * * * or otherwise managing the sexually explicit content'' of such a site. While the comment correctly states that the proposed exclusion is analogous to the exclusion for transmission, which permits a transmitter to delete material that it considers ''obscene * * * or otherwise objectionable'' without being considered to have selected or altered the content of the communication, see 18 U.S.C. 2257(h)(2)(B)(v) (citing 47 U.S.C. 230(c)), Congress did not provide similar language modifying the exclusion for distribution of the image, and thus the Department is limited by the statutory text.

In addition, as described in more detail below, in certain circumstances a pixilated depiction can still constitute lascivious exhibition. *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994). A categorical exemption for persons who pixilated or otherwise obscured depictions would risk creating a loophole for the production of material that is in fact covered by the definition of sexually explicit conduct.

Several commenters ask the Department to exclude news and documentary programming from the definition of ''producer.'' The comments claim that producers of that programming use footage provided by others under the fair use doctrine. The comments posit that if a producer includes news and documentary producers, then such producers either will lose the ability to obtain footage depicting any adult sexual conduct, or will be forced to make payments to the original producer notwithstanding the fair use doctrine.

The Department declines to adopt this comment. The First Amendment does not permit even a bona fide reporter to trade in child pornography in order to create a work of journalism, see *United States* v. *Matthews*, 209 F.3d 338 (4th Cir. 2000), not to mention the possibility that someone might purport to be a news or documentary producer to evade the statute. Accordingly, it is consistent with the law for the final rule to cover journalistic and similar works.

One comment inquires whether a secondary producer is required by the proposed rule's change to § 75.2(a)(1) to ''examin[e] * * * a picture identification card prior to production of the depiction,'' or whether this obligation is limited to the primary producer. The commenter asks that the Department allow an entity that obtains a domestic or foreign-made film or program for American distribution but has no role in the production of that film or program to be considered a ''distributor'' rather than a ''secondary producer'' of such material, and therefore to be exempt from the requirements. The comment would allow secondary producers to disseminate a work in the United States even when a primary producer failed to obtain the required records prior to the date of original production.

The Department declines to adopt this comment. The comment would effectively turn all secondary producers into distributors, exempting them from section 2257's requirements, contrary to the Act's making section 2257 applicable to that activity. A significant goal of the legislation was to eliminate commercial markets for non-commercially produced child pornography. Although the rule does not require secondary producers to check identification themselves, secondary producers should be aware that they incur a significant risk if they do not avail themselves of the identification documents that primary producers have created. Secondary producers who do not check records run the risk that they are distributing child pornography if the performers depicted in fact were not of legal age. Furthermore, to the extent that such foreign-produced material includes only lascivious exhibition, a U.S. secondary producer could avail itself of the provisions of the certification.

One comment notes the proposed rule's elimination of ''mere'' from the term ''mere distribution'' that is contained in the current regulation and requests that the Department add ''or gratuitous transfer'' after the word ''distribution'' in the definition of ''producer'' in § 75.1(c)(4)(ii). The comment suggests that adding ''or gratuitous transfer'' would avoid a potential problem in the meaning of the word ''distribution'' when read in connection with the term's restriction to commercial contexts in § 75.1(d) of the current regulations. The comment believes that the latter provision correctly suggests that the regulations' record-keeping requirements are restricted to commercial production operations. And it requests that the Department to elaborate whether or which transfers should require disclosure statements.

The Department declines to adopt this comment. The definitions in the proposed rule are (with minor grammatical changes to conform to the structure of the regulation) exactly those in the statute, and the Department sees no need for further clarification, particularly with respect to a particular term that itself would have to be defined.

One comment asks the Department to remove the term ''assembles'' from the definition of ''producer'' in § 75.1(c)(2). The Department declines to adopt this comment. As noted above, the

definitions in the regulations are those contained in the statute, and the statutory definition of ''produces'' includes ''assembling * * * a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct.'' 18 U.S.C. 2257(h)(2)(A)(ii).

One comment notes that many depictions will have more than one primary producer, as a depiction can be photographed, then digitized, or be generated by computer from a depiction of an actual person. Various entities could be involved in creating a particular depiction. Each entity or person who performed even one of these tasks would be a primary producer. Moreover, since only secondary producers can rely on copies of documents, the comment requests that the Department provide that only one primary producer should be designated and required to maintain records.

Another comment states that the rules are unclear concerning how many or which producers must be named if there is more than one primary or secondary producer. It notes that parents and subsidiaries may not have the same address. The Department adopts this comment in part by stating that the final rule provides that where a primary producer is a corporate entity, only one primary producer associated with that entity will exist. For purposes of efficiency in inspection, where the corporate parent entity is the primary producer, that is the entity that should be named in the disclosure statement as the keeper of the records.

The Department adopts these comments in part. In response to a similar comment, the final rule published in 2005 stated, ''The Department does not believe that logic, practicability of record-keeping or inspections, or the statue dictates that there be one and only one primary producer for any individual sexually explicit depiction. Any of the persons defined as primary producer has easy access to the performers and their identification documents and should therefore each have responsibility individually and separately of maintaining the records of those documents.'' However, upon reconsideration, the Department has decided to clarify that if multiple individuals are all employed by the same entity, the entity constitutes the ''primary producer'' for purposes of record-keeping, not the individuals.

Similarly, one comment notes that a single reproduction can create numerous secondary producers. Under § 75.1(c)(2), a preexisting photograph can be digitized by one person, inserted on a computer site by another, which is managed by a third, and if each of these is employed by a corporation, then there are now seven secondary producers arising out of a single reproduction, each of whom must now seek and obtain from the primary producer information concerning every depicted performer. The commenter considers this scenario to be unlikely, threatening availability of the depiction.

As with the similar comment regarding multiple primary producers, the Department adopts this comment in part. The Department has clarified that if multiple individuals are all employed by the same entity, the entity constitutes the ''secondary producer'' for purposes of record-keeping, not the individuals. However, there may be multiple secondary producers who are separate entities engaged in separate commercial enterprises—e.g., one company purchases a depiction from the primary producers and publishes it on a Web site and another purchases and publishes the same depiction in a magazine several years later—and who must each maintain the records associated with the depiction.

One comment questions whether § 75.1(c)(4)(v), which allows a Web site such as YouTube to post depictions without having to keep records, allows someone to display a YouTube video on their own Web site and still fall within the exemption because YouTube would not have the records itself and the person downloading from YouTube would not have access to the records. As described in the comment, it would appear that the individual who downloads a depiction of actual sexually explicit material from a another site onto a site that he or she controls is a producer because he or she has ''reproduc[ed]'' or ''insert[ed] on a computer site or service a digital image of, or otherwise manage[ed] the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct'' within the meaning of the definition of ''secondary producer'' in § 75.1(c)(2). Whether or not the source for the person is a site such as YouTube, which may not be required to maintain records as a secondary producer, since the original individual producer who posts a depiction on that site is required to affix a disclosure notice to each page of the sexually explicit depiction, a secondary producer who downloads that depiction onto another site should be able to obtain the requisite information for compliance with its own record-keeping and disclosure requirements.

Date of Original Production

The proposed rule defined ''date of original production'' to mean the date that the primary producer actually created the image of actual sexually explicit conduct. One comment requests that the Department define this term in this fashion for primary producers, but, in the case of secondary producers, that the date of original production should also be permitted, at the discretion of the secondary producer, to be the date of the secondary producer's relevant conduct.

The Department adopts this comment. Obtaining the date of the original production from the primary producer should not pose a problem for a secondary producer, since the secondary producer obtains the records of the production from the producer. As explained more fully below, the Department in the final rule has eliminated the requirement that the statement of location of records required by § 75.6 contain a date of original production (or any other date, as in the regulation currently in force). Hence, a secondary producer is not responsible for including that information in a statement that it affixes to material it secondarily produces. However, primary producers, as explained below, will henceforth be required to create and maintain a record of the date of original production, such record being transferred to the secondary producer along with all other records required by part 75.

To the extent that this is a new requirement for both primary and secondary producers that did not exist previous to the proposed rule, the Department clarifies that it applies only prospectively from the date of the publication of this final rule.

Also, in response to a comment, the Department has clarified that if a depiction is made over the course of multiple dates, the date of original production consists of the earliest of those dates. There is no requirement in the rule that any depicted performer be 18 on the date of original production so long as that performer is 18 as of the date that a depiction of that individual is created. Producers who keep records demonstrating that performers are 18 as of the date of original production conform to the requirements of the rule. The final rule has been changed to reflect that in the case of a performer who was under 18 at the time that production began, but became of legal age before he or she was depicted, an alternative date of original production

with respect to that performer is the first date that that performer was actually filmed for the production at issue.

The Department has also clarified the meaning of ''*date of original production*'' with respect to matter that is a secondarily produced compilation of one or more separate, primarily produced depictions. The final rule provides that with respect to such a compilation, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction therein was produced. In the event a performer in any of the individual depictions was under 18 on that date, the alternative date of original production with respect to that performer is the first date that any scene depicting that performer was actually recorded.

Employed by

One comment states that the Department erred in defining ''employed'' in the 2257A proposed rule because the Department cannot make the term broader than it is normally understood by simply defining it broadly. The comment goes on to state that ''[w]e do not think that it is a rare case at all that a producer creates images covered by sections 2257 or 2257A which depict non-employees—as properly understood—in sexual roles. But defining 'employe[e]' more broadly than usual defeats the obvious sense of the safe harbor provision which Congress has promulgated.''

The Department declines to adopt this comment. The definition of ''employed'' used in the proposed rule is consistent with the commonly understood definition, which does not necessarily require that an employee be paid by an employer. One common definition of ''employ'' is ''to use or engage the services of,'' while another is ''to provide with a job that pays wages or a salary.'' *Merriam-Webster Collegiate Dictionary* 408 (11th ed. 2003). Although the commenter seeks to characterize the Department's definition of the term as somehow broader than normal, the Department's definition is wholly consistent with the dictionary definition of the term in that it covers not only a producer providing a person with a job that pays wages but also a producer using or engaging the services of a person. The Department thus does not believe that the proposed rule's definition of ''employed'' is inconsistent with the text of the statute.

Sexually Explicit Conduct

Many comments argue that the *Dost* factors are vague and not readily transferable to an adult, notwithstanding the Department's statements concerning the proposed rule. These comments asserted that inquiring whether setting, pose, and visual depictions are appropriate, natural, or suggestive for a child are nonsensical for adults because such conduct is not improper for adults. One comment maintained that the *Dost* factors represent in this context an inappropriate burden shift from presumed constitutional expression to a presumption of child pornography, and another suggested that an image not otherwise lascivious could be inappropriately found to be lascivious based on its proximity to adult lascivious images.

The Department does not adopt these comments. The Department does not consider application of the *Dost* test to adults to be nonsensical. The point of the factors is to determine whether a particular depiction is of actual sexually explicit conduct for purposes of determining whether compliance with various legal requirements is necessary. The age of the person depicted is irrelevant to whether the image depicts actual sexually explicit conduct, except for one *Dost* factor that is age-dependent and which the proposed rule identified as not being relevant to the depiction's status as actual sexually explicit conduct. If the acts depicted would fall within any of the remaining *Dost* factors if they were performed by a minor, one who produces actual sexually explicit conduct must take the requisite steps necessary to ensure that the individual performing these acts is of legal age. The proposed rule creates no presumption of or against the existence of child pornography. The rule's applicability depends on the image as it is without reliance on any presumptions. The *Dost* factors themselves do not erect any presumption. Nor is the lasciviousness determination made with regard to anything but the depiction that is produced.

One comment, relying on a Court of Appeals decision that accepted the relevance of the *Dost* factors, *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994), maintains that their applicability here would mean that millions of images on Myspace or Youtube or Facebook may require section 2257 compliance even though they do not involve nudity or sexual activity. The comment states that the rule must define exhibition of the genitals to consist only of nude exhibition. Otherwise, it maintains, every photo of male water polo players or other competitive swimmers would be potentially subject to section 2257 record-keeping, as would other depictions of persons in tight clothing suggestive of genitalia.

The Department does not adopt this comment. The comment takes an overly broad reading of the law of child pornography and applies that reading to produce a nonsensical result. The *Knox* case does not stand for the proposition claimed by the comment. It is not the case that pictures of boys' water polo teams constitute child pornography. The images at issue in *Knox* were lasciviously displayed. Although the genitals were clothed in that case, they were covered by thin, opaque clothing with an obvious purpose to draw attention to them, were displayed by models who spread or extended their legs to make the pubic and genital region entirely visible to the viewer, and were displayed by models who danced or gyrated in a way indicative of adult sexual relations. 32 F.3d at 746–47. None of these attributes remotely applies to standard swim team photographs or underwear or other mainstream advertising. Therefore, very few images posted on Myspace or Youtube of clothed individuals would require section 2257 compliance, and the description in this rule of the kinds of images that do so provides clear guidance to the narrow situations in which clothed images would trigger section 2257 compliance.

One comment suggests, as an alternative to the *Dost* factors, that the rule define ''lascivious exhibition of the genitals'' to mean images that display an individual's naked genital area.

The Department declines to adopt this comment. As discussion of the depictions at issue in the *Knox* case shows, there are instances when covered genitals can amount to child pornography. When such images are created, if the performers are under 18, what is being produced is child pornography. The obligations of the proposed rule must apply to producers who create depictions that could constitute lascivious exhibition, so as to reduce the possibility of child exploitation. One comment asks whether the depiction of scantily clad women in a strip club or bedroom would be subject to the regulations and criminal penalties. The comment maintains that the need to pose such a question means that producers would not know what materials trigger the record-keeping requirements, which would cause a chilling effect. The comment claims that creators of widely shown films and television programs who make a mistake in this respect risk prosecution.

The Department does not adopt this comment. The proposed rule rejected a

categorical approach that would state whether every possible depiction was one that fell within a definition. Rather, it adopted the *Dost* factors, which rely on context as well as content. A depiction of scantily clad women in a strip club or bedroom can appear in limitless permutations, and the Department cannot state that all or none would constitute lascivious exhibition of the genitals without consideration of the *Dost* factors. Those factors provide the context that producers and the Department will rely on to determine whether an image depicts actual sexually explicit conduct so as to minimize any chilling effect. Film and television producers are particularly unlikely to risk prosecution for displaying scantily clad performers because of the certification option.

One comment suggested that because of the vagueness of the *Dost* test, a producer may not know that he must obtain identification before production. If the producer does not do so, the comment asks what options are then available to the secondary producer who determines that the *Dost* test applies. The comment maintains that as a result, some producers may not be able to acquire and disseminate a wide range of movies and television programs, especially foreign productions.

The Department does not adopt this comment. Prosecutions for production of child pornography have been upheld by many courts applying the *Dost* test to determine whether a depiction is one that lasciviously exhibits the genitals. *See, e.g., United States* v. *Horn*, 187 F.3d 781 (8th Cir. 1999); *United States* v. *Villard*, 885 F.2d 117, 122 (3d Cir. 1989). That they have done so contradicts the argument that the test amounts to unconstitutional vagueness in defining ''lascivious exhibition.'' A secondary producer who is concerned that a primary producer may have violated the requirements of the statute and the regulation has the options of requesting that the primary producer revisit the issue and examine picture identification cards and compile age records. Furthermore, secondary producers of qualifying material may be able to avail themselves of the certification in section 2257A and its implementing regulation.

One comment disputed the Act's extension of section 2257 to cover lascivious exhibition as closing a previous loophole in that statute. The comment asserts that the prior version reflected a desire to limit the law to depictions that involve actual sexually explicit activity and avoid overbreadth through inapplicability of its provisions to fully clothed adults.

The Department does not adopt this comment. The characterization of the Act is not an operative part of the regulation that requires a response.

One comment requests that the Department distinguish between actual and simulated masturbation in defining actual sexually explicit conduct. The Department declines to adopt this comment. To the extent that this is merely a subset of a larger question as to the distinction between ''actual'' and ''simulated'' conduct, the meaning of ''actual'' conduct with respect to all the conduct covered by the statute and the regulation is clear on its face. To the extent that ''simulated'' was not clear on its face, this final rule regulation contains a definition.

One comment requests that the Department define ''sadistic or masochistic abuse'' because some people believe that safe and consensual bondage is not abuse, and requests that the Department distinguish between actual and simulated sadistic or masochistic abuse. The Department declines to adopt this comment. That term is not a subject of this rulemaking. Moreover, actual sexually explicit conduct depends on the content of what is being displayed, not on whether the content is subjectively considered to be abusive. If belief as to abuse were to control, a producer who determined that nothing was abusive would be able to avoid compliance with the regulations in their entirety, creating massive opportunity for child exploitation.

One comment contends that the definition of ''sexual'' varies among communities and that the final rule should contain more guidance as to the meaning of the term. It asks whether nude photos of a single person's erect penis is sexual, or whether a hand over the pubic area is sexual.

The Department declines to adopt this comment. It believes that the definition of actual sexually explicit conduct contained in the final rule is clear. The Department does not believe that a producer would have any difficulty in determining whether hypothetical depictions of the kind posed by the commenter would constitute actual sexually explicit conduct within the meaning of the rule.

Simulated Sexually Explicit Conduct

In the proposed rule to implement section 2257A, the Department started its analysis of the proper definition of the term for regulatory purposes with the term's plain meaning. The term ''simulated'' is generally defined as ''made to look genuine.'' *Merriam-Webster's Collegiate Dictionary* 1162 (11th ed. 2003). The Department believed that an objective standard—that is, one defined in terms of a reasonable person viewing the depiction—is appropriate to add to this basic definition. The proposed rule's definition of ''simulated sexually explicit conduct'' thus read as follows: ''[S]imulated sexually explicit conduct means conduct engaged in by performers in a visual depiction that is intended to appear as if the performers are engaged in actual sexually explicit conduct, and does so appear to a reasonable viewer.''

Three comments state that the final rule should incorporate the definition of ''simulated sexual intercourse'' provided by the Supreme Court in *United States* v. *Williams*, 128 S. Ct. 1830, 1840–41 (2008). One comment further recommends that the definition should explicitly incorporate by reference the definition in *Williams*. That definition reads, in pertinent part:

> ''simulated'' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera.

Id. While the *Williams* definition refers to ''simulated sexual intercourse,'' not ''simulated sexually explicit conduct,'' the Department understands the comments to recommend that the final rule use the *Williams* definition as appropriately amended to refer to ''simulated sexually explicit conduct,'' not ''simulated sexual intercourse.''

The Department believes that the *Williams* definition conceptually is not dissimilar to that outlined in the proposed rule, and adopts both comments. The final rule thus incorporates a revised definition of ''simulated sexually explicit conduct.''

One comment recommends that the proposed rule's definition of ''sexually explicit conduct'' should refer to 18 U.S.C. 2256(2)(B), not 18 U.S.C. 2256(2)(A). The comment states that the narrower definition at section 2256(2)(B), which would require depictions to be graphic or lascivious, would be more consistent with the state laws the Department rejected in determining how to define ''simulated sexually explicit conduct.''

The Department declines to adopt this comment. The definition at section 2256(2)(B) is limited, by its own terms, to images described in section 2256(8)(B)—images that are ''a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.''

In other words, section 2256(2)(B) has no relevance to a regulation that concerns actual persons as opposed to virtual persons.

All Performers, Including Minor Performers

One comment states that the proposed rule is unclear as to whether the record-keeping requirements apply to all performers in a depiction, or to primary performers, and recommends that the Department should clarify that these requirements apply only to primary performers and not to any background performers in the depiction.

The Department declines to adopt this comment. The commenter did not attempt to define ''primary'' or ''background'' in this context, and the Department has difficulty in doing so. As a practical matter, in many cases it would be difficult to determine whether a performer in a visual depiction of lascivious exhibition or simulated sexually explicit conduct is a ''primary'' or a ''background'' performer. For example, in a lascivious exhibition depiction of a person on a bed, a person depicted in that same image as standing nearby, wearing lingerie, and watching the person on the bed could well be a ''primary'' performer—however that term were to be defined—depending on the level of interaction between that person and the person depicted on the bed. On the other hand, conceivably a fully clothed person could be considered a ''background'' performer even if located on the same bed, again depending on the level of interaction between the performers. Similar confusion would apply in the context of depictions of simulated sexually explicit conduct. In order to avoid such confusion, the Department believes that it is appropriate to require, as stated in the proposed rule, that all performers in depictions of lascivious exhibition or simulated sexually explicit conduct be covered.

Maintenance of Records

Date of Original Production

One comment characterizes the proposed rule as faulty because it does not specifically require that a record be made of the date of original production, although the proposed rule will require that this date be stated in the disclosure statement.

The Department adopts the comment's view that it was an oversight that the proposed rule did not require that a record otherwise be made of the date of production. As noted above, the Department, after careful consideration, has amended the record-keeping requirement to include that a primary producer record the date of original production at the time it examines the picture identification card of the first performer in the depiction. Again, to the extent that this is a new requirement for primary producers, the Department clarifies that it applies only prospectively from the date of the publication of this final rule.

Several comments note that in § 75.2(a)(1) of the proposed rule, producers are required to create and maintain records of the name and date of birth of each performer obtained by the producer's examination of a picture identification card prior to the date of production of the depiction. They point out that the Act made no change to section 2257(b), which is the source of this requirement. The comments ask the Department to state that only the ''examination'' of the picture identification card that must take place prior to the production of sexually explicit images, and not necessarily the creation of a record based on the examination of the picture identification that must occur before production.

The Department declines to adopt these comments. As noted above, the Department believes that in order to fully implement the purpose of the statute, the record must be made at the time of examination of the document and has clarified that in this final rule. Furthermore, the Department requires in the final rule that a primary producer make a record of the date of original production. This record will then flow to secondary producers and enable them to affix the date to the disclosure statement. However, in order to simplify the requirement, the Department has clarified that if a depiction is made over the course of multiple dates, the date of original production consists of the single and earliest of those dates.

One comment states that the original production date is not often available, particularly because it was never a requirement of section 2257. The comment cautions that were the final rule to require keeping this information, hosts of most Web sites will be immediately out of compliance. Another comment notes that the Department stated in its proposed rule that secondary producers need comply only with the rules for material that was produced after the Act's 2006 effective date, and § 75.2(c) states that producers of visual depictions made after 1995 and before 2005 may rely on identification that was valid under the record-keeping and labeling regulations that were in force on the date of original production.

As noted above, the Department adopts the comment seeking prospective application of the record-keeping requirements documenting that identification was checked prior to the occurrence of production. The comment noting that producers may rely on identification rules and record-keeping requirements that applied on the date of original production of the depiction is correct, and demonstrates that Web site owners will not have to conform their existing records to the new requirements, contrary to the statement contained in the comment noted above.

Two comments request that the record-keeping requirements with respect to viewing identification documents prior to production apply only to primary producers. According to the comments, only primary producers have an opportunity to examine picture identification cards prior to the production. At most, the comments ask, secondary producers should be required to examine what they receive from the primary producer that relates to depictions from the primary producer. One of the comments believes that without such an alternative, there will be an effective prohibition on disseminating numerous widely disseminated productions. And even then, it claims, foreign films would not have such documentation because even if a secondary producer could obtain and inspect the required records retroactively, it may be unable to do so because of difficulties in locating performers or because of data protection laws.

The Department adopts these comments in part. It rejects some of the concerns as reflecting a misunderstanding of the requirements of the final rule. A secondary producer is not required under the rule to check identification documents. That is a responsibility only of the primary producer. A secondary producer may risk child pornography offenses, however, if he does not take steps to assure himself that the performer is actually of legal age. Nonetheless, the secondary producer is required by the final rule only to retain records. Those records enable the Department to identify who the primary producer was for any depiction and to verify that the depicted performers were of legal age. The Department believes that to avoid a commercial market in child pornography through the witting or unwitting actions of secondary producers, secondary producers must keep records that each depiction occurred only after the primary producer checked valid identification documents. Were secondary producers to be exempted from this requirement, a real risk of commercial marketing of

illegal product would develop. The comments are mistaken in postulating that the final rule imposes a duty on a secondary producer to locate foreign performers after the fact. What the secondary producer must do, even for foreign productions, is to ensure that it has copies of the records that show that the primary producer checked the legal age of performers prior to the date of original production.

Requirement of Hard Copies

The proposed rule amends § 75.2(a) concerning requirements for maintenance of records. The proposed rule requires that the copy of the identification documents be retained in hard copy form. The Department received four comments regarding the proposed rule's requirements for maintaining copies of identification card records in hard copy form.

Two comments state that nothing in the Act or proposed rule requires that records be kept in hard copy format. It contends that there is no justification with contemporary technology for requiring hard copies. The comment also notes that the proposed rule represents a departure from § 75.2(f), which permits records to be kept in digital form if they include scanned copies of identification documents. Another comment reiterates that point, and adds that electronic copies would permit the passage of records along the chain of distribution as the rules contemplate. Otherwise, records could be divided when shared, which could create losses or errors and put the producer in danger of violating rules by having incomplete or improperly maintained records. This comment asks that the Department return § 75.(2)(a)(1) to its current form by deleting the word ''hard,'' or consider the new requirement for a hard copy of the picture identification document to be satisfied by scanning the identification card or a hard copy of it, and/or by electronic versions that can be printed out to create hard copies at the time of inspection.

The Department adopts these comments. Nothing in section 2257 requires that records be kept in hard copy format, and, indeed, existing § 75.2(f) permits copies of identification documents to be scanned and stored electronically if they can be authenticated by a custodian. The proposed rule did not seek to amend § 75.2(f). The proposed rule's changes to § 75.2(a) that mandate the retention of all copies of identification documents and pictures in hard copy format would create a conflict with the terms of § 75.2(f). The final rule, therefore, amends proposed § 75.2(a)(1) to add ''or digitally scanned or other electronic copy of a hard copy.'' Note, however, that in the event a regulated entity or individual decides to retain records in electronic format, nothing in the Act or the regulations provides that technical difficulties would excuse failure to make the records available at reasonable times for inspection.

One comment notes that in the proposed rule the Department stated that a producer need not keep a copy of a URL hosting a depiction that the producer produced ''but over which he exercises no control.'' The commenter asks that the Department modify this statement to read ''but over which he exercises no corporate control'' or other such language that clarifies that the producer is not responsible for Web sites not owned by the producer.

The Department declines to adopt this comment. Were the Department to state that the producer is not responsible for Web sites the producer does not own, the final rule would not apply to a producer who influenced or directed what happened to the depiction, even if he did not own the Web site. If a producer exercises control over a depiction, whether as an individual or as a corporate entity, and regardless of whether the producer owns the Web site on which the depiction is displayed, then the producer must retain the copy of the URL hosting a depiction that the producer produced. The only exception to this requirement, as noted above, is where an individual who would be a primary producer under the final rule's definition is an employee of a corporate primary producer. Under such circumstances, that individual will not be considered a primary producer.

Redaction

One comment states that the viewer of the identification document need not know the Social Security number or exact birth date of a performer.

The Department does not adopt this comment. The proposed rule quite clearly allows a producer to redact the performer's Social Security number. An exact birth date sometimes may be redacted so long as the year is not obscured. However, if a performer is 18 on the date of original production, the month or even the day of the month must not be redacted if a question would exist whether he was of legal age at the time of the original production.

Compliance Date

In accordance with current law, the final rule retains July 3, 1995, as the effective date of the rule's requirements for secondary producers related to depictions of actual sexually explicit conduct. (The current regulations, published in 2005, adopted July 3, 1995, as the effective date of enforcement of section 2257 based on the court's order in *American Library Association* v. *Reno,* No. 91–0394 (SS) (D.D.C. July 28, 1995).)

In response to a comment stating that the proposed rule created potential confusion by omitting language from the 2007 proposed rule implementing the Adam Walsh Act's changes to section 2257, the Department clarifies, as stated in the preamble to the 2007 proposed rule, *see* 72 FR at 38036, that the one exception is that this final rule would not penalize secondary producers for failing to maintain required records in connection with those acts of production that occurred prior to the effective date of the Adam Walsh Act. The proposed rule also stated that producers of visual depictions of actual sexually explicit conduct made after July 3, 1995, the effective date of the regulations published in 1992, and before June 23, 2005, the effective date of the current regulations published in 2005, may rely on picture identification cards issued by private entities such as schools or private employers that were valid forms of required identification documentation under the provisions of part 75 in effect on the original production date. Finally, the proposed rule stated that the effective date concerning depictions of simulated sexually explicit conduct will be 90 days after it is published in the **Federal Register** as a final rule.

Two comments address the disparity between the statutory effective date of section 2257's coverage of depictions of lascivious exhibition (July 27, 2006) and the statutory effective date of section 2257A (90 days after publication of this final rule implementing section 2257A), which includes the safe harbor provision exempting producers who certify from section 2257's provisions concerning depictions of lascivious exhibition. One comment recommends that the Department make the safe harbor provision retroactive to the July 27, 2006, effective date of section 2257 concerning depictions of lascivious exhibition. The other comment states that the Department should make the effective date of part 75 with respect to depictions of lascivious exhibition the same date as the statutory effective date of section 2257A. This comment further states that setting the same effective date for rules regulating depictions of lascivious exhibition and simulated sexually explicit conduct would ''avoid[ ] potentially fatal vagueness problems under the First Amendment.''

Under either suggestion, the effective date of the safe harbor provision and the regulatory requirements concerning depictions of lascivious exhibition would be the same.

The Department adopts these comments in part. The final rule provides that the regulatory requirements applicable to depictions of lascivious exhibition apply starting 90 days after the publication of this final rule.

Two comments argue that the proposed rule creates First Amendment vagueness and ex post facto problems because individuals did not create records as of the effective date of the proposed rule which they did not think would be necessary. The Department does not accept the comment that the proposed rule created any First Amendment vagueness problem, *see American Library Ass'n, supra,* but does accept the comment insofar as the proposed rule would operate retroactively and, as stated above, modifies the compliance date accordingly.

Two comments state that to avoid retroactivity, the final rule should not apply to material that is actually sexually explicit only because it displays lascivious exhibition of the genitals and that was acquired by a secondary producer prior to the compliance date of the regulation. One of these comments requests the Department, if it adopts a different standard, to define ''acts of production,'' so that a secondary producer would know based on an acquisition date or other standard what content required record-keeping and what did not.

The Department declines to adopt this comment. Although the Department is sympathetic to the concerns expressed in the comment, and wishes to avoid retroactivity, it does not agree that the date that a secondary producer obtained the image displaying lascivious exhibition of the genitals should determine whether the regulation applies. There is no requirement in the existing or proposed rules that secondary producers document the date they obtained particular depictions. Were the Department to adopt the comment, unscrupulous secondary producers could claim that they acquired any depiction created before the final rule's compliance date prior to that date. Secondary producers who wished to demonstrate in good faith that their collections contained depictions that were obtained only after the compliance date of the final rule would be obliged to mark every such depiction currently in their possession to prove that they possessed it as of that date. Moreover, the Department would have no way of proving that the producer acquired the depiction prior to the compliance date of the final rule. The Department seeks to ensure that prohibited depictions were not created on or after the compliance date as herein modified. This concern derives from the statutory language, which turns on the date of production. The date that the secondary producer acquired the image is of no relevance. A secondary producer will be able to comply with the final regulation on an exclusively prospective basis by determining that appropriate procedures were followed for such depictions that were originally produced after the compliance date of the final rule.

Another comment requests that, even if the Department were to adopt a prospective compliance date, the final rule not apply to images (as opposed to depictions) created before the compliance date, i.e., a digitization of a previously existing depiction. The comment points out that a digital image made after the compliance date could be based on an initial depiction that could be older. The producer of the digital image could not use that earlier depiction, even if it were eighty years old, because it could not reconstruct the records. Therefore, the comment concludes that the final rule should be limited to images first created before the compliance date. The comment also states that the Department must accept that it cannot address preexisting content.

The Department declines to adopt this comment. The Department does agree that because the final rule will apply prospectively, it cannot address preexisting depictions that constitute actual sexually explicit material only because they display lascivious exhibition of the genitals. However, the Department can address digitized or other modified versions of preexisting content where the modifications occur after the final rule's compliance date. In light of the changed compliance date of the rule, any preexisting depiction of lascivious exhibition of the genitals that is not now digitized can be digitized before the rule takes effect. That will avoid the problem stated by the comment. Any secondary producer after that date who digitizes a depiction without obtaining records showing that the depiction was in accordance with the final rule will either need to obtain another digitized version of the depiction that does so or track down the primary producer of either the original or another digitized version of the depiction to create the records.

One comment notes that the statutory language on this point is broader than the language of the proposed rule. The statute says that section 2257 does not apply to ''any depiction of actual sexually explicit conduct'' involving lascivious exhibition of the genitals that was produced ''in whole or in part'' prior to the compliance date. The comment states that the final rule should track that language.

The Department declines to adopt this comment. The comment implies that under the statutory language, any depiction of lascivious exhibition of the genitals that was produced after the compliance date of the final rule is not covered by section 2257 if any other part of the image was produced before the compliance date. The Department does not so read the statute. There are five situations in which the statutory language discussed could apply, and the Department believes that it is important to set forth the applicability of the statutory language to each.

First, prior to the compliance date of the final rule, a depiction could have been created of lascivious exhibition of the genitals and no other form of actual sexually explicit conduct as that term is defined after the compliance date of the final rule. Prior to the final rule, this was not a depiction of actual sexually explicit conduct. If the depiction were modified or another depiction connected to it that did not contain lascivious exhibition or another form of actual sexually explicit conduct, then the final rule would not apply because the lascivious exhibition of the genitals was produced before the compliance date of the final rule.

Second, a depiction produced before the compliance date could have contained neither actual sexually explicit conduct as that term was then defined nor lascivious exhibition of the genitals. If a producer then altered or added to the depiction, or to a connected depiction, a depiction of lascivious exhibition of the genitals after the compliance date, this comment implies, the depiction would be one of lascivious exhibition of the genitals that was ''in part'' created after the compliance date of the final rule, and the final rule would not apply. The Department disagrees. No depiction of lascivious exhibition of the genitals was contained in this image before the compliance date of the regulation. All such material appeared only after the compliance date of the regulation, and, therefore, such material is covered by the final rule.

Third, a depiction of actual sexually explicit material as it was then defined, but which did not depict lascivious

exhibition of the genitals, could have been produced before the compliance date of the final rule. After that date, a producer might then add lascivious exhibition of the genitals to the depiction itself or to a connected depiction. According to the implication of the comment, section 2257 could not apply to the depiction that contains lascivious exhibition of the genitals because it was produced in part prior to the compliance date of the final rule. In fact, the image was already covered by the statute because it displayed actual sexually explicit content as that term was defined prior to the compliance date of the final rule. Nothing in the Act made material that was previously subject to section 2257 lose that status. No depiction of actual sexually explicit conduct involving lascivious depiction of the genitals was produced in whole or in part prior to the compliance date. Notwithstanding that the depiction of lascivious exhibition was added after the compliance date, the depiction nonetheless is subject to section 2257. Otherwise, any depiction of actual child pornography could be taken out of the scope of section 2257 by modifying or connecting to such an image a depiction of lascivious exhibition of the genitals that was produced prior to the compliance date of the final rule. A statute passed to enhance prosecution of child pornography cannot reasonably be read so as to prevent the prosecution of all child pornography offenses through such a simple subterfuge.

Fourth, a depiction could have been produced prior to the compliance date of the final rule that depicted lascivious exhibition of the genitals and no other form of actual sexually explicit conduct. Suppose that after the compliance date of the final rule, another depiction of lascivious exhibition of the genitals were then added, whether or not it also displayed any other example of actual sexually explicit conduct. The implication of the comment is that the depiction contains lascivious exhibition of the genitals that was produced ''in part'' before the compliance date of the final rule, and therefore is beyond the reach of the final rule. Under this theory, even if the after-added actual sexually explicit conduct were in fact child pornography, section 2257 could not apply because the earlier image contained a depiction of lascivious exhibition of the genitals that was produced prior to the compliance date of the regulation. The Department disagrees. It will treat each such image separately. The depiction of lascivious exhibition of the genitals that was produced before the compliance date of the final rule will not be governed by the final rule although some of the image was produced after its compliance date. This is the case because part of the depiction was produced before the compliance date. The connected depiction of actual sexual sexually explicit conduct in this example was produced after the compliance date of the rule, and must conform to its strictures.

Fifth, a depiction could have been produced before the compliance date of the rule that contained both lascivious exhibition of the genitals and actual sexually explicit conduct as it was defined before passage of the Adam Walsh Act. Then, following the compliance date of the final rule, the depiction could have had appended to it any form of actual sexually explicit conduct, including actual child pornography. Under the implication of the comment, the depiction would contain, in part, lascivious exhibition of the genitals that was produced before the compliance date of the Act, and, therefore, none of the material would be subject to the final rule. Under this approach, even the material that was actual sexually explicit conduct under its pre-Act definition would no longer be covered by section 2257. The Department disagrees. There is no indication that Congress intended to accomplish that result. Under this approach, every example of child pornography—even those that have been subject to section 2257—could never yield a prosecution if it were appended to a depiction of lascivious exhibition of the genitals that was produced before the compliance date of the final rule. No such result is required. In this circumstance, each depiction would be treated separately. The part of the depiction that involved only lascivious exhibition of the genitals and was produced prior to the compliance date of the final rule would not be subject to the final rule. The other parts of the depiction would be subject to the final rule, either because they were examples of actual sexually explicit conduct as that term was defined before the compliance date of the final rule or they were produced after the compliance date of the final rule and met the definition of the term as it existed upon that compliance date.

Inspections

Although the proposed rule made no changes to the inspection requirements contained in § 75.5, the Department received a number of comments on the existing regulations.

One comment proposes that the amount of time for which business premises be open for inspections should not be 20 hours per week as per § 75.5(c). The comment says that there is a need to address inspection timing where a producer has an entirely separate full-time job elsewhere. Two comments, including this one, contend that this problem would be eliminated by using third-party record-keepers. Four comments state that small businesses in this field work out of their homes, and cannot staff their operation for 20 hours per week while performing outside employment. These comments also expressed concern about inspections occurring in their homes.

The same question was raised in the context of the rulemaking on the prior version of the regulations, and the Department declined to accept the comment. *See* Inspection of Records Relating to Depiction of Sexually Explicit Performances, 70 FR 29607, 29614 (May 24, 2005). At the time, the Department believed that permitting third-party custodianship would unnecessary complicate the inspection process and undermine its effectiveness.

Upon reconsideration, the Department adopts this comment in part. The Department now believes that it can still accomplish the purposes of the statute—in particular, effective inspections—even allowing for third-party custodianship of the records. Hence, although it will not modify § 75.5(c), the Department will permit records required under part 75 to be held by third parties. By allowing third-party custodians to maintain the records, the burden on small businesses is reduced, including any fears arising from posting home addresses, where many of these small businesses are reported to operate, and any concerns of record-keeping inspections of those same premises. In the text of the regulation, such a third party is referred to a ''non-employee custodian of records'' to distinguish it from the producer and any person he may directly employ to maintain the records.

In addition to this change, in response to one comment, the Department has eliminated the requirement that the name of an individual be listed on the disclosure statement and has permitted only the title to be listed.

One comment states that section 2257 allows the Attorney General to inspect records, and that, therefore, the obligation of the producer is to make records available only to ''the Attorney General.'' Section 75.5(a) allows inspectors other than the Attorney General, and the comment claims that the statute does not permit such individuals to inspect. The comment further notes that the rule should

identify the class of persons who are investigators, lest the custodian be uncertain concerning which people he should allow to inspect the premises. The comment maintains that there is a need for the Department to demonstrate to those subject to inspections that the inspection authority will not be abused.

The Department declines to adopt this comment. Under general principles of delegation, the Attorney General may delegate to subordinate officials the performance of the Attorney General's duties. The commenter's fear that under the language of the proposed rule, unaccountable or unknown individuals could conduct the record searches is therefore unwarranted.

The Department received thousands of similar comments that note that § 75.5(b) provides for inspections without advance notice and request that it should instead require such notice. Some commenters say producers will not destroy any records if given notice because they would then face liability for a missing record. If notice is used to put into order records that have not been organized, then the comment believes that no legitimate purpose of the record-keeping requirement would be harmed by providing notice. The commenters further ask the Department to specify the consequences at the premises if no one is present when the investigator arrives, such as whether the inspector will knock down the door. Two other comments request that the Department eliminate no-notice inspections.

The Department declines to adopt these comments. As it stated previously:

> Advanced notice would provide the opportunity to falsify records in order to pass inspection. Lack of specific case-by-case notice prior to inspection will promote compliance with the statute and encourage producers to maintain the records in proper order at all times, as is contemplated by the statute. The rule will specify that inspections are to occur during the producer's normal business hours. The inspection process clearly does not contemplate warrantless forced entry solely because no one is present when the investigator arrives.

70 FR at 29619.

The Department received thousands of similar comments that argue that non-routine inspections should always require probable cause and a search warrant. The Department declines to adopt these comments. These inspections are administrative in nature, and, under well-established legal principles, no search warrant is required. *See id.*

One comment states that a single owner of a home-based Web site would be captive in his own home for 20 hours per week. The Department responds to this comment by noting that it is permitting required records under Part 75 to be held by third parties.

One comment maintains that the ''reasonable times'' provision of § 75.5(c)(1) could mean that an inspection could be made at 2:30 a.m. if a live Webstream or production work is being conducted then, and that such an inspection would interrupt production. Moreover, according to the comment, production could be done during the day in Europe while it is 2:30 a.m. in the United States, even though it would not yet be clear which images will be published and there will not have been time to cross-reference. The comment argues that if there is probable cause to believe that an underage performer is actually working in an off-hours production, the courts can issue warrants without the need for any late-night records inspection at all.

The Department declines to adopt this comment. The ''reasonable times'' provision will be applied according to its plain meaning. Moreover, the comment misunderstands the nature of the statutory requirement which the rule implements. The goal of the record-keeping regime is not to intervene to stop crimes involving underage performers that have already occurred. Rather, the point of the record-keeping is to prevent victimization in the future. The inspection requirement is designed to ensure that the prophylactic identification- and age-verification measures are complied with.

One comment concerning the four-month interval for inspections states that although some large entities or a custodian arrangement may warrant inspections as often as every four months, the many small production operations with small numbers and static images do not. It claims that inspections of such entities that occurred with such frequency would simply mean that inspectors would review the same images, which it contends is an invitation to harassment. The Department responds to this comment by noting that while inspections may take place as often as every four months, they are not required to occur so frequently. Moreover, the regulation requires that inspections ''be conducted so as not to unreasonably disrupt the operations of the establishment.''

One comment notes that § 75.5(c)(4) specifies what the investigator may say at the end of an inspection, and what the producer is permitted to say. The comment expresses that the regulations should also include a statement that the authority to search does not include the authority to require that any questions be answered. The comment also maintains that the regulation should say that everyone on the premises is free to leave before or during a records inspection. If everyone is not free to leave, the comment believes that the rule should say so and include the constitutional safeguards appropriate for custodial investigation situations.

The Department declines to adopt this comment. Administrative inspections are not custodial investigations that would require advisories concerning the right to counsel or to avoid self-incrimination.

One comment states that the Department should consider ''legislation'' forbidding anyone other than a custodian or a Department investigator from moving, disturbing, or interfering with the required records in any way. It contends that the integrity of the records, including their cross-referencing, otherwise could be disturbed. The comment also asks that this notice clarify that the seizure or theft of some or all of the records does not require the cessation of any ongoing or planned ''expression.'' If the seizure did have this effect, according to the comment, then the records would have to be returned within 24 hours so that ''expression'' could promptly resume.

The Department declines to adopt this comment. The Department has no evidence that unauthorized individuals have interfered with records or that there is a serious risk of such interference occurring in the future. (The Department also notes that it lacks the authority to enact laws, and that its authority is limited to executing laws, including through the publication of implementing regulations such as this one.)

One comment posits that searches under section 2257 have not identified any underage performers, so their purpose cannot be to catch and prosecute people who arrange for such performances. It claims that no producer knowingly uses underage performers, and that section 2257 is an after-the-fact tool, not one that advances prevention.

The Department does not adopt this comment. It does not agree that no producer knowingly uses underage performers. On the contrary, the Department's successful prosecution of child pornography cases every year proves that some producers do knowingly or recklessly use underage performers. Further, as discussed above, the Department believes that section 2257 is in fact preventive because it ensures that before any production occurs, the producer undertakes steps to ensure that the performers are of legal

age. Finally, the purpose of the regulation in large part is to prevent unknowing use of underage performers.

Location of Records

Statement of Location of Books and Records

The proposed rule changes the requirement under § 75.6(a) that producers place on every ''copy'' of a depiction of sexually explicit conduct a statement that indicates the location of books and records. Under the current regulation, that statement could be contained in a label or a hyperlink. The proposed rule would require that the definition of ''copy'' mean that the producer must attach a ''statement describing the location of records * * * [that is to] be affixed to every page of a Web site (controlled by the producer) on which visual depictions of sexually explicit conduct appear.''

One comment argues that an exemption statement is not required if a depiction is produced by foreign producers who did not intend at the time of production for the depiction to enter the United States market.

The Department does not adopt this comment. Determining when the producers of the foreign production intended to distribute the depiction in the United States would be essentially impossible, leaving producers free to claim that they had no such intention on the date of original production. If the depiction is made available in the United States, then the disclosure statement is required, regardless of the intent at the time of production.

Eleven comments claim that the proposed rule's change to including the statement on every page could lead to harassment of Web page operators who operate their sexually explicit businesses out of their homes, potentially resulting in physical injury, stalking, burglary, or identity theft. They say that placing a link on the Web page constitutes affixing the copy to a Web page but avoids harassment risk because the exposure of the custodian's name will be limited to people who are seriously seeking the records information. Two commenters raise their concerns that sharing this information with secondary producers could result in the same harms and ask that secondary producers not keep this information. Nine comments raise similar harms as potentially occurring to performers if the location of the records were placed on every page. One comment expresses concern that the primary producer's sharing with others of the addresses and other contact information could make it liable for how the information might be used by others, including crimes against the performers. Two comments request that the secondary producer's home address not appear on the disclosure statement, while another comment recommends that the secondary producer's street address be included but not the street address of the primary producer, which would keep the secondary producer's statements of locations of records from being unmanageably long due to the inclusion of other producers' locations. One comment states that the proposed rule will greatly increase exposure of identification of producers, chill protected speech, and serve the rule's purpose no better than a link would.

One comment reported that Web sites based on static pages would have to manually update every page if changes must be made to the compliance notice, such as the publication date, business address, producer name, and custodian name. Each update would cause the potential for error, and each honest mistake could result in prosecution. Although dynamic sites could more easily update the compliance notice, extra processing by the Web site server would be necessary, which is costly. There would be a considerable extra load on the server for individual page compliance, according to the comment, and dynamic pages will face technical challenges if operators of such Web sites are to comply.

The Department adopts these comments in part. The Act requires that the location of the records must appear on each ''copy'' of a depiction of sexually explicit conduct, meaning every Web page for Internet sites. The Department believes that its final rule allowing producers to place records in the care of third-party custodians will obviate any harms to performers that might otherwise occur due to disclosure of the address where the records are kept. It also will amend the final rule to permit the posting of a link or ''mouseover'' on each Web page to satisfy the requirement that every page of a Web site provide the location where the required records are stored.

Five comments say that a hyperlink text to a full statement that can be updated as needed would fulfill the purpose of the proposed rule. The hyperlink would appear on each page. One of these comments notes that the Act requires that a notice appear on every page on which a depiction appears, but that notice could still appear in a dedicated link. It claims that although the Act required that the notice appear on every page, the Act did not alter the manner in which the notice is presented. One comment says that the Web site could use an appropriately labeled link that opens to several pages of disclosure statements or an elaborate table of disclosure statements. Producers could use a series of links to keep individual disclosure statements close to the galleries to which they relate. One comment believes that one notice linked to every page of a site provides everything the Department needs to enforce the statute by identifying the responsible record and the place where the records are located.

Four comments claim that the requirement that a notice appear on every page would ruin the aesthetics of the Web site. Attention of viewers is measured in seconds, according to these comments, and clutter will harm gaining attention. One comment thought that a solution to the aesthetics problem would be to avoid having the disclosure statement appear on the face of the image, so as not to increase the size of the image files or to harm the integrity of the image itself. If the disclosure statement appeared in a comment field within the digital file, at a defined location, then both the producer and the Department would know where it could be found, the comment concluded.

The Department adopts these comments in part. Without accepting as valid every fear that the comments raise, the Department does believe that the language in the proposed rule, and even its comments at 72 FR at 38035, allow it to require a less-burdensome disclosure statement than commenters anticipated by eliminating language in the current regulation that permitted a home page statement or hyperlink on that page. Although the current regulations that allow such a statement to be placed only on the home page cannot be squared with the statutory changes, the Department does believe that the Act would permit the required statement that appears on each page to be a hyperlink that contained all the statutorily required record-keeping compliance information. By adopting this change, the Department believes that it will respond to essentially every concern that a comment raised regarding privacy, threats, aesthetics, or computer technology.

Seven comments state that moving the disclosure statement from the main page to every page is unnecessary and a nuisance. One comment says that each printed page is necessary for records and books, but an explanation is needed for applying this mandate to electronic media. Another comment thought that the disclosure statement could be affixed to a magazine or other printed matter in the same fashion as a shoplifting tag, not printed on the copy

itself, and that only movies would actually require appearance of the statement on the work itself. Two comments state that the existing requirement of a disclosure statement on the homepage or principal URL of a Web site has worked well and that there is no need for it to appear on each and every Web page where the triggering content appears.

Two comments state that it is impossible to apply the requirement that the disclosure statement appear on every Web page to live Web casts. Another contends that it is unrealistic to expect a separate disclosure statement or a separate line in a disclosure statement for every separate work that is placed on each and every Web page. One comment notes that for composite works, there are thousands of images often organized into separate galleries. A Web page could have an index page with 100 images that were produced on different dates, according to the comment, and that more generality should be allowed in the statement.

The Department declines to adopt these statements. Section 2257A(e)(1) requires that a statement describing where the records are located ''shall cause to be affixed to every copy,'' and provides specifically that ''the term 'copy' includes every page of a Web site on which matter describes in subsection (a) appears.'' The Department must issue regulations implementing the statute, and it is prevented from adopting those comments asking that each page not be required to contain the disclosure notice, or stating that such notices are unnecessary, that notices should be able to appear on a separate tag, or that it is unrealistic to expect that each Web page will contain a disclosure notice. And because the statutory requirement applies to ''[a]ny person to whom subsection (a) applies,'' the Department may exempt neither primary producers, secondary producers, nor producers of live Web casts. As noted in the proposed rule, and finalized in this rule at § 75.2(a)(1), however, producers of live Web casts may satisfy the requirement by ''includ[ing] a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.''

One comment states that the records should require not the name and address of the individual, but a title, since the name of the relevant individual changes over time. The comment believes that such a change would avoid an invasion of privacy if the person maintaining the records is a performer. The comment believes that this is the same privacy interest that led the Department in the proposed rule to redact non-essential information from copies of performers' identification cards before providing secondary producers with copies of records. The Department believes that its allowance of the keeping of the records by third-party custodians eliminates any possibility of invasions of privacy of this type. The Department also accepts the comment's view that the title of the custodian could be provided rather than the name of a specific individual, since the responsible person could change over time, otherwise requiring that each existing disclosure statement be changed.

One comment expressed the view that the disclosure statement should provide information concerning the date of photography and the name, address, and title of a person who produced it, including its insertion into a Web page, and state the name of the person responsible for maintaining the records. The Department declines to adopt this comment, because the Department does not believe it is necessary for the disclosure statement to contain all of this information. Instead, the Department believes that the objectives of the statute are advanced through the rule's record-keeping requirements, which will ensure that the necessary information is available, while at the same time reducing the burdens on entities compared to those that would be imposed by additional requirements concerning the disclosure statement.

One comment recommends that the existing regulations on the appearance of the disclosure statement contained at § 75.6(e) should be changed. It contends that the typeface requirements are inadequate because point size is an objective criterion. It would prefer that the regulation specify how large the type should be but not how large it is compared to other printing. It also argues that a point-measured minimum size is irrelevant on a computer site because the appearance of the text will depend on the settings of each monitor displaying it.

The Department has declined to adopt this comment. Precisely because typeface appearance can vary, the Department believes that it is important to require that disclosure-statement typeface be a certain size compared to other printing. Because the size of computer screens and their settings tend to vary little among the general public, the Department concludes that specifications governing the size of type should be retained.

One comment asks which entity bears the obligation of providing a disclosure statement when one Web site frames content originating from, and wholly contained on, the servers of another producer, where the content is selected and changed in the originator's sole and exclusive discretion. The Department states that where a Web site operator operates as a producer, even as a secondary producer, it must comply with the disclosure statement requirements of the final rule. Where a Web site operator is a distributor, it need not comply with those requirements.

Date of Original Production

The proposed rule also would require that the date of original production be among the records that are required to be contained in the statement describing the location of books and records. One comment argues that it is sensible to use the date of first production because this is the date that matters for the production of child pornography, to which the records relate, and which would determine when the record-keeping obligations expire. However, this comment states that the date of original production should not appear on the disclosure statement because it is important only once the performers' dates of birth are known. Since that information is not a part of the disclosure statement, the comment states that inclusion of the production date makes no sense. The commenter suggests requiring that the records referred to in the disclosure statement themselves detail the relevant production dates: The earliest date that the primary producer created any sexual image depicted of each performer.

As noted above, the Department adopts this comment.

Location of the Statement

One comment requests that the Department describe how the rules requiring a statement apply to simulated sexually explicit material on digital video discs (DVDs) that are divided into different segments, such as bonus material. The regulations at § 75.8, the comment notes, tell what should be done where end credits exist, but often such bonus material has no end credits. The comment advocates that § 75.8(e) should apply in this circumstance rather than §§ 75.8(b) and (c). The comment also asks the Department to conclude that the statement can appear at the end of each item of bonus material available, or if identical for all materials, in a separate dedicated menu option that opens the statement.

The Department adopts this comment and has clarified in the final rule that for purpose of § 75.8, a DVD containing

multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD. This is analogous to a magazine containing multiple depictions, per § 75.8(a), locating the statement on a single page.

Two comments state that some Web sites contain thousands of pages of constitutionally protected visual depictions and other content. They question whether producers would be required to display thousands of disclosure statements, especially when so many different depictions can appear on one site. They contend that affixing disclosure statements to thousands of depictions would create a stigma based on an ambiguous definition of lascivious exhibition in one picture out of thousands.

The Department does not adopt these comments. If any entity operates a Web site that contains thousands of pages of depictions of sexually explicit conduct, then those entities are required by law to display thousands of disclosure statements. As noted, the Department in this final rule is permitting those statements to appear as hyperlinks. The number of depictions on a site is not the relevant issue, but whether on a particular Web page there appears one or more such depictions. If the owner of a Web site chooses to display thousands of depictions on one Web page and one of those is a depiction of lascivious exhibition, then that Web page must contain a disclosure statement. The comments offer no evidence to support a view that such a statement would create a stigma, nor does the Department believe that ''lascivious exhibition'' is defined ambiguously. Any person who believes that only one depiction among thousands is of lascivious exhibition can display that depiction on a Web page unto itself. Moreover, a studio or any other entity that conforms to section 2257A's certification safe harbor will not face the situation that these comments hypothesize.

These comments also ask the Department to delay the compliance date of the disclosure statement until the Department issues its regulations effectuating the safe harbor of section 2257A, which may apply to the entities referenced in the comments. The Department believes that Congress intended that the safe harbor was to be available to entities who qualified for its operation in a manner that would preclude the need for such entities to conform to the disclosure and record-keeping requirements. Therefore, as noted earlier, the Department adopts this portion of the comments.

One comment specifically requests that the current language of § 75.8(d) that permits a hyperlink on the homepage of a URL be retained. The Department declines to adopt this comment. The Act requires a disclosure statement on each page of a Web site. As noted above, however, the Department will allow that statement to appear as a hyperlink that is displayed on each page that depicts sexually explicit conduct.

One comment asks that if the Department allows a hyperlink on the index page, that it make clear where the disclosure hyperlink should appear since the first page may not contain any covered depiction. Because the Department does not adopt the view that the Act permits the appearance of a hyperlink only on an index page, it does not adopt this comment.

Two comments ask whether the disclosure statement that the Act requires for each page depicting actual sexually explicit conduct applies to every page of such Web site, or only the pages that contain actual sexually explicit conduct. The Department responds to this comment by referencing that the plain language of section 2257A(e)(1) of the Act provides that a disclosure statement must appear on ''every page of a Web site on which matter described in subsection (a) appears.''

One comment asks what the word ''matter'' means, and the Department again references the plain language of the Act in subsection (a), which refers to depictions of sexually explicit conduct. Another comment asks whether a Web site is a ''matter'' subject to regulation and, if so, whether each of its elements is an individually ''matter'' for such a purpose. It also inquires whether a Web site as a whole is a ''matter'' or whether it is simply an amalgamation of many matters, and whether the Department is requiring many different disclosure statements because a Web site has many different pages.

The Department answers this comment by stating that it requires many different disclosure statements only when a Web site displays many different depictions of sexual explicit conduct. The Act requires that when any page of any Web site depicts any sexually explicit conduct—''matter'' as contained in subsection (a)—then the page must contain a disclosure statement. Hence, it is not the Web site or its pages that is a ''matter,'' but the depiction itself.

One comment related that neither the statute nor regulations define a ''Web page.'' The comment says that the term could mean a screen that appears on a computer, an HTML document on the Internet, or anything covered by a single URL. The comment suggests that a definition is needed to avoid vagueness and provides a list of 28 definitions of the term.

The Department declines to adopt this comment. The use of the term ''Web page'' in the regulation predates the amendment of the statute in the Act, and the lack of a definition of ''Web page'' was not previously raised in the comments in the rulemaking for the 2005 version of the regulation. That is the case even though the definition of ''URL'' was commented upon, and responded to by the Department. See 70 FR and 29610. This confirms the Department's belief that a definition of the term is not needed for compliance with the regulation.

The same comment contends that it would be impractical and unnecessary to require the disclosure statement to appear on the screen during the playing of a video clip that depicts actual sexually explicit conduct. The Department does not accept this comment. It refers the commenter to the terms of existing § 75.8(b), which describes where the disclosure statement must appear for a motion picture or videotape.

Exemption Statement

One comment states that there should not be an exemption statement under § 75.7. Even in the presence of such a statement, the comment contends that the government must still prove all the elements of an offense. It says that many depictions are not required to contain a disclosure statement—not just ones produced before the compliance date, but also later depictions for which the record-keeping period has expired. The comment also maintains that no such exemption statement is required if a depiction is foreign-produced by producers who did not intend at the time of production for the depiction to enter the United States market, or by married couples who produce videotaped images of themselves for their own personal use.

The Department declines to adopt these comments. It does not agree that foreign-produced materials will not require disclosure statements if they were not intended to be made available in the United States at the time of production. Determining when the producers of the foreign production intended to distribute the depiction in the United States would be essentially impossible, and even if it were possible to do so, producers would simply claim that on the date of original production, no such intent had manifested itself. If

the depiction is made available in the United States, then the disclosure statement is required, regardless of the intent at the time of production. With respect to personal use, the Department does not construe section 2257 and part 75 to encompass an adult couple's recording of its intimate activity for the couple's private use in the home.

Exemption From Statutory Requirements With Respect to Visual Depictions of Lascivious Exhibition and of Simulated Sexually Explicit Conduct In Certain Circumstances and Associated Certification Regime

As outlined above, Congress in the Act filled two gaps left by the original section 2257 by amending section 2257 to cover lascivious exhibition and by enacting section 2257A to cover simulated sexually explicit conduct. In enacting section 2257A, Congress determined it would be appropriate, in certain circumstances, to exempt producers of visual depictions of lascivious exhibition (for which records must be kept under section 2257, as amended by the Act) and producers of visual depictions of simulated sexually explicit conduct (for which records must be kept under section 2257A) from statutory requirements otherwise applicable to such visual depictions. See 18 U.S.C. 2257A(h).

The safe harbor provision in the statute in essence permits certain producers of visual depictions of lascivious exhibition or of simulated sexually explicit conduct to certify that in the normal course of business they collect and maintain records to confirm that performers in those depictions are not minors, although the records may not necessarily be collected and maintained in the format required by part 75. Where a producer makes the required certification, matter containing such visual depictions is not subject to the labeling requirements of the statute.

In the proposed rule, the Department crafted a certification regime (described in detail below) that would have implemented the safe harbor in such as way as to permit such producers, in accordance with the statute, to be subject to lesser record-keeping burdens than those in part 75, while still protecting children from sexual exploitation. Four comments recommend several major changes to the certification provision. These comments are described below.

Who May Certify

Any entity that meets the statutory requirements for eligibility, which are incorporated verbatim in the proposed rule, may certify that it meets the requirements of section 2257A(h). In addition, an entity may certify for itself and all sub-entities that it owns or controls. The names of all sub-entities covered must be listed in such certification, however, and must be cross-referenced to the matter for which the sub-entity served as the producer.

Both United States and foreign entities may certify. In the case of a certification by a foreign entity, the foreign entity, which may be unlikely to collect and maintain information in accordance with United States federal and state tax and other laws, may certify that it maintains the required information in accordance with their foreign equivalents. The Department considers the statute's use of a broad description of laws and other documentation that would satisfy the certification to provide authority for this permission to foreign entities.

The proposed rule would have required that the certification be signed by the chief executive officer of the entity making the certification, or in the event an entity does not have a chief executive officer, the senior manager responsible for overseeing the entity's activities.

One comment recommends that due to chief executive officers' demanding schedules, other executive officers should be able to sign the certification. The Department adopts this comment.

One comment urges the Department to confirm that if an entity produces both materials that are and are not covered by the certification regime, the entity is not disqualified from using the certification regime for covered materials. The Department adopts this comment.

The certification regime in the proposed rule was similar for producers of lascivious exhibition and producers of simulated sexually explicit conduct, but differed in some material respects, as described below.

Time Period for Certification

The proposed rule would have required the certification to be filed every two years. The Department could have chosen a shorter period for certification, a longer period, or a permanent certification. The Department believed, however, that two years is a reasonable period, as it would ensure that certifications remained up-to-date without imposing overly onerous burdens on regulated entities.

One comment recommends the elimination of proposed § 75.9(e), which would require certifications every two years. The comment points out that if the requirement to list the titles of works covered by the certification and other related information were deleted, it would not be necessary to require producers to submit certifications every two years. Instead, the Department could simply require re-certification if there are material changes in the information the producer certified under § 75.9(c)(1) and (2) concerning how the producer collects and maintains information concerning its employees who perform in its works covered by the certification regime.

The Department adopts this comment. As explained below, as the Department adopts various comments concerning the information to be provided in the certification under § 75.9, it is not necessary to require producers to re-certify every two years. It is, however, still necessary to establish certifications on the record as soon as possible. Accordingly, the Department will require an initial certification due 180 days after the publication of this proposed rule as a final rule. This will provide sufficient time for entities to determine if they wish to certify and to come into compliance with the certification requirements. Initial certifications of producers who begin production after the publication of this proposed rule but before the expiration of the 180-day period following its publication as a final rule are due on the last day of the 180-day period. Initial certifications of producers who begin production after the expiration of the 180-day period are due within 60 days of the start of production. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to be the next day that is not a Saturday, Sunday, or federal holiday.

Enforcement of the Certification

All of the statements in the certification are subject to investigation. The proposed rule stated that ''a false certification will result in a violation of section 2257A and potentially other criminal statutes.'' *See* 72 FR at 32266.

One comment asks the Department to clarify that a ''false certification'' is one that is knowingly and willfully false, and to specify the criminal statutes that may be violated by such a false certification.

The Department adopts this comment. The federal statute criminalizing a false certification is 18 U.S.C. 1001, which requires that a statement be knowingly and willfully false. Depending on the facts of a particular case, however, a person submitting a false certification could violate other federal statutes. The Department notes that a false certification would necessarily result in

a violation of sections 2257 or 2257A if a producer submitting that false certification did not comply with the record-keeping provisions of the relevant statute.

Form and Content of the Certification

The certification regime in the proposed rule requires that a producer provide a letter to the Attorney General that:

(1) Sets out the statutory basis under which it and any relevant sub-entities are permitted to avail themselves of the safe harbor;

(2) Certifies that regularly and in the normal course of business, the producer, and any relevant sub-entities collect and maintain individually identifiable information regarding all performers employed by the producer who appear in visual depictions of simulated sexually explicit conduct or of lascivious exhibition;

(3) Lists the titles, names, or other identifying information of visual depictions (or matter containing them) that include non-employee performers;

(4) Lists the titles, names, or other identifying information of visual depictions (or matter containing them) produced since the last certification;

(5) Certifies that any foreign producers of visual depictions acquired by the certifying entity either maintain the records required by section 2257A or have themselves provided a certification to the Attorney General, and the producer making the certification has copies of those records or certification; or, for visual depictions of simulated sexually explicit conduct only, has taken reasonable steps to confirm that the performers are not minors;

(6) Lists the titles, names, or other identifying information of the foreign-produced visual depictions (or matter containing them) that include performers for whom no information is available but for whom the U.S. entity has taken reasonable steps to confirm that the performers are not minors; and

(7) Certifies that U.S. primary producers of visual depictions acquired by the certifying entity either maintain the records required by section 2257A or certify themselves under the statute's safe harbor, and that the producer making the certification has copies of those records or certification(s). *See* 28 CFR 75.1(c)(1).

The Department received several comments on the certification provisions of the proposed rule. These comments are discussed below in turn.

One comment states that the Department should prepare a form for the certification instead of requiring producers to submit a letter.

The Department declines to adopt this comment. As outlined below, the Department has simplified the requirements for the certification in response to comments received. Accordingly, the short letter that would be required would not be significantly more burdensome on producers, if at all, than requiring producers to fill out a form.

Statutory Basis for the Certification

The first requirement is straightforward—the entity providing the certification must state why it is entitled to certify under the terms of the statute. This will include citation to the specific subsections of the statute under which it is making the certification and to basic evidence justifying that citation. Specifically, the letter should either: (i) Cite 18 U.S.C. 2257A(h)(1)(A) and 28 CFR § 75.9 and state that the visual depictions listed in the letter are ''intended for commercial distribution,'' ''created as a part of a commercial enterprise'' that meets the requirements of 18 U.S.C. 2257A(h)(1)(A)(ii), and are ''not produced, marketed or made available * * * in circumstances such tha[t] an ordinary person would conclude that * * * [they] contain a visual depiction that is child pornography as defined in section 2256(8)''; or (ii) cite 18 U.S.C. 2257A(h)(1)(B) and 28 CFR § 75.9 and state that the visual depictions listed in the letter are ''subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent or profane programming'' and are ''created as a part of a commercial enterprise'' that meets the requirements of 18 U.S.C. 2257A(h)(1)(B)(ii).

No comments were received on this provision.

Certification of Collection and Maintenance of Records

The second requirement is the certification under either subsection 2257A(h)(1)(A)(ii) or (B)(ii). Under either subsection, the certifier must demonstrate its compliance with five elements: that the entity (1) ''regularly and in the normal course of business collects and maintains'' (2) ''individually identifiable information'' (3) ''regarding all performers, including minor performers employed by'' the entity (4) ''pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards'' (5) ''where such information includes the name, address, and date of birth of the performer.'' The Department will consider any entity's procedures that include these basic elements to be in compliance with the certification.

One comment states that the proposed rule's certification statement is inconsistent with the statutory safe harbor provision because it requires the producer to certify that it maintains records concerning all performers employed by the producer who appear in depictions of simulated sexually explicit conduct or lascivious exhibition, whereas the statute permits a blanket certification as to all performers employed by the producer. The comment then states that requiring the producer to certify only as to performers who appear in visual depictions of simulated sexually explicit conduct or lascivious exhibition would first require the producer to determine which depictions may contain simulated sexually explicit conduct or lascivious exhibition, which would be difficult and time-consuming (another comment also notes the ''troubling'' nature of requiring producers to determine what materials depict lascivious exhibition or simulated sexually explicit conduct ''given the vagueness of the definitions for these terms''). Moreover, the comment states that the proposed rule would be inconsistent with Congressional intent because it would deny producers the ability to make the blanket certification contemplated by the statute. The comment also states that a blanket certification will better serve the Department's goals than a tailored certification. The comment thus recommends that the certification language at § 75.9(c)(2) be revised to end at ''all performers employed by [name of entity],'' deleting ''who appear in visual depictions of simulated sexually explicit conduct or of lascivious exhibition of the genitals or pubic area.'' The comment makes a conforming recommendation that the definitions of ''regularly and in the normal course of business collects and maintains'' and ''all performers, including minor performers'' at § 75.1(p) and (r), respectively, be amended to clarify that the certification applies to all performers a producer employs, not just those appearing in depictions of lascivious exhibition or simulated sexually explicit conduct.

The Department adopts this comment. Section 75.9(c)(2) in the final rule thus has been amended to end at ''all performers employed by [name of entity].'' Sections 75.1(p) and (r) in the final rule have also been amended pursuant to the comment.

List of the Titles, Names, or Other Identifying Information of Visual Depictions That Include Non-Employee Performers

As an extra precaution against evasion, the proposed rule's third requirement would have been a list of all visual depictions or matter containing visual depictions in which non-employees have engaged in sexually explicit conduct. This would have provided the Department with notice and a record that such visual depictions by the producers exist and, if necessary, would have enabled the Department to investigate the bona fides of the certifying entity. The Department believed the list would not be so burdensome as to have defeated the purpose of the certification regime—namely, reducing the burden of the record-keeping requirements otherwise imposed in part 75. Rather than maintaining age-verification records, copies of each performance, etc., the certifying entities would have needed only to provide a list of their productions that include depictions of lascivious exhibition or simulated sexually explicit conduct by non-employee performers.

Four comments state that this provision, § 75.9(c)(3) of the proposed rule, is overly burdensome, not contemplated by the statute, and should be stricken. Four comments also state that § 75.9(c)(4) and (6) should be stricken, while three comments state that § 75.9(c)(5) and (7) should be stricken. Because these comments generally apply to § 75.9(c)(3) through (7) of the proposed rule, the Department will summarize and respond to them all here rather than repetitively throughout the preamble.

These comments make various claims, described below, in seeking the deletion of these provisions. First, these provisions go beyond the statutory requirements for the certification by requiring the producer to determine whether materials depict lascivious exhibition or simulated sexually explicit conduct. Second, these provisions are inconsistent with the statutory requirements for the certification by requiring the producers to make lists, whereas the statute does not mention lists at all. Third, the list requirements would likely be found unconstitutional because they would result in eviscerating the statutory safe harbor: By limiting the safe harbor to producers who go through the burdensome process of identifying which materials depict lascivious exhibition or simulated sexually explicit conduct, the proposed rule would impose substantial content-based restrictions on protected speech, with the result that the government would interfere with protected speech in the name of targeting unprotected speech. Fourth, unlike other provisions of the relevant statutes, which expressly permit the Department to specify the records that must be kept and how they must be maintained, section 2257A(h) does not provide the Department any flexibility as to what a producer must certify to be eligible for the safe harbor. Fifth, the list provisions are inconsistent with Congressional intent that once a producer makes the certification required by statute, it should ''not be subject to the more burdensome requirements of this statute.'' Sixth, much ''back office'' work will be required to enable producers to have a reasonable basis for the expansive certifications required. Seventh, while the certification process as outlined in the proposed rule may be less burdensome than full record-keeping under part 75, the difference is only a matter of degree, as the amount of information required to complete a certification under the proposed rule would be significant.

The Department adopts these comments in part, and will strike § 75.9(c)(3), (4), (6), and (7) from the final rule. As explained below, the Department will amend § 75.9(c)(5) in the final rule rather than striking it entirely.

List of the Titles, Names, or Other Identifying Information of Visual Depictions Produced Since the Last Certification

The fourth requirement in the proposed rule would have provided the Department with both a notice and a record regarding which depictions or matters are subject to the certification. In drafting the proposed rule, the Department considered simply allowing entities to make a blanket assertion that they maintain the required records on all employees who perform in all matter they produce. The Department initially determined, however, that depiction-specific information would enable investigators more easily to determine whether a visual depiction is covered by the section 2257A certification regime. The list submitted by a certifying entity would have included the titles, names, or other identifying information of visual depictions acquired by the certifying entity from foreign or U.S. primary producers.

As noted above, the Department is adopting comments to strike this provision from the final rule.

Certification for Entities Acquiring Foreign-Produced Matter

The fifth requirement in the proposed rule was a subsidiary certification for entities acquiring matter subject to the record-keeping requirements from foreign producers. The Department understands that many producers in the United States acquire films and other matter that may contain visual depictions of lascivious exhibition or simulated sexually explicit conduct from producers abroad. In order to produce that matter for the U.S. market and comply with the law, the U.S. entity acquiring the matter must certify either that the foreign producer in the first instance maintained the records required by the statute and that the U.S. entity has copies of those records, or that the foreign entity has certified on its own that it (the foreign producer) maintains foreign-equivalent records in the normal course of business, and that the U.S. entity has a copy of that certification. The Department believes it is appropriate for the exemption to apply based on certifications that foreign producers maintain foreign-equivalent records because foreign countries generally have tax and employment laws requiring identification of employees that are substantially similar to requirements under U.S. law.

There may be cases where a U.S. entity acquires foreign-produced matter and cannot certify the information above. In such a case, the U.S. entity would not be able to produce the matter in the United States. Denying the market in the United States access to a large amount of foreign-produced matter, however, could be construed as a burden on American citizens' First Amendment rights to free expression. At the same time, the Department cannot risk permitting either foreign children to be exploited in the visual depictions produced for the U.S. market or evasion of the statute by unscrupulous U.S. producers.

Therefore, U.S. entities making the certification may certify that, to the extent that they have acquired visual depictions or matter containing visual depictions of simulated sexually explicit conduct from foreign entities, and, to the extent that the primary foreign producer does not either maintain the records required by the statute or provide a certification to the Attorney General itself, the entity making the certification has made reasonable efforts to ensure that no performer in any such foreign visual depiction is a minor.

One comment describes as vague and unreasonably burdensome the proposed rule's certification at § 75.9(c)(5) that U.S. secondary producers take ''reasonable steps to confirm'' that performers in foreign works are not minors. The comment states that the Department should either impose a lesser standard, such as a good faith belief that the foreign work does not depict minors, or specify what is meant by ''reasonable steps.'' The comment suggests that ''reasonable steps'' could include reliance on representations and warranties from a foreign producer. Another comment makes the same points, stating that if the proposed rule's § 75.9(c)(5) is not stricken, the section should be amended to specify what constitutes ''reasonable steps'' and that such steps should not impose a duty to investigate but rather should permit reliance on a review of the work itself and/or reliance on a representation or warranty of the foreign producer. This comment also notes that the certification as to the age of the performers should explicitly state that the performer was not a minor at the time the visual depiction was produced.

The Department adopts these comments to the extent they recommend clarification of ''reasonable steps,'' with the caveat that any review of the materials or reliance on the representations made by a foreign producer must itself be in good faith. The Department also adopts these comments to the extent they recommend the certification be revised to state the performer's age at the time the visual depiction was originally produced. Accordingly, the corresponding section in the final rule (designated as § 75.9(c)(3) due to the deletion of the proposed rule's § 75.9(c)(3) and (4)) will explain that reasonable steps may include, but are not limited to, a good-faith review of the material itself or good-faith reliance on representations and warranties from a foreign producer, and the certification will be revised to state that the performers were not minors at the time the visual depiction was originally produced.

One comment states that the proposed rule's § 75.9(c)(5) would require a producer to take affirmative steps where a foreign producer either did not make a certification itself to the Attorney General or does not collect and maintain the requisite records, which would be an additional burden. Another comment vigorously opposes any suggestion that foreign producers must comply with any provision of section 2256 or 2257A in order for their material to be eligible into the United States, and acknowledged that the Department itself recognized that any such suggestion could be construed as a burden on First Amendment rights. A third comment also notes the Department's recognition of this constitutional concern, stating that ''permitting a secondary producer to make an alternative certification [the ''reasonable steps'' certification under the proposed rule's § 75.9(c)(5)] for such [foreign-produced] materials is consistent with the purpose of the Act and constitutional principles.'' This commenter believes that the alternative certification ''is a reasonable accommodation to ensure that American citizens are not deprived of access to a substantial amount of foreign material.''

The Department of course recognizes that the ''reasonable steps'' certification would require a U.S. producer to take additional steps concerning foreign-produced material if the foreign producer neither has made a certification to the Attorney General nor collects and maintains foreign-equivalent records. For the reasons outlined above, however, a certification that provided no assurance or indication whatsoever that the performers in foreign-produced works are not minors could lead to the possibility that U.S. producers could inadvertently introduce foreign material depicting minors engaged in simulated sexually explicit conduct into the United States market. The Department believes that the alternate certification for foreign-produced material in the final rule, which is significantly less burdensome than that originally proposed (because it does not require the production of any list of covered material and specifies that a U.S. producer may rely on the representations and warranties of the foreign producer), strikes an appropriate balance.

The proposed rule would not have permitted the same certification process for visual depictions of lascivious exhibition acquired from foreign entities. The Department considered that the risks of exploitation of children in such visual depictions and the risk of evasion of the record-keeping requirements would be too great to permit the accommodation for visual depictions of simulated sexually explicit conduct outlined above. The Department was further concerned that providing a method for weaker enforcement of section 2257 with regard to lascivious exhibition would undermine the existing section 2257 requirements. The Department did note, however, that Congress clearly considered non-compliance with record-keeping requirements concerning visual depictions of simulated sexually explicit conduct (under section 2257A) to be a less-serious crime than non-compliance with analogous requirements for visual depictions of actual sexually explicit conduct (under section 2257), as exemplified by the misdemeanor penalty for violation of the former section versus the felony penalty for violation of the latter section.

Three comments state that the alternative certification outlined above concerning foreign-produced material depicting simulated sexually explicit conduct should also be available for foreign material depicting lascivious exhibition. One of these comments provided the following proposed text for this certification: ''I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute * * * [simulated sexually explicit conduct] or * * * [lascivious exhibition] are not minors.'' This comment further notes that ''[d]ue to the comparably small number of foreign films at issue, the burdens associated with making such reasonable efforts would be minimal when compared with the burdens of reviewing all domestically-produced matter to identify scenes containing'' simulated sexually explicit conduct or lascivious exhibition.

One comment explained that the Department was wrong to suggest, by providing an alternate certification for materials depicting simulated sexually explicit conduct but not for materials depicting lascivious exhibition, that ''posing a minor for simulated sexual conduct is necessarily less abusive than depicting a minor in the lascivious display of genitals or pubic area'' and that the Department should treat both kinds of material similarly to minimize constitutional concerns. The comment also notes that expanding the alternate certification to cover lascivious exhibition materials will not place foreign children at risk of being victimized through the production of child pornography because ''the

importation and even the mere possession of child pornography remains seriously criminal in all of the United States, even if all of the children depicted are other than U.S. nationals.'' Another comment states that it was inexplicable for the Department to permit an alternative certification for materials depicting simulated sexually explicit conduct but not for materials depicting lascivious exhibition.

The Department adopts these comments. Accordingly, in the final rule § 75.9(c)(3) (renumbered from the proposed rule's § 75.9(c)(5)) will use the text proposed by the comment above.

List of All Foreign-Acquired Matter for Which Records of Performers Are Not Available

The sixth requirement in the proposed rule would have required that the entity making the certification include a list of the visual depictions or matter, including those visual depictions for which no records exist but for which the certifying entity had made reasonable efforts to ensure that no performer in any visual depiction is a minor. As with the case of non-employee performers, this list would have provided the Department with notice and a record that such visual depictions existed and, if necessary, would have enabled investigation of such matter. At the same time, the requirement of the list and a certification of reasonable efforts by the secondary producer in the United States would have provided as much protection as possible without unduly infringing on constitutional rights. The Department considered that the risk of evasion would have been mitigated by the severe criminal penalties for production of child pornography that would apply to any matter covered by the record-keeping requirements.

As noted above, the Department is adopting comments to strike this provision from the final rule.

Certification of Record-Keeping by Primary Producers

The seventh requirement in the proposed rule would have been that, as with foreign primary producers, an entity acquiring visual depictions must certify either that the primary producer in the first instance maintained the records required by the statute and that the certifying entity has copies of those records, or that the primary producer has certified on its own that it (the primary producer) has made a certification and that the entity has a copy of that certification.

As noted above, the Department is adopting comments to strike this provision from the final rule. A key consideration in the Department's determination to adopt these comments is that this provision necessarily would have only applied to material produced in the United States. As the U.S. primary producers of that material would either be required to comply with the record-keeping provisions of sections 2257 or 2257A or to have themselves provided with the certification to the Attorney General required by § 75.9, it appears that the Act's goals would be met without requiring the secondary producers to provide another certification.

Application to Secondary Producers

The Department has received many comments on the application of the proposed rule to secondary producers. Two comments note that the proposed rule applies to secondary producers as of July 3, 1995, except that no penalties would be imposed against secondary producers who failed to maintain records for acts of production that occurred prior to the 2006 effective date of the Adam Walsh Act. The comments argue that this would allow criminal prosecutions of secondary producers to be based on materials that were not covered at the time of their creation. The Department believes that application of its regulations to secondary producers has reflected the statutory language since 1995 and that the Act reinforces this applicability. Nonetheless, the Department, recognizing that some secondary producers might not have believed that they were required to adhere to the requirements of part 75, agreed in the proposed rule to apply the penalties against secondary producers only for depictions with dates of production after the 2006 effective date of the Act. However, the statutory language is clear that secondary producers are subject to the Act, and, therefore, it is not the case that any prosecution of any secondary producer for failure to adhere to part 75 for depictions originally produced prior to the Act's 2006 effective date would subject anyone to criminal sanctions based on materials that were not covered at the time of their creation.

One comment states that the regulations should not apply to a secondary producer who obtained the materials before the compliance date without reproduction rights. According to the commenter, the republication rights would be worthless since it is impossible to go back to the primary producer to obtain those records, particularly if the contract at the time did not permit providing the records.

The Department does not adopt this comment. As stated above, once the Adam Walsh Act took effect, all secondary producers were clearly on notice that part 75 applied to all depictions that were originally produced after the compliance date. However difficult obtaining the necessary records may now be, the secondary producer could have done so at the time in accordance with its statutory obligation. Failure to have done so will not excuse noncompliance. However, as elaborated more fully below, the Department in response to comments has changed the compliance date of the final rule for entities who can claim the exemption from part 75 obligations that is contained in section 2257A. Thus, although secondary producers who are governed by part 75 must comply with its provisions with respect to depictions of actual sexually explicit conduct originally produced after the Act's compliance date, secondary producers who can claim the exemption in section 2257A will not need to comply with part 75 in the interim.

Two comments argue that secondary producers will not be able to comply with the terms of the proposed rule because primary producers have not made information available to secondary producers in all cases due to privacy concerns. Two other comments remark that even if the primary producer provides the records to the secondary producer, requiring the secondary producer to keep the records harms the performers' privacy.

The Department does not adopt these comments. The Act applies to secondary producers, and, therefore, the final rule does so as well. Moreover, privacy concerns may not always be the reason why a primary producer chooses not to provide such identification records. The possibility exists that the primary producer declines to provide the records because the models are not of legal age. Congress applied section 2257 to secondary producers, and reaffirmed that applicability in the Act, so that child pornography would not be able to gain a market among secondary producers. Eliminating that market is critical to the suppression of child pornography. Given the Department's willingness to allow redaction of personal information to the extent possible to protect privacy while at the same time confirming legal age, it believes that there will be no unwarranted invasion of the performers' privacy as a result of the proposed rule.

Four comments objected to applicability of the proposed rule to secondary producers on the ground that

secondary producers rarely come into contact with performers. These commenters claim that it is impossible for secondary producers to inspect the original identification of the performers, and that secondary producers cannot comply with this requirement.

The Department declines to adopt these comments. As stated, Congress intended to prevent secondary producers from creating a commercial market for child pornography by relying on their lack of knowledge of the age of performers used by primary producers. The Department believes that it is inaccurate to state that secondary producers cannot comply with the proposed rule. No aspect of the rule is such that secondary producers will find it ''impossible'' in any sense to comply with them. Moreover, the legal duty that the final rule imposes on secondary producers relates to record-keeping only. The comments' claim that the secondary producer must inspect the original identification documents of the performers is incorrect, although secondary producers should take steps to ensure that they do not violate criminal prohibitions relating to child pornography.

Another comment states that secondary producers cannot know whether the information that the primary producers possess is accurate. It notes that a secondary producer can be non-compliant despite taking all possible compliance measures. The Department agrees that both primary and secondary producers who keep the required records may lack full certainty that the information that they have is accurate. However, the rule does not require that producers be completely certain of accuracy. Primary producers must check documents and keep records based on those documents, with the entitlement to see driver's license or passport numbers to ensure that the identification validly identifies that the named performer is of legal age. A secondary producer is not required to examine documents, and if it chooses to do so, will not face liability simply because the documents are not accurate.

Two comments contend that the proposed rule should not extend to secondary producers because concerns relating to those entities' document availability can be addressed by referencing the name and address of the primary producer's records custodian, without requiring a duplicate and separate set of regulatory documents by the secondary producer. A third comment makes a similar point, noting that such a reference is permitted under the current § 75.2(b) of the regulations. The comment asks that only primary producers—not secondary producers—be required to personally discharge the record-keeping requirements.

The Department does not adopt these comments. Under the suggested approach, the secondary producer will not have demonstrated that he has actually received copies of the records from the primary producer. If secondary producers were exempted from an obligation to keep records, then the Department could never determine the identity of the primary producer. Failing to have the rule apply to secondary producers would also thwart the language of the Act that makes section 2257 applicable to secondary producers, increasing the chances that a commercial market would exist for child pornography and thus for child exploitation.

One related comment notes that under the proposed rule and section 2257(f)(4), each republisher must include the producer's disclosure statement on every republished copy. According to the comment, an investigator would therefore know where to find the primary producer, and it would be easier for an investigator to locate the primary producer rather than to inspect the secondary producer's records. Two other comments state that secondary producers should not be inspected because they use content provided by primary producers; they argue that inspection of primary producers' records would be easier than inspecting thousands of secondary producer sites.

The Department declines to adopt these comments. The Act imposed a requirement for secondary producers to maintain records that governs the Department's final regulation.

One comment posits that when original footage is created by a foreign primary producer, but an American secondary producer seeks to use the footage in news or a documentary, the foreign producer is beyond the reach of section 2257 and may not have any documents. The secondary producer in this circumstance will be unable to obtain the necessary records, and will have to forgo the footage or risk criminal penalties. According to the comment, this would result in a ban on certain programming, raising major First Amendment concerns.

The Department does not adopt this comment. In such a circumstance, the U.S. producer would be able to rely on the certification.

General Comments

Numerous comments address the proposed rules in general ways that do not require individual responses. For example, many comments argue that the rule is an unconstitutional burden on free speech, a violation of the Equal Protection Clause of the Constitution, a violation of the Fourth Amendment, or a violation of privacy rights. Other comments argue that the rule legislates morality, targets a legal industry for harassment, impedes citizen access to the Internet, or establishes government surveillance of citizens' Internet activities. Some comments recommend that rather than the government publishing this rule, the government should encourage better parenting, enforce laws prohibiting and punishing child pornography more vigorously, or establish an alternative age verification program, such as a database of all performers. A number of comments claim that the rule unfairly burdens small businesses run by women. Some comments misunderstand the scope of the rule to apply to consumers of pornography and therefore suggest that consumers be subject to age verifications procedures. Three comments raised the possibility that producers might experience stress over the fear that they might go to jail for inadvertently misfiling or misplacing records, another commenter is concerned that a person could face liability for inadvertently posting a depiction of sexually explicit conduct, and other commenters fear that producers are liable to suit for disclosing information about performers or that a Web site operator could be liable to suit for disclosing information about those who post depictions on their Web sites. Other commenters request exemptions for certain types of media or Web site operations that are not provided for in the statute. One comment recommends ending all record-keeping requirements prior to this rule and starting anew.

The Department notes that these comments essentially took issue with the underlying statute and its requirements. The Department responds with three points. First, many of the comments either misunderstand or overstate the effect of the regulation. Second, courts have upheld existing section 2257 and its implementing regulation as a valid exercise of power by Congress and the Executive Branch, and the Department believes that the Adam Walsh Act and the final regulations are as well. Third, the Department is under a statutory obligation to publish the rule and cannot ignore its duty or change the statutory requirements through its rulemaking. To the extent these comments raise issues relating to the regulations themselves, the Department

also relies on the discussion in other parts of the supplementary information in support of the rule.

Finally, the Department responds to three other comments regarding the regulation's applicability to non-commercial activities. One comment states that the definition of ''sell, distribute, redistribute, and re-release,'' in § 75.1(d) suggests that the entire record-keeping obligation of producers is limited to commercial production operations. One comment stated that age-verification requirements should apply only to producers who pay performers, not individuals who post photos of themselves, and another comment maintains that an exemption statement should not be required if a depiction is produced by married couples who produce videotaped images of themselves for their own personal use.

The Department adopts these comments in part and rejects them in part. The statute is not clearly limited to producers who pay performers. However, it is limited to pornography intended for sale or trade. Section 2257 speaks in terms of participants in the professional pornography industry: The persons exhibited are ''sexual performers'' who must provide their ''alias, nickname, stage, or professional name,'' 18 U.S.C. 2257(b)(2), and the producer's relationship with the ''performer'' is described as ''hiring, contracting for, managing and otherwise arranging for the depiction of'' the individual to be shown in the images, *id.* 2257(h)(2)(B)(iii). Similarly, records must be kept for ''every performer portrayed'' (suggesting multiple ''performers''); a disclosure statement is to be affixed to ''every copy'' of covered sexually explicit material (suggesting multiple copies); and producers working with images already in existence by definition produce materials ''intended for commercial distribution.'' *Id.* 2257(a), (e)(1), (h)(2)(A)(ii). Further, age records must be maintained at the producer's ''business premises'' and made available for administrative inspection. *Id.* 2257(c). Likewise, under the implementing regulations, age records must be cross-indexed by performer and by title of the explicit work, 28 CFR 75.2, and maintained ''at the producer's place of business,'' *id.* § 75.4. Finally, records inspections may be carried out at ''any establishment of a producer,'' and ''during the producer's normal business hours.'' *Id.* § 75.5. The legislative history of section 2257 further underscores Congress's intent to regulate images produced by the pornography industry: The age-verification system was proposed by the 1986 Pornography Commission, which described the recommended legislation as reaching anyone ''engaged in the sale or trade of sexually explicit material'' so that minors could be protected ''through every level of the pornography industry.'' Atty Gen. Comm'n on Pornography, *Final Report* at 619 (1986).

Regulatory Procedures

Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Department of Justice drafted this rule in a way to minimize its impact on small businesses in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, while meeting its intended objectives. Because the Department, based on the preliminary information available to it through past investigations and enforcement actions involving the affected industry, was unable to state with certainty that the proposed rule, if promulgated as a final rule, would not have any effect on small businesses of the type described in 5 U.S.C. 601(3), the Department prepared preliminary Regulatory Flexibility Analyses in accordance with 5 U.S.C. 604. Based on this same information, the Department concluded that there were likely to be a number of small businesses that are producers of sexually explicit conduct as defined in the statute, as amended by the Act. In the proposed rules, the Department specifically requested information from affected entities. This information was requested, in part, to assist us in determining the nature and extent of the impact the final rule will have on affected entities. Although the Department received some comments, the information we received was not sufficiently detailed to allow us to state with certainty that this rule, if promulgated, will not have the effect on small businesses of the type described in 5 U.S.C. 605. Accordingly, the Department has prepared the following final Regulatory Flexibility Act analysis in accordance with 5 U.S.C. 603.

A. Need for and Objectives of the Rules

As described in detail in the ''Background'' section above, the objectives of the rules were to reduce the chances that minors are depicted in actual or simulated sexually explicit conduct by requiring that producers ensure that all performers are in fact of legal age, so as to reduce harm to children at the time of production and in subsequent years.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

The Department received 35 comments on its preliminary Regulatory Flexibility Analysis with regard to the proposed rule implementing revised section 2257. No commenters on the proposed rule to implement section 2257A commented specifically on that proposed rule's Regulatory Flexibility Analysis; comments as to the cost of that proposed rule are addressed below in the sections on the Small Business Regulatory Enforcement Fairness Act of 1996 and Paperwork Reduction Act.

Many of these provided general comments about expenses that small businesses would incur without comparing such costs to their total revenues. One comment states that individual women who put depictions of lascivious exhibition on the Web make between $15,000 and $50,000 and do not have the money to buy office space. Three comments noted that producers who work from home will have to rent office space if they want to keep their home address private, or they will be required to pay for day care. One comment states that the proposed rule would create significant bureaucratic challenges to content producers by implementing a requirement to provide production-date information in more locations.

The significant issues raised by the public comments in response to the initial regulatory flexibility analysis are as follows: One comment estimated that costs of compliance for an ''adult business'' would be $250,000, about 25% of the business' net revenues.

For example, one comment remarked that his business would need to hire three full-time staff to manage and collect information concerning 205,000 profile holders on a personal posting Web site and compile the required age documents. The comment estimated that the cost of the three base salaries would be $150,000 per year, which exceeded the business' current revenue, and that his home (office space) lacked room for three additional staff. The comment also notes that it could not pass these costs on because the business did not charge a membership fee, and that making copies of records on 205,000 users would mean that it would have to purchase 136 three-drawer filing cabinets. It contends that the space required for this many cabinets would mean that it would have to rent external storage units for $67,200 per year, that the cost of the filing cabinets would be $68,000, and that the total compliance cost for the business would be $345,800.

Three comments made similar comments concerning types of expenses without specifying amounts.

Six comments claim that compliance costs for collecting records, documentation, updating, cross-referencing, and legal services would be high. One comment states that small businesses would incur excessive legal costs because of the ''draconian sanctions'' for failure to comply with the substantive or procedural requirements of the statute and regulations. One comment claims that the costs of compliance would present a large obstacle to expanding a business. Three comments state generally that the proposed rule would harm small business. Two comments point out that small businesses would need to separate these records from others, which would be costly, and that they would incur vastly increased storage costs due to the necessity of maintaining records for every photograph of every performer. Two comments contend that the proposed rule would place an unreasonable burden on many law-abiding businesses. One comment claims that the vast majority of Web sites are small entities, and that listing their owner's street (often home) address and individual name is a substantial burden and creates a chilling effect on constitutionally protected expression. One comment states that secondary producers are often small businesses that could not afford the time or expense to obtain and maintain copies of records that are best created and maintained by the primary producer that does see the original documents. Two commenters represented that some secondary producers will go out of business due to the proposed rule's requirements. One comment states that it would lose revenue from international profile holders because he will not be able to obtain required United States documents from foreigners who post self-nudes on the commenter's profile Web site. Two commenters from small businesses claimed that they could never generate the money necessary to pay for the increased expenses associated with the proposed rule.

One comment states that the Department would greatly reduce compliance costs if section 2257 producers could take advantage of the 2257A process under 2257A(h)(1)(A)(ii). The comment states that this would eliminate the need to produce and maintain segregated records. Doing so, the comment states, would give these producers the same compliance option as producers who are identical in every permissible relevant respect. One comment argues that the Department is required under 5 U.S.C. 605(b) to conduct analyses to ensure that the regulation will not have a ''significant impact on a number of small entities.'' The comment states that analyses are required unless the agency can make a ''no significant impact'' certification. One comment argues that the Department failed to conduct or write a proper initial regulatory flexibility analysis.

These comments are not all specifically addressed to the proposed rule's initial regulatory flexibility analysis, but the content of the comments raise issues that are in substance addressed to the analysis, and are therefore discussed in the final regulatory flexibility analysis. The Department offers the following as a summary of its assessment of the issues that were raised.

The Department believes that there is merit in those comments that raised cost impact and logistical concerns relating to individuals who produce actual sexually explicit depictions on Web sites at their homes. The Department has made changes to the proposed rule as a result of these comments. The Department believes that the final rule relieves three restrictions that will largely respond to the generalized comments that the Department received concerning the cost impact of the proposed rule on small businesses. First, the final rule does not require the keeping of hard copies, only that such copies be produced on the demand of inspectors. This relief of a restriction will reduce costs of storage, personnel, and related expenses that were noted in the comments. The combined effect of these reliefs of restrictions will greatly reduce the impact of the rule on law-abiding businesses, on expanding businesses, and on the profitability of businesses. Second, the final rule, in a change from the proposed rule, allows hyperlinks to appear on each Web page, rather than require that the full disclosure statement appear on each such Web page. This relief of a restriction will reduce the cost of providing information concerning the original production date in more locations, as one comment raised. Third, the final rule permits the producer not to retain records onsite. Rather, the required records can be retained by third-party custodians. This change, although imposing a cost of custodian services by those entities that choose to take advantage of it, will greatly reduce compliance costs in the categories of storage, rental space, and record-keeping including segregation of records, legal, and staff salaries. Additionally, this change will relieve other burdens on small businesses enunciated by the comments, such as release of home address information. Finally, small businesses that can fall within the safe harbors contained in section 2257A will be relieved of record-keeping and disclosure-statement requirements altogether as outlined above.

In addition to the reduction in burden on small businesses associated with substantive changes to the proposed rule, the Department notes the importance of the change in the compliance date of the final rule in alleviating burdens on small businesses. Originally, the record-keeping obligations that the rule imposes on small businesses were to relate to all works produced after the effective date of the statute in 2006. But the Department has changed the final rule's compliance date to the compliance date of the final rules that will be issued to implement section 2257A. The Department believes that the two statutes are interrelated because section 2257A contemplates that some entities, including some small businesses, are to be able to comply with its terms, and that by doing so, they would not have to comply with the regulations issued under the Act. Because the final rule's record-keeping requirements will never apply even for a single day to small businesses that comply with the section 2257A certification process, the record-keeping cost burden on such small businesses is completely eliminated. Moreover, even those small businesses that will eventually need to comply with the final rule because their conduct does not permit them to use the section 2257A certification exemption will not have to expend resources complying with the final rule for the years that have lapsed since the proposed rule's compliance date.

Two of the commenters were Internet sites on which users can post profiles who claim that the rule would adversely affect their business operations. The Department does not believe that these comments reflected the effect of either the proposed rule or the final rule on their businesses. A profile site is not normally a producer. The individuals who post depictions of lascivious exhibition on those sites are producers. It is the latter, not the former, assuming that the Web site does not act as a producer, who are required to comply with the record-keeping and disclosure statements. Furthermore, this final rule does not impose as large an impact on small business as some commenters understood from the proposed rule.

The Department responds to the comment that recommends that small businesses receive the opportunity to comply with the statutory safe harbor by stating that the exemption referred to in the comment is available to any producer who can meet its conditions. The Department's ability to apply an exemption is limited by the statutory language. However, the Department has recognized the exception that is created in section 2257A(h)(1)(A)(ii), and in its final rule, the Department has stated that it will ensure that the applicability of that safe harbor will operate despite the fact that no regulation implementing it has been promulgated. As stated above, the Department has set the compliance date for the final rule so as to allow entities who are compliant with section 2257A(h)(1)(A)(ii) not to comply with the final rule or incur the costs of doing so, even as an interim measure. Moreover, the Department notes that applicability of the exemption does not turn on whether the entity seeking to comply with the safe harbor is a large or small business. The exemption turns on the conduct of the entity that seeks to utilize it, not the status of the entity itself.

With respect to the procedural requirements for a regulatory flexibility analysis, the Department believes that this final regulatory flexibility analysis fully satisfies 5 U.S.C. 604.

As in its initial regulatory flexibility analysis, the Department continues to believe that approximately 500,000 Web sites involving 5,000 businesses that depict actual sexually explicit conduct are affected by the rule. As a result of being subject to the final rule, these businesses will be required to check identification documents, record information about production dates and age and names of performers, and affix disclosure statements to each copy of a page that depicts actual sexually explicit conduct. These businesses are in the film, magazine, Internet, satellite, mail order, magazine, content aggregation, and wholesaler industries. Although one commenter claims that there are more affected businesses based on considerable exposure to the industry, the comment provides no specific basis for that belief, nor did it offer any competing number or evidence for such a number. One other commenter notes that there are about 1,000 firms that operate more than 100,000 adult subscription Web sites. This statement does not affect the validity of the Department's estimates of the number of Web sites and firms that the rule would affect. The Department's estimate did not estimate the number of subscription sites or the number of firms that operate them. The commenter's estimate of a portion of the relevant site universe is fully consistent with the Department's estimate of the entire number of affected Web sites. No other commenters specifically took issue with the Department's estimate, which it continues to adhere to.

The final rule requires small businesses and other entities that produce actual sexually explicit materials to undertake record-keeping and other compliance requirements. They must check particular forms of identification to determine that all performers portrayed in such depictions are of legal age, they must keep records, they must segregate the records, and they must place disclosure statements on each page of a Web site that contains actual sexually explicit conduct. The professional skills required to comply are those necessary to produce the records and to place the disclosure statement on a hyperlink on each page of a Web site.

C. Description and Estimates of the Number of Small Entities Affected by the Rules

A ''small business'' is defined by the Regulatory Flexibility Act (''RFA'') to be the same as a ''small business concern'' under the Small Business Act (''SBA''), 15 U.S.C. 632. Under the SBA, a small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA. See 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). As in its initial regulatory flexibility analysis, the Department continues to believe that approximately 500,000 Web sites involving 5,000 businesses that depict actual sexually explicit conduct are affected by the rule. The Department believes that of these 5,000 businesses, 4,000 are small businesses. It reaches this conclusion from comments that stated that the vast majority of businesses affected by the final rule are small businesses.

In the proposed rule to implement revisions to section 2257, the Department stated that, based upon the information provided to the Department through past investigations and enforcement actions involving the affected industry, there are likely to be a number of small businesses that are producers of visual depictions of sexually explicit conduct as defined in the statute, as amended by the Adam Walsh Act. In the proposed rule to implement section 2257A, the Department stated that based upon the information available to the Department, there are likely to be a significant number of small businesses that are producers of visual depictions of simulated sexually explicit conduct.

Pursuant to the RFA, the Department requested affected small businesses to estimate what these regulations will cost as a percentage of their total revenues in order to enable the Department to ensure that small businesses are not unduly burdened.

The Department also stated that the proposed rules had no effect on State or local governmental agencies.

D. Description of the Proposed Reporting, Record-Keeping and Other Compliance Requirements of the Rule

In the proposed rule to implement revisions to section 2257, the Department stated that the proposed rule modified existing requirements for private companies with regard to visual depictions of sexually explicit conduct to ensure that minors are not used in such depictions. One of these requirements that would specifically affect private companies is Congress's expansion of the coverage of the definition of ''sexually explicit conduct'' to cover lascivious exhibition of the genitals.

In the proposed rule to implement section 2257A, the Department stated that the proposed rule imposed requirements on private companies with respect to visual depictions of simulated sexually explicit conduct to ensure that minors are not used in such depictions. Specifically, the Department noted, the rule imposed certain name- and age-verification and record-keeping requirements on producers of visual depictions of simulated sexually explicit conduct concerning the performers portrayed in those depictions. The Department also noted that the proposed rule, however, provided an exemption from these requirements applicable in certain circumstances.

The costs of the rule to small entities are less than the Department originally anticipated. Thus, the conclusions of the cost estimate that was submitted to the Department by Georgetown Economic Services reflect assumptions that no longer apply. For instance, that report estimated average small business monthly compliance costs of $5,000, plus up-front conversion costs and time to ensure initial compliance. The report contends that most small businesses in the pornography industry generate insufficient revenue to cover this level of regulatory cost imposition. However, because the Department has listened to the comments that it has received, and

believes that its objectives can be accomplished while at the same time implementing regulatory changes resulting in imposing a lighter burden on regulated industry, it does not believe that the report's conclusion, if it ever was correct, applies to the final rule.

For instance, the report assumes in its high cost estimate figures related to formatting section 2257 records and leasing storage space. However, the final rule changed the requirements that imposed these costs so as to dramatically reduce them. For instance, far less storage space is needed now that the final rule, in response to comments, has eliminated the hard-copy requirement. It was the proposed rule's hard-copy requirement that had generated the need for significant storage space. Similarly, the cost of legal fees will be significantly less than anticipated. The report estimated that the proposed rule would require affected businesses to hire at least one full-time employee to maintain the database at a cost of $20 per hour. Since the final rule, responding to various comments concerning the need to hire employees and the difficulties that this requirement posed for part-time operators and for operations that were run out of the home, has permitted records to be stored in offsite, third-party locations, businesses will not need to incur the cost of hiring full-time individuals to maintain only their own records. And it bears repeating that the cost estimate's figures for online dating sites misapprehend the nature of both the proposed and final rules. The operator of such a site incurs no obligations under either rule if it simply operates as a location where users post lascivious exhibitions; it is the individual producer who posts such material on the Web site who must comply with the regulatory provisions.

E. Description of the Steps Agency Has Taken To Minimize the Significant Adverse Economic Impact on Small Entities

The Department took numerous steps to minimize the economic impact on small entities consistent with the objectives of the Act. As noted above, precisely to minimize the concerns of commenters that significant compliance costs would be incurred by small businesses if the proposed rule were promulgated without change as a final rule, the Department adopted three significant substantive changes to that proposed rule: (1) Elimination of a ''hard copy'' requirement for record-keeping; (2) allowing third parties to be custodians of the records; and (3) allowing the disclosure statement to appear as a hyperlink, rather than in full, on each page. The Department also changed the compliance date. These changes will reduce staffing requirements, the need to rent or purchase filing cabinets, the cost of modifying existing images, and other small business compliance costs that commenters have raised. Although some of the general comments that the Department received were rejected based on policy concerns, few of the comments submitted on the economic impact of the rule on small business were rejected for policy reasons. Such comments were either adopted to reduce the restrictions on small businesses where the Act permitted or, in almost all circumstances, were rejected because the Act did not legally permit the Department to adopt them.

Section 2257(a) requires that whoever produces matter that contains actual sexually explicit conduct ''create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.'' This requirement prevents the Department from modifying the proposed rule to exempt secondary producers or small businesses as a class. Moreover, each person with this obligation must ascertain by examining identification documents the name and date of birth of each performer who is visually depicted in sexually explicit conduct. And each must also ascertain other names of the performer. Subsection (c) requires that the records be maintained under the terms of regulations promulgated by the Attorney General and that they be made available at all reasonable times for inspection. These provisions impose burdens on small and other businesses that are not reducible to insignificance. Similarly, subsection (e) requires that all covered entities affix to every copy of sexually explicit material a statement indicating where the mandated records are kept. Those records are to conform to standards issued by the Attorney General. And section 2257A(h) contains a specific safe harbor certification process that allows some entities to avoid compliance with these requirements.

The Department, however, may not expand the category of entities that fall within that subsection's parameters beyond those who meet the statutory conditions. Nor may the Department exempt secondary producers from record-keeping and other compliance requirements that the Act mandates. Therefore, the Department accepted alternatives to the proposed rule that effectuated the statutory objectives while reducing the compliance burdens of small businesses, but rejected those alternatives that were inconsistent with the statute and its purposes.

One proposed reduction in compliance costs for small businesses that was rejected on policy grounds was the request to end the segregation-of-records requirement for section 2257 records. Because the Attorney General must inspect these records, the Department believes that a lesser imposition will occur on those subject to inspection if the requisite records are kept separately. The Attorney General will not then need to review all of a producer's records in search of section 2257 records, nor will the small business need to disrupt its business for the length of time for all of its records to be inspected. Therefore, the Department believes that its position on this point will not impose substantial cost on small business. Further, it believes that it has drafted the final rule to take into account the legitimate cost concerns of small businesses to the proposed rule wherever possible. The Department is unaware of any other federal rules that may duplicate or conflict with the proposed rule, and no commenter has brought any such rule to its attention.

Executive Order 12866

This final rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 (Principles of Regulation). The Department has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly this rule has been reviewed by the Office of Management and Budget.

The benefit of the rule is that children will be better protected from exploitation in the production of visual depiction of sexually explicit conduct by ensuring that only those who are at least 18 years of age perform in such depictions. The costs to the industry include slightly higher record-keeping costs.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more, in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

Proposed Rule on Revisions to Section 2257

At the time of the proposed rule the Department stated that the proposed rule was not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5 U.S.C. 804. 72 FR at 38037. The Department determined that the proposed rule would not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

One comment disputes the Department's view that the proposed rule would not cost the economy more than $100,000,000. According to this comment, software support and legal advice costs ''will be substantial and probably incalculable.'' It claims that secondary producers will need to employ a records custodian at least 20 hour per week and that doing so for the 5,000 businesses that the Department estimates will be affected would cost $30,000 each, for a total cost of more than $100,000,000. One comment cited a poll of businesses asking them what they expected the cost of compliance with the proposed rule would be and determined an average cost of more than $210,000 per business. The comment asks that the proposed rule be reviewed and promulgated in accordance with requirements pertaining to rules that impose a greater than $100,000,000 impact on the economy. The Department received a comment containing a long technical cost estimate that had been prepared by an entity other than the commenter that posited that compliance costs associated with the proposed rule would be significant.

The Department does not adopt these comments. First, as outlining the substance of the comments in the notice demonstrates, not all commenters have accurately understood the proposed rule. In each instance, those commenters overstate the burden of the proposed rule upon them. That overstatement would necessarily cause such entities who participated in a poll to overestimate the compliance costs they would incur as a result of the rule. Second, the comments on the proposed rule by affected entities were entirely unfavorable. These entities would have every reason to overstate their compliance costs, and there is reason to believe that this has occurred. The Department questions the salary estimates that were offered for hiring staff to keep records, for instance. Similarly, one commenter states that compliance costs per small business would amount to $30,000 and another that the cost would be more than $200,000. This chasm in the estimates raises serious questions concerning the accuracy of the estimates and the methodology that produced them.

Moreover, whatever validity these estimates may have had with respect to the proposed rule, the decreased compliance costs due to removing restrictions as contained in the final rule reduces the accuracy of the submitted estimates significantly. Although a business that produces depictions of lascivious exhibition will be required to keep records, because such a business could use a third-party custodian that would benefit from economies of scale, because hard copies would not have to be kept, and because the disclosure statement requirements have been significantly eased, such a business would avoid significant amounts of compliance costs for such categories as legal, storage, and staffing costs. There is no reason to believe that the final rule would impose $100,000,000 in costs on the economy. Many of the entities covered by this final rule already produce actual sexually explicit conduct as defined under the narrower existing rule, which imposes greater costs on such entities than those associated with this final rule; hence, they will face only negligible additional costs.

Because the cost estimates are based on assumptions regarding the proposed rule that were changed for the final rule, its conclusions that ''most web-based businesses will exit from the industry'' and that other types of businesses ''will either shut down or move their businesses to another country'' are not valid. The Department has adopted the legitimate concerns of legitimate pornographic small businesses, and has changed the final rule in ways that significantly reduce the costs of the regulations on operations, and that will result in few if any business failures on the part of entities that wish to comply with the laws against producing child pornography.

In addition, the Department believes that the best estimate of cost of compliance per affected small business is in actuality far less than what commenters have submitted. The Department is aware of the existence of businesses that provide section 2257 services to regulated entities to ensure satisfaction of the requirements of the 2005 final rule, and it therefore fully expects that such entrepreneurial activity will also provide compliance services with respect to this final rule. Various Web sites provide model releases, software, technical support, installation, assistance with data, and additional hardware such as scanners. For example, one service provides tracking of content, performers, identification, and other section 2257 compliance information for a cost of $8,000 to the producer. Another Web site offers similar services with respect to performer data collection, creation of digitized images, indexing, cross-referencing, record-creation, offsite maintenance of records, release documents, reports, correction of record discrepancies, generation of documents for vendors and distributors, storage of scanned releases and compliance statements, and storage of names and aliases, for an initial cost of $1,500 plus $60 per month for online record access and stored performer records.

The Department also expects that since the final rule allows third parties to hold records of small businesses, even apart from the services now being offered, some of which include offsite record maintenance, a third-party custodian industry will exist to support regulated small businesses at reasonable costs, should a small business wish to outsource only those elements of its compliance costs with the final rule.

One comment states that many of the entities regulated by the final rule would be considered small businesses, in that their revenue would be less than $27,000,000, or if secondary producers, $23,000,000, or $13,500,000, or $6,500,000, depending on their respective operations; however, the comment provided no average revenue per small business. In any event, averages in the context of the rule could diverge widely from medians. Suffice it to say, given that the comment states that the adult pornography business generates $12 billion in revenues, even

a small business with revenues considerably less than the smallest category of small business—$6,500,000—would not find to be overly burdensome compliance costs ranging from (at the low end) $1,500 plus $60 per month to (at the high end) $8000.

One comment argues that SBREFA requires agencies to consider alternatives that fit federal regulatory initiatives to the scope and scale of small entities. It states that agencies must consider the regulatory impact of their rules on small businesses, and analyze alternatives that minimize effects on small businesses. The Department adopts this comment, and as noted elsewhere in this notice, has made multiple changes to the proposed rule that demonstrate consideration of alternatives that would reduce the impact of the rule on small businesses, and has adopted several proposals that commenters have asked the Department to accept where the statutory language permitted it to do so.

One comment characterizes the compliance costs of the proposed rule as burdensome with respect to staffing, software development, updating and maintenance, and institution of new compliance procedures. The Department has addressed this comment in part by adopting the cost-saving measures described earlier in this preamble: reducing the staffing and computer burdens of the final rule by allowing third-party custodians to keep records, by eliminating the hard copy requirement of the proposed rule, and by permitting the disclosure statement to appear on each page by hyperlink text.

Five comments state that the proposed rule would force small companies to shut down. These five comments also maintained that surviving firms would face a much harder time in continuing operations. Yet another comment posited that the remaining firms would produce less output as a result of the proposed rule. One comment raised concerns that affiliate sites that contain photographs will not be able to survive the cost of formatting records, maintaining a database, and leasing space, and may go out of business as a result. One other comment related that dating sites that displayed about 8,000,000 profiles with graphic content would need to make photo records at 3 minutes per record, with a staffer paid $20 per hour to create a picture for every file. That comment cited a National Research Council report that compliance with the regulations would be likely to increase expenses and drive out some of the small enterprises.

The Department does not adopt these comments. First, as stated above, the Department does not believe that the final rule will cause the outcomes that the comments predicted, since the final rule takes into account so many of the concerns of small businesses. Also, as stated above, businesses such as dating services that in fact do not produce depictions of sexually explicit conduct, are not the entities that are responsible for record-keeping and disclosure statements. Those responsibilities in those circumstances would fall upon the individuals who post graphic content on the site. To the extent that the final regulation does impose costs on small businesses that could affect their operations, the Department believes that these costs are the irreducible minimum costs that Congress imposed in the Act as a consequence of increasing the likelihood that underage depictions would not be produced or that demand for and distribution of such depictions would not be increased because of the existence of secondary producers who wittingly or unwittingly made them available.

In addition, the Department does not believe that the National Research Council's 2002 report, *Youth, Pornography, and the Internet,* quoted by one commenter, provides support for the commenter's position. First, the report is now six years old and was issued before the current regulations were published. Second, the report did not quantify the purported effect of regulations on small businesses that would occur as a result of even the prior rules, much less this rule. Moreover, at page 213, the report notes that ''[m]ore active enforcement'' of the record-keeping requirements ''may better protect minors from participation in the creation of child pornography.'' To the extent that the comment relies on the report to claim that the effect of the rule might be to drive some small operators out of business, the Department agrees, but that report makes that statement only with respect to businesses who do not comply with their statutory obligations.

Many comments pertained to the proposed rule's effect on social networking sites. These comments claim that the proposed rule would harm adult social networking sites because of record-keeping requirements on users, a decline in the number of users, and their unwillingness to provide the required information because of fear of discrimination, because their names would be posted. Additionally, they state that the effect of the proposed rule could be the elimination of the social networking site industry, which the comments described as a legal and valuable way for adults to meet one another.

The Department does not adopt these comments. Although the rule would require users who chose to display actual sexually explicit conduct on adult social networking sites to keep records, the rule is inapplicable to social network site operators. The rule cannot exempt users from the record-keeping requirements the Act imposes. The Department has minimized these effects by reducing the costs of compliance. Moreover, it has eliminated any concerns, whether or not justified, that such users would face discrimination by allowing third-party custodians to maintain the records. The user's disclosure statement that is required to appear on the Web site would therefore not need to identify any name or address of the user, but merely the location of the third party that holds the records.

Two comments claim that secondary producers' income would decline as a result of having to comply with the rule. According to these commenters, out of fear of relying on primary producers' records, rather than reproducing depictions provided by primary producers, they would instead use text links to primary producers' sites. The Department does not adopt these comments. As a result of the final rule, secondary producers can trust that primary producers complied with section 2257 and did not employ underage performers.

Four comments state that the proposed rule would not affect foreign Web masters, and the federal government would have to spend funds to determine which businesses were or were not foreign. These comments also contend that harm to domestic business would occur vis-a-vis foreign businesses as perhaps more production would occur offshore, which would circumvent the safeguards. One comment claims that the rule would worsen the balance of payments because Americans will have to obtain their pornography from foreign sources. One comment states that the regulation would create an unfair trade barrier (against the United States) because offshore personal page Web sites will be more attractive for American citizens who wish to self-post nude content, and all users will shift their profiles to offshore sites.

The Department does not adopt these comments. The rule can apply only to circumstances to which the Act applies. Congress has limited authority to apply American criminal prohibitions against entities that operate only in foreign

countries, and the Department can only issue regulations implementing those prohibitions that have the same reach. To the extent that production of depictions of actual sexually explicit conduct shifts offshore as a result of record-keeping requirements generally, that is the unavoidable effect of the Act. The Department has minimized burdens on small business to minimize the effect of the rule on the situation these comments raise. To the extent that the rule reduces production of child pornography in the United States, that is the desired goal of both the Act and the rule. With respect to balance of payments, Americans who seek pornography will have access to numerous domestic sources of pornography under the rule, even if some production moved offshore. The comment makes no showing that the rule will cause the price of access to domestic pornography to rise compared to foreign pornography to a level that would lead pornography-seeking Americans to shift their purchases from domestic to imported product.

One commenter notes that the EU Privacy Directive means that some primary producers will only obtain affidavits that relate to people under 18 and that state where the records are located. Therefore, American businesses could not obtain needed records, while foreign competitors do not need to worry about the need to comply or experience compliance costs.

The Department does not adopt this comment. The Act requires that records exceeding those allowed in the EU Privacy Directive be kept. Foreign competitors will operate under different rules to the extent of U.S. and EU authority. The Department is unable to change that fact.

Proposed Rule To Implement Section 2257A

As stated in the proposed rule, the Department is unable to estimate with any precision the number of entities producing visual depictions of simulated sexually explicit conduct. Because the issue of the number of entities producing visual depictions of simulated sexually explicit conduct is a new issue that has arisen precisely because of the enactment of section 2257A, there does not appear to be much available information concerning the number of entities producing such material. As a partial indication, according to the U.S. Census Bureau, in 2002 there were 11,163 establishments engaged in motion picture and video production in the United States. Based on a rough estimation that 10% were engaged in the production of visual depictions of simulated sexually explicit conduct, the Department estimated that approximately 1,116 motion picture and video producing establishments would be covered. The underlying statute provides an exemption from these requirements applicable in certain circumstances, and it requires producers to submit certifications to qualify for this exemption. The Department has no information concerning the number of otherwise covered entities that would qualify for this statutory exemption, nor is it able to estimate this number. For entities that qualify for the statutory exemption, however, the Department estimated that it would take less than 20 hours per year, at an estimated cost of less than $25.00 per hour, to prepare the biennial certification required for the statutory exemption. The Department's burden-hour estimate for preparing the biennial certification required for the statutory exemption was based on the proposed rule's requirements for such certification, which have been drastically curtailed and simplified in the final rule. The proposed rule would have required that the certification take the form of a letter indicating that the producer regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers employed by that person, and would have required a list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition produced since the last certification, as well as a list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition that include non-employee performers. The Department assumed that the certification's main burden would have been to require producers to maintain a list of the visual depictions produced during the certification period, and that the majority of the work to prepare the certification would be performed by administrative staff. The Department further estimated that 90% of such entities would qualify for the exemption.

The Department received three comments contesting the Department's estimates for preparing the certification contemplated by the proposed rule. One comment states that the Department's estimation that preparing the certification would require less than 20 hours a year of administrative staff time at a cost of less than $25 per hour ''grossly understates the burden at issue'' because the determination as to whether given depictions constituted lascivious exhibition or simulated sexually explicit conduct, a prerequisite to preparing the lists contemplated by the proposed rule, would require attorneys to review the depictions at a cost far higher than $25 per hour, and thousands of hours of material would have to be reviewed. The comment thus concludes that ''the regulations impose not a trivial burden, but a very substantial one that will surely chill legitimate expression by producers anxious to avoid criminal sanctions.''

The second comment states flatly that the Department's estimate that the certification contemplated by the proposed rule would require less than 20 hours per year to prepare, at an estimated cost of less than $25 per hour ''has no basis in reality'' because some producers will have hundreds or even thousands of depictions, and also because the producers will have certain obligations with respect to foreign-produced materials such as seeking to determine if foreign producers comply with the requirements of United States law or taking reasonable steps to assure that foreign materials do not depict minors in depictions of lascivious exhibition or simulated sexually explicit conduct. This comment also explains that the determination as to whether depictions constitute lascivious exhibition or simulated sexually explicit conduct will have to made with the assistance of counsel, which will entail increased costs.

The third comment bluntly states that the Department's ''assumptions regarding the time and cost of compliance with the proposed [certification] regime * * * are unsupported and fallacious.'' The comment states that Department's citation to the 11,163 producers in 2002, above, ''represented only 'primary producers' '' and that ''there have long been many, many times that many websites featuring sexually explicit materials operating from the United States.'' This comment also states that the Department's estimation that 10% of the 11,163 producers ''disseminate simulated sexually explicit materials or material with lascivious exhibition * * * cannot be justified and seems unrealistic to us.'' Moreover, the comment states that ''since domestic 'secondary producers' are substantially dependent upon foreign primary producers, limiting the number of producers to those counted by the Census Bureau excludes thousands more primary producers'' and ''including 'secondary producers' '' into the Department's numbers multiplies the scope by magnitudes.'' The

comment concludes that ''[a]ssuming a more realistic number of several million adult websites, even keeping the unjustified and unjustifiable ten percent [that produce depictions of lascivious exhibition or simulated sexually explicit conduct], the Department has undercounted the number of entities affected by a factor of one hundred or more'' and that ''rather than the 1100 producers claimed by the Department, there are likely several hundred thousand.''

The Department recognizes the difficulty of estimating the burden of preparing the certification contemplated by the proposed rule and the difficulty of estimating the number of producers of depictions of lascivious exhibition and simulated sexually explicit conduct. Accordingly, the Department appreciates the comments that responded to the Department's request for input on these issues.

With respect to the burden of preparing the certification required by the final rule, the Department believes that it would be minimal compared to the burden of preparing the certification contemplated by the proposed rule. The certification in the final rule does not require producers to identify which of their materials constitute depictions of lascivious exhibition or simulated sexually explicit conduct, nor does it require producers to keep records concerning the depictions produced that include non-employee performers, the depictions produced since the last certification, the foreign-produced depictions that the certifier took reasonable steps to confirm did not depict minors, or a certification that a primary producer either collects and maintains the records required by sections 2257 and 2257A or has itself made the requisite certification to the Attorney General. The final rule now only requires that the producer state the basis under which it qualifies for the certification regime, using the brief certification statement contained in § 75.9(c)(2) of the final rule. For foreign-produced materials, a producer would use either the certification or alternate certification contained in § 75.9(c)(3) of the final rule. The Department thus believes that the certification would impose a far smaller burden than that contemplated by the proposed rule.

In cases other than those involving foreign-produced material, for which the alternate certification is necessary, the Department estimates the certification would require less than two hours to complete. A further reduction in the burden as compared to the certification contemplated by the proposed rule is that the final rule only requires that the certification be submitted once and amended only as needed, rather than requiring that a certification be submitted every two years. Estimating that the certification is prepared by an administrative staffer at a cost of $25 per hour, the certification should cost a producer no more than $50.

In cases involving foreign-produced material where the alternate certification contained in § 75.9(c)(3) of the final rule is necessary, a producer would have to take ''reasonable steps to confirm'' that depictions do not depict minors. The certification in the final rule would impose a reduced burden in this circumstance as well, as the final rule clarifies that such ''reasonable steps'' can include simply reviewing the depictions or relying on a representation or warranty made by the foreign producer of these materials. In cases where the foreign producer makes such a representation or warranty, the Department estimates little or no additional cost in preparing the certification. In cases where the producer is required to review the materials, the Department believes that U.S. producers for sound business reasons already review the materials they obtain from foreign producers, and the review contemplated by the certification would involve little or no additional cost. In particular, the Department does not believe this review would be required to be conducted by an attorney, as a good-faith belief that the material does not depict minors would be sufficient to meet the certification's standard.

Accordingly, even assuming that the Department understated the number of producers by a factor of one hundred as stated by one comment cited above, resulting in an estimate of roughly 100,000 producers in the United States, and further estimating that 90% of these producers qualify for the exemption, the total cost of preparing the certification required for the statutory exemption would be approximately $4.5 million (100,000 producers times 90% times $50 each). Given that a study submitted as a comment to the proposed rule implementing section 2257 (and submitted as an attachment to a comment on the proposed rule implementing section 2257A) estimated that the adult industry had revenues of $12.9 billion in 2006 ($9.2 billion from sectors including: video sales and rentals, the Internet, magazines, cable/satellite/hotel, and mobile), the Department believes the $4.5 million estimated cost of preparing the certification is not excessive.

In the proposed rule, the Department estimated that if 3,000,000 visual depictions of simulated sexually explicit conduct are created each year and that it requires 6 minutes to complete the record-keeping requirement for each depiction, the record-keeping requirements would impose a burden of 300,000 hours. Based on the Department's estimation that producers of 90% of these depictions would qualify for the statutory exemption from these requirements, the proposed rule estimated that the requirements would only impose a burden of 30,000 hours. The Department further estimated that the record-keeping requirements would cost $6.00 per hour to complete and $0.05 for each image of a verifiable form of identification.

The Department received two comments on its estimate for collecting the required records for those producers that do not qualify for the statutory exemption. One comment states that it was ''ludicrous'' for the Department to estimate that it would only take six minutes to complete the record-keeping requirement for each depiction, estimating four performers in each depiction, often foreign records for each performer, and the need to cross-reference the records to the performance. The comment states that ''there is no possibility that the process could take only six minutes, even for one performer.'' The other comment states that it is ''extraordinarily unlikely that * * * record-keeping associated with certification would 'cost $6.00 per hour to complete.' ''

The Department notes, however, that a study submitted as a comment to the proposed rule implementing section 2257 (and submitted as an attachment to a comment on the proposed rule implementing section 2257A) ''assume[d], based on industry interviews, that * * * [i]t takes at least three minutes to complete a Section 2257 file for a photograph * * * [and] [t]he market rate in California for a worker who can complete a Section 2257 file without error quickly is $20 per hour, including all benefits.'' The Department thus declines to accept the comment that a six-minute-per-depiction estimate is unrealistic, but accepts the comment that its $6 per hour estimate for these record-keeping tasks understates the costs. Given the nature of the work and the availability of software to assist in the record-keeping, it seems unlikely that the associated tasks would require skilled labor. Even providing roughly 130% of the Federal minimum wage for work that would appear to be essentially data

entry would yield only $10 per hour. Therefore, the Department rejects the view that $20 per hour is an accurate estimate, but adopts $10 as more reasonable.

No commenter disputed the Department's 3,000,000 images figure. Therefore, the Department continues to estimate that 3,000,000 visual depictions potentially covered by the statutory exemption are created each year. Applying its estimation that it takes 6 minutes to complete the record-keeping requirement for each depiction, the Department therefore continues to calculate that the record-keeping requirements would impose a burden of 300,000 hours. Although one commenter alleged that the Department understated the number of producers by 100 to 1, no commenter disputed that 90% of those producers would qualify for the statutory exemption. Hence, based on the Department's continued estimation that producers of 90% of the 3,000,000 depictions would qualify for the statutory exemption from these requirements, the final rule continues to estimate that the requirements would only impose a burden of 30,000 hours. The Department now estimates, however, that the record-keeping requirements would cost $10.00 per hour to complete. In an abundance of caution, to account for the costs of software noted above, the Department now estimates that each image would cost $.10 to process (i.e., twice the original estimate). Furthermore, the Department, based on the comment claiming underestimation of the number of primary and secondary producers by 100 to 1, adopts 100,000 as the total number of affected producers. Accordingly, the Department now estimates that the total annual cost for the 10% of entities (i.e., 10,000) not qualifying for the statutory exemption would be $330,000 (30,000 hours times $10 per hour, plus $.10 times 300,000 images). Thus, the average cost to an individual small business producer who did not qualify for the exemption would be $33.00 per year ($330,000 divided by 10,000). Even at the commenter's suggested $20, the cost per small business would be $66.00 per year. As mentioned above, even a small business in the lowest revenue level would find this cost to be manageable.

Paperwork Reduction Act

This final rule modifies existing requirements to conform to newly enacted legislation. It contains a revised information collection that satisfies the requirements of existing regulations to clarify the means of maintaining and organizing the required documents. This information collection will be submitted to the Office of Management and Budget for regular approval in accordance with the Paperwork Reduction Act of 1995. In the proposed rule, the Department asked for public comment on four issues: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and estimations used; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). The Department estimated that there are 500,000 Web sites and at least 200 producers of DVDs, videos, and other images containing visual depictions of actually explicit conduct (as defined by the revised section 2257), constituting 5000 businesses, and invited comments on these estimates. The Department also invited comments on its estimates that the proposed rule implementing section 2257 applied to 2,000,000 depictions of actual sexually explicit conduct (including the visual depictions of lascivious exhibition of the genitals or pubic area of a person not covered by the regulation), that each depiction would generate 6 minutes to complete its associated record-keeping, and that the record-keeping requirements would impose a burden of 200,000 hours.

Two comments state that the entire record-shifting burden arises from the requirement that records be maintained at the producer's own place of business. If third parties were custodians, and their location were properly disclosed, then both primary and secondary producers could rely on the same third-party custodian using the same disclosure statement. This would minimize the record-keeping burdens by concentrating them on third parties who were willing and able to receive the information and then organize, maintain, and make the information available for inspection. The comments posit that there may be interest in the regulated industry to assist in having third-party professional record-keepers trained and compliant in the record-keeping. These third parties would perform cross-reference and maintenance, and allow records to be available for forty hours per week, dramatically easing the overall burdens. According to the comments, the secondary producer could then fulfill its record-keeping obligations by merely referring to the location of the records created by the primary producer.

The Department adopts the comments in part. As stated above, the Department believes that its objectives can be accomplished and the burden reduced on small business by allowing producers to use third-party custodians to store their records. The final rule reflects this change from the proposed rule. The Department believes, however, as stated above, that a secondary producer who does not actually see copies of identification cards that the primary producer uses to prove that the performer was at least 18 years old as of the date of original production may take an unnecessary risk of distributing child pornography.

One comment remarked that some producers of actual sexually explicit conduct exist only virtually and that their records should therefore be permitted to be created only virtually. The Department accepts this comment in part. Regardless of the nature of the entity that produces actual sexually explicit conduct, the final rule permits records to be kept in electronic form.

One comment states that subjecting those who exclusively produce depictions involving lascivious exhibitions to record-keeping as of July 2006 would create a paperwork burden not intended by Congress. The comment expressed the view that Congress intended to reduce these entities' paperwork by creating a certification process. As stated above, the Department is delaying the imposition of the record-keeping requirements for entities whose activities enable them to confirm to the certification safe harbor until such time as the Department issues the final rule that implements section 2257A.

One comment notes the burden imposed by having each Web page contain a substantial amount of regulatory information to enable the producer to display otherwise constitutionally protected expression without criminal penalties, which it contends violates free expression. The Department adopts this comment in part. The final rule's display requirements will not require substantial regulatory information, but will permit hyperlinks. The Department does not accept the remainder of the comment. Under the terms of the final rule, producers of constitutionally

protected depictions of actual sexually explicit conduct will be fully able to create such images without risk of criminal penalties so long as they maintain records and affix a disclosure statement to each page that displays such an image. Without such compliance, there is no guarantee that the depiction is in fact constitutionally protected expression. In fact, experience demonstrates that there is too great a likelihood that a child will have been victimized by such a depiction, and that such a depiction may be used to victimize others.

Four comments state that compliance with the proposed rule is expensive, invasive, and burdensome. One comment notes that the proposed rule placed a burden on a person who displayed depictions of actual sexually explicit conduct to keep and distribute information to strangers about the performers. The Department adopts these comments in part. Although some of the requirements of the Adam Walsh Act will result in additional expenses for businesses, the Department has reduced those burdens in the final rule. It has eliminated the hard copy requirement, permitted hyperlinks rather than complete disclosure statements on each Web page, and permitted producers to place required records in the hands of third-party custodians. Primary producers must share information on performers with secondary producers, but that is a requirement of the Act.

Two comments state that hard copy is not required and is very expensive. One comment says that hard copy is counter to the requirements of the Paperwork Reduction Act requirement that agencies minimize the burden of information collections through appropriate electronic or other information technology. One comment notes that some Web sites have many thousands of pages of actual sexually explicit material, and it argues that there is no reason for a hard copy. Inexpensive scanners, it maintains, can produce digital depictions at a resolution such as 300 dots per inch that can eliminate the need to read a copy of the identification document, and that hard copies may be less clear for inspectors. The Department accepts these comments, without necessarily agreeing with the characterization of the proposed rule under the PRA and, as stated, will permit the required records to be stored electronically.

One comment notes that the proposed rule is burdensome given its requirements concerning the date of original production, which would mandate overhauling each and every disclosure on a Web site after identifying such a date for those images. The Department adopts this comment. Identification of the original date of production is crucial to the inspection process, and the records must indicate that date; however, it is not necessary to have on the disclosure statement. Accordingly, the final rule eliminates § 75.6(B)(2).

Four comments state that the proposed rule would achieve none of its stated goals, either because people will lie about their age or produce fake identification documents or because illicit entities would not keep records. Thirty-five comments claim that the rule would do little to protect minors or curb child pornography.

The Department does not adopt these comments. People who lie about their age must still produce identification cards, or the producers will be criminally liable for depicting them. The Department cannot guarantee that some individuals will not provide fake documents, but such individuals risk incurring criminal penalties, and the Department believes that the existence of these penalties will persuade many people who would be tempted to use fake documentation to avoid doing so. Further, the Department believes the rule will achieve its objective of implementing the policies of the Act, whether or not it is completely successful in eradicating the production of all child pornography.

On a related issue, one comment notes that false identification cards can appear authentic and lead to the production of many depictions and subsequent republications of the performer's image. However, since the rule requires that a copy of each image must be kept in the records of each of the many producers, the comment asks what producers are to do once the fraud is revealed. It states that producers will destroy their images when the fraud is revealed, but asks if the rule permits the destruction of the records, and if not, asks how custodians would be protected against state laws that criminalize even the private possession of child pornography.

The Department responds to this comment by stating that records of the production of such depictions must be retained even after the fraud is discovered. The Department would need to be able to inspect the identification documents that were provided as a basis for creating the depiction.

One comment states that secondary producers cannot determine if a scanned or faxed document was actual or altered, and could unknowingly accept false information. The comment questions whether the producer would be shielded from prosecution if the primary producer presents false or altered documents, and asks whether there will be a database for the secondary producer to check whether the primary producer's age documents are valid, as would be the case with a passport.

The Department responds to this comment by stating that the secondary producer must keep a copy of the relevant identification documents under the terms of the rule. So long as the producer keeps a copy of the document that reasonably appears to conform to the requirements of the rule, the producer will not face criminal liability. But as stated above, the producer must keep the records even if the image turns out not to relate to a performer of legal age. As discussed above, the Department will not establish a database as part of this rule.

One comment states that secondary producers have no relationship with the performers depicted in actual sexually explicit conduct, and that applying the record-keeping requirements to them therefore accomplishes nothing. The Department does not adopt this comment. Unless the secondary performer keeps appropriate records, then the fears that Congress expressed that secondary producers will knowingly or unknowingly create a commercial market for child pornography may materialize.

One comment contends that the proposed rule's requirement that information be placed on every page will not make the required information more easily accessible to the Department, and that it will increase compliance costs. The Department does not adopt this comment. Placement of the required information on every page will enable the Department to determine that any given depiction of actual sexual conduct is of a person who is of appropriate age, and the adherence to this requirement will make that information more accessible to the Department. Additionally, the Act requires that the Department's final rule impose such a requirement, and the Department notes that the final rule will impose the minimal compliance costs associated with the Act's requirement by permitting hyperlinks rather than the full disclosure statement to appear on each regulated page.

One comment concedes that the cross-referencing requirement has a governmental purpose when an inspector needs to obtain performance records based upon a legal name or an alias or a title of a work. However, the

comment contends that there is no basis to require cross-referencing so that an inspector can obtain an alias name that was never used in productions and was never used as an adult, or records concerning unknown works.

The Department does not adopt this comment. The Department would not know (and questions whether many producers would know) that an alias was never used in productions. If an alias had in fact been used in productions, it is vital for the Department to be able to determine that such depictions were originally produced when the performers were over 18. If an alias was never used while a performer was an adult, it may have been used when the performer was a child. Being able to trace records when the performer may have been a minor is of obvious significance to the Department's efforts to combat child exploitation.

One comment requests that the Department prepare a form analogous to an IRS form that, if properly completed, will assure the filer that it has complied with all statutory and regulatory reporting requirements. The form would be available for employers to record the fact that they have examined appropriate identification requirements before employing any individual in covered employment. The comment believes that primary producers should not have to guess concerning the required content of their records or to seek expensive legal advice from attorneys. The comment recommends that the form should be one that is used to create paper records or that can be digitally incorporated into record-keeping software for those who choose to keep the records in digital form.

The Department does not adopt this requirement. It is not possible for the Department to create a form that would ensure that the regulated entity has complied with all requirements. It is the actual performance of the checking function that the record-keeping must document. Individualized records must be kept, rather than filling out a form indicating merely that identity was checked. Moreover, copies of the identification cards must be kept to prove that the performers were of age. Finally, the comment seeks what is essentially a compliance certification procedure rather than a record-keeping principle. Congress created a particular means by which entities may be found to be in compliance with the rule even though the statutory record-keeping and disclosure requirements are not adhered to. The Department is not free to write another alternative method of compliance.

Two comments claim that the current regulations are more than adequate to fulfill their purpose. The Department does not accept this comment. Congress enacted the Act to impose additional requirements to prevent the production of child pornography because section 2257's pre-Act definition of ''actual sexually explicit conduct'' and accompanying regulations were insufficient to achieve that objective. The Department must therefore issue the final rule per statutory command and believes that these additional requirements will make the production of child pornography more difficult than under current rules.

One comment states that some sites have many thousands of images and that each would take many kilobytes of storage and that the largest sites would need many gigabytes of storage to comply with the rule. It claims that sites with streaming video need to retain seven years' worth of recorded video. According to the comment, regardless of whether video is live or recorded, and regardless of whether copies are held in hard form or electronically, the size and number of video files will create a significant burden, in some cases requiring storage of gigabytes of data or thousands of videos. The comment wonders what governmental benefits these requirements will produce.

The Department does not adopt this comment. As to live performances, the proposed rule specifically provides, ''For any performer in a depiction performed live on the Internet, the records shall include a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.'' 72 FR at 38036. This will significantly reduce the storage costs the commenter discusses. As to recorded performances, the Department does not accept the alleged burdensome nature of the storage costs. The district court in *Free Speech Coalition* v. *Gonzales* favorably cited the Department's expert witness to the effect that ''large numbers of depictions can be electronically stored by purchasing hard drives at insubstantial prices.'' *Free Speech I,* 406 F. Supp. 2d at 1208.

Several commenters address the time period for the retention of records. One comment views the seven-year record retention requirement as excessive, noting that at three inspections per year, the producer would face 20 or 21 inspection cycles. The comment believes that there is no reason why that many inspections would be needed for a particular record and that the Department would learn the actual age of a depicted performer before so many inspections were carried out. The comment asks that the final rule make clear that the records of a depiction can be disposed of seven years after a depiction's creation, and that a producer's records concerning a performer can be disposed of seven years after the performer is last depicted by the producer.

One comment points out that the required time for keeping records can be seventeen years. If a corporation leaves the adult entertainment business just before the seven-year record-keeping requirement, it must keep the records for an additional five years. And if the company goes out of business altogether, then the individual custodian must keep the records for another five years. The comment asks that the final rule should say that the operative period is the shortest of whichever of these three contingencies occurs first.

One comment notes that a secondary producer must keep the relevant record for seven years after the depiction was reproduced, perhaps beginning seven years after the depiction was produced. The comment points out that the information in the records properly relates to the initial production and not the reproduction. It posits that there is no reason to restart the clock for each republication. The comment also expresses concern that requiring the records to be maintained as long as the depiction is in circulation would be so cumulatively burdensome as to unconstitutionally harm expression.

One comment asks that no one be required to keep records of a particular depiction more than seven years after it was initially created. A secondary producer may want to reproduce a depiction eight years after it was made, but the primary producer may have eliminated the records. The comment asks whether the secondary producer can reproduce without the records, or its further reproduction is restricted at the cost of the constitutional rights of the primary producer who is also now quite lawfully without the records.

The Department declines to adopt these comments. Concerns about the retention period for records were addressed in the final rule published in 2005. At that time, the Department stated, ''The regulation provides for retention of records for seven years from production or last amendment and five years from cessation of production by a business or dissolution of the company. The Department does not believe that these limits are unreasonable. The only way to satisfy the commenters' objection that the periods of time can multiply

would be to impose a blanket short period of time no matter what changes to the records were made. Such a change would frustrate the ability to ensure that records were maintained up-to-date and prevent inspectors from examining older records to determine if a violation had been committed. In addition, the time periods, contrary to the claim of the commenters, do not violate *American Library Association* v. *Reno*. In that case, the DC Circuit held that part 75 could not require records to be maintained for as long as the producer remained in business and allowed a five-year retention period '[p]ending its replacement by a provision more rationally tailored to actual law enforcement needs.' 33 F.3d at 91. The Department has determined that the seven-year period is reasonable, thus satisfying the court's directive. The production of child pornography statute of limitations was increased in the PROTECT Act from five years to the life of the child, and the increase contained in the regulation seeks to comport with that extended statute of limitations. Finally, the Department wishes to clarify that the statute requires that each time a producer publishes a depiction, he must have records proving that the performers are adults. Thus, if a producer purges his or her records after the retention period but continues to use a picture for publication, the producer would be deemed in violation of the statute for not maintaining records that the person depicted was an adult. Records are required for every iteration of an image in every instance of publication.'' 70 FR at 29614.

One comment believes that the proposed rule's record-keeping requirements impose a heavy burden. It argues that copies of the full set of required records must follow any depiction to any secondary producer who assists in disseminating the constitutionally protected expression, which will restrict such dissemination.

The Department does not adopt this comment. Although a burden is imposed by the record-keeping requirement, it is necessary that secondary producers retain copies of records that the primary producer examined prior to producing depictions of sexually explicit conduct. Otherwise, there is no way to determine that the depiction is in fact constitutionally protected expression rather than a record of child exploitation. Since preventing the existence of a commercial market for child pornography is a major purpose of the Act, the Department believes that it has adopted the least-restrictive burden for secondary producers and the Department to be sure that the performers were of legal age on the original production date of the depiction of actual sexually explicit conduct.

One comment points out that because a secondary producer cannot assemble records from scratch, he should be able to receive a copy of the primary producer's records so long as the secondary producer also obtains, records, and maintains the primary producer's business address. The comment expressed a belief that the volume and complexity of the requirements will limit the distribution of constitutionally protected material. It complains that if a primary producer licenses some but not all of a set of its images, it will be difficult for a secondary producer to untangle the cross-references so that the secondary possesses the required records (because possessing extraneous matter subjects that individual to a five-year sentence per § 75.2(e)). The comment anticipates that some primary producers will not want to share records concerning identification cards because secondary producers might compete with those primary producers if they knew where to find the performers. Moreover, if the performer obtained an agreement from the primary producer not to use a secondary producer to republish their depiction, then constitutionally protected expression will be frozen out of existence.

The Department does not adopt this comment. For a secondary producer to know that as of the original production date, the performers were of legal age, copies of the records of the primary producer must be provided that demonstrate that fact. To identify the appropriate primary producer, the secondary producer must keep records itself. The only means of ensuring that children are not performing in the depiction is to determine the birthdates of the performers and to keep records. The Department must have access to these records to ensure that children are not being depicted. First Amendment rights are not implicated if, in response to the rule, primary producers choose not to share records because they fear that secondary producers may compete with them. Moreover, if a performer obtains an agreement through an agent that the primary producer will not use a secondary producer to republish a depiction, then the reason that the secondary producer would become unable to obtain the image is through the operation of the agreement, whether or not the Department had ever issued any regulations. The First Amendment is not implicated under those circumstances.

One comment states that a secondary producer can satisfy the Act by requiring only an email or a letter from the primary producer attesting to the availability of the date of birth documentation's availability at the primary producer's place of business, unless the secondary producer is also a primary producer. The Department does not adopt this comment. A secondary producer's reliance on an email or letter does not ensure that the secondary producer actually retains records documenting that the performer was of legal age as of the date of original production.

One comment notes that each Web site can contain multiple depictions, which may have been created on different dates. Each webmaster would have to develop a unique system of cross-referencing, coding, or identifying the production date of each depiction. The comment would prefer that webmasters be permitted to identify the most relevant date, of either production, duplication, reproduction, or reissuance of a depiction.

The Department does not adopt this comment. Apart from the lack of clarity concerning what the most relevant date from the choices above for a particular depiction, the Department believes that the date of original production is a critical element for the disclosure statement that Congress has required. Confirmation of the date of birth of the performer and of the date of original production are the two most important pieces of information necessary to be recorded if child pornography is to be kept out of production and commercial distribution. Knowledge of only a later date that is unrelated to the date of original production of the image will not ensure that the performer was of legal age as of the date that the depiction was created, the key factor determining whether a particular depiction is child pornography or not.

Two comments oppose cross-referencing requirements because, the commenters say, they are a means only to harass producers. The Department does not adopt this comment. Cross-referencing requirements, as described above, are vital to determining whether a performer under any name that the performer has used has been depicted in actual sexually explicit conduct despite their status as a minor. Cross-referencing will enable the Department to establish, whatever name may be used, whether a performer's identification card demonstrates legality of age for such productions.

Two comments suggest that the burden of segregating records in § 75.2(d) and (e) is too stringent. One points out that if a stray 1099 form, model release, or I–9 form were to wind up in the section 2257 records instead of the more general personnel file, then the producer or custodian would face years in prison. The comment contends that there should be a different rule for inadvertent misfiling.

The Department does not accept this comment. The segregation requirement in fact reduces the burden that the rule imposes upon the regulated entity. Due to segregation of records, the inspector need only review a unified set of records, without need to search every document in the facility.

Two comments request that the final rule reduce the burden on primary producers by not requiring that they make or receive sworn statements that all content is legal and all models are over 18. The Department declines to adopt this comment, as it describes the effect of neither the proposed rule nor existing regulation.

The Department received no comments challenging its estimates that 2,000,000 depictions of actual sexually explicit conduct would be generated this year, that the associated record-keeping for each depiction would amount to 6 minutes, and that the total related burden of compliance for this category was 200,000 hours, and it therefore continues to adhere to these estimates. Two million depictions at a cost of $10 per hour of record-keeping and a duplication cost of $0.10 per depiction produces a total cost of compliance with the final section 2257 rule of $2,400,000.

The OMB Control Number pertaining to the rule is 1105–0083.

List of Subjects in 28 CFR Part 75

Crime, infants and children, Reporting and record-keeping requirements.

■ Accordingly, for the reasons set forth in the preamble, part 75 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; PROTECT ACT; ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006; RECORDKEEPING AND RECORD-INSPECTION PROVISIONS

■ 1. The authority citation for part 75 is revised to read as follows:

Authority: 18 U.S.C. 2257, 2257A.

■ 2. The heading of part 75 is revised to read as set forth above.

■ 3. Amend § 75.1 by revising paragraphs (b), (c)(1), (c)(2), (c)(4), (d), and (e), and by adding paragraphs (m) through (s), to read as follows:

§ 75.1 Definitions.

* * * * *

(b) *Picture identification card* means a document issued by the United States, a State government, or a political subdivision thereof, or a United States territory, that bears the photograph, the name of the individual identified, and the date of birth of that individual, and provides specific information sufficient for the issuing authority to confirm its validity, such as a passport, Permanent Resident Card (commonly known as a ''Green Card''), or employment authorization document issued by the United States, a driver's license or other form of identification issued by a State or the District of Columbia; or a foreign government-issued equivalent of any of the documents listed above when the person who is the subject of the picture identification card is a non-U.S. citizen located outside the United States at the time of original production and the producer maintaining the required records, whether a U.S. citizen or non-U.S. citizen, is located outside the United States on the original production date. The picture identification card must be valid as of the original production date.

* * * * *

(c) * * *

(1) *Primary producer* is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or a picture of, or who digitizes an image of, a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. When a corporation or other organization is the primary producer of any particular image or picture, then no individual employee or agent of that corporation or other organization will be considered to be a primary producer of that image or picture.

(2) *Secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or digitally- or computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of, an actual human being engaged in actual or simulated sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing. When a corporation or other organization is the secondary producer of any particular image or picture, then no individual of that corporation or other organization will be considered to be the secondary producer of that image or picture.

* * * * *

(4) Producer does not include persons whose activities relating to the visual depiction of actual or simulated sexually explicit conduct are limited to the following:

(i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) Distribution;

(iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) The provision of a telecommunications service, or of an Internet access service of Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231));

(v) The transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; or

(vi) Unless the activity or activities are described in section 2257(h)(2)(A), the dissemination of a depiction without having created it or altered its content.

(d) *Sell, distribute, redistribute, and re-release* refer to commercial distribution of a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, but does not refer to noncommercial or

educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations.

(e) *Copy*, when used:

(1) In reference to an identification document or a picture identification card, means a photocopy, photograph, or digitally scanned reproduction;

(2) In reference to a visual depiction of sexually explicit conduct, means a duplicate of the depiction itself (e.g., the film, the image on a Web site, the image taken by a webcam, the photo in a magazine); and

(3) In reference to an image on a webpage for purposes of §§ 75.6(a), 75.7(a), and 75.7(b), means every page of a Web site on which the image appears.

* * * * *

(m) *Date of original production* or *original production date* means the date the primary producer actually filmed, videotaped, or photographed, or created a digitally- or computer-manipulated image or picture of, the visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. For productions that occur over more than one date, it means the single date that was the first of those dates. For a performer who was not 18 as of this date, the date of original production is the date that such a performer was first actually filmed, videotaped, photographed, or otherwise depicted. With respect to matter that is a secondarily produced compilation of individual, primarily produced depictions, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction in that compilation was produced. For a performer in one of the individual depictions contained in that compilation who was not 18 as of this date, the date of original production is the date that the performer was first actually filmed, videotaped, photographed, or otherwise depicted for the individual depiction at issue.

(n) *Sexually explicit conduct* has the meaning set forth in 18 U.S.C. 2256(2)(A).

(o) *Simulated sexually explicit conduct* means conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean not sexually explicit conduct that is merely suggested.

(p) *Regularly and in the normal course of business collects and maintains* means any business practice(s) that ensure that the producer confirms the identity and age of all employees who perform in visual depictions.

(q) *Individually identifiable information* means information about the name, address, and date of birth of employees that is capable of being retrieved on the basis of a name of an employee who appears in a specified visual depiction.

(r) *All performers, including minor performers* means all performers who appear in any visual depiction, no matter for how short a period of time.

(s) *Employed by* means, in reference to a performer, one who receives pay for performing in a visual depiction or is otherwise in an employer-employee relationship with the producer of the visual depiction as evidenced by oral or written agreements.

■ 4. Amend § 75.2 by:

■ a. Revising paragraph (a) introductory text and paragraphs (a)(1) and (a)(2), and adding paragraph (a)(4);

■ b. Adding two sentences at the end of paragraph (b);

■ c. Revising paragraphs (c) and (d); and

■ d. Adding paragraphs (g) and (h).

The additions and revisions read as follows:

§ 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped, transported, or intended for shipment or transportation in interstate or foreign commerce, and that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or one or more visual depictions of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall, for each performer portrayed in such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of a picture identification card prior to production of the depiction. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall also include a legible hard copy or legible digitally scanned or other electronic copy of a hard copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible hard copy of a picture identification card. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after June 23, 2005, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall include a copy of the depiction, and, where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction. If no URL is associated with the depiction, the records shall include another uniquely identifying reference associated with the location of the depiction on the Internet. For any performer in a depiction performed live on the Internet, the records shall include a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.

(2) Any name, other than the performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in a visual depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter. Producers may rely in good faith on representations by performers regarding accuracy of the names, other than legal names, used by performers.

* * * * *

(4) The primary producer shall create a record of the date of original production of the depiction.

(b) * * * The copies of the records may be redacted to eliminate non-essential information, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm the name and age may not be redacted.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the date of original production of the visual depiction to which the records are associated. If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to § 75.2(a)(2). Producers of visual depictions made after July 3, 1995, and before June 23, 2005, may rely on picture identification cards that were valid forms of required identification under the provisions of part 75 in effect during that time period.

(d) For any record of a performer in a visual depiction of actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) created or amended after June 23, 2005, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, all such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service). If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records, and such records shall thereafter be maintained in accordance with this paragraph.

* * * * *

(g) Records are not required to be maintained by either a primary producer or by a secondary producer for a visual depiction of sexually explicit conduct that consists only of lascivious exhibition of the genitals or pubic area of a person, and contains no other sexually explicit conduct, whose original production date was prior to March 18, 2009.

(h) A primary or secondary producer may contract with a non-employee custodian to retain copies of the records that are required under this part. Such custodian must comply with all obligations related to records that are required by this Part, and such a contract does not relieve the producer of his liability under this part.

■ 5. Revise § 75.4 to read as follows:

§ 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business or at the place of business of a non-employee custodian of records. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business or at the place of business of a non-employee custodian of records. If the organization is dissolved, the person who was responsible for maintaining the records, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

■ 6. Section 75.5 is amended by revising:

■ a. Paragraphs (c)(1), (c)(3), and (c)(4);

■ b. Paragraph (d); and

■ c. Paragraph (e).

The revisions read as follows:

§ 75.5 Inspection of records.

* * * * *

(c) *Conduct of inspections.* (1) Inspections shall take place during normal business hours and at such places as specified in § 75.4. For the purpose of this part, ''normal business hours'' are from 9 a.m. to 5 p.m., local time, Monday through Friday, or, for inspections to be held at the place of business of a producer, any other time during which the producer is actually conducting business relating to producing a depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, the producer must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than 20 hours per week.

* * * * *

(3) The inspections shall be conducted so as not to unreasonably disrupt the operations of the establishment.

(4) At the conclusion of an inspection, the investigator may informally advise the producer or his non-employee custodian of records of any apparent violations disclosed by the inspection. The producer or non-employee custodian or records may bring to the attention of the investigator any pertinent information regarding the records inspected or any other relevant matter.

* * * * *

(d) *Frequency of inspections.* Records may be inspected once during any four-month period, unless there is a reasonable suspicion to believe that a violation of this part has occurred, in which case an additional inspection or inspections may be conducted before the four-month period has expired.

(e) *Copies of records.* An investigator may copy, at no expense to the producer or to his non-employee custodian of records, during the inspection, any record that is subject to inspection.

* * * * *

■ 7. Amend § 75.6 by:

■ a. Revising paragraph (a);

■ b. Removing and reserving paragraph (b)(2), and removing the second sentence from paragraph (b)(3);

■ c. Revising paragraph (c); and

■ d. Adding paragraph (f).

The addition and revisions read as follows:

§ 75.6 Statement describing location of books and records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued after July 3, 1995, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter to affix the statement. In this paragraph, the term ''copy'' includes every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears.

* * * * *

(c) If the producer is an organization, the statement shall also contain the title and business address of the person who is responsible for maintaining the records required by this part.

* * * * *

(f) If the producer contracts with a non-employee custodian of records to serve as the person responsible for maintaining his records, the statement shall contain the name and business address of that custodian and may contain that information in lieu of the information required in paragraphs (b)(3) and (c) of this section.

■ 8. Revise § 75.7 to read as follows:

§ 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part if:

(1) The matter contains visual depictions of actual sexually explicit conduct made only before July 3, 1995, or was last produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995. Where the matter consists of a compilation of separate primarily produced depictions, the entirety of the conduct depicted was produced prior to July 3, 1995, regardless of the date of secondary production;

(2) The matter contains only visual depictions of simulated sexually explicit conduct or of actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person, made before March 18, 2009;

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part.

■ 9. Amend § 75.8 by:

■ a. Revising paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (f); and

■ c. Adding a new paragraph (e).

The revisions and additions read as follows:

§ 75.8 Location of the statement.

* * * * *

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture shall contain the required statement on every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears. Such computer site or service or Web address may choose to display the required statement in a separate window that opens upon the viewer's clicking or mousing-over a hypertext link that states, ''18 U.S.C. 2257 [and/or 2257A, as appropriate] Record-Keeping Requirements Compliance Statement.''

(e) For purpose of this section, a digital video disc (DVD) containing multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD.

* * * * *

■ 10. Add § 75.9 to read as follows:

§ 75.9 Certification of records.

(a) *In general.* The provisions of §§ 75.2 through 75.8 shall not apply to a visual depiction of actual sexually explicit conduct constituting lascivious exhibition of the genitals or pubic area of a person or to a visual depiction of simulated sexually explicit conduct if all of the following requirements are met:

(1) The visual depiction is intended for commercial distribution;

(2) The visual depiction is created as a part of a commercial enterprise;

(3) Either—

(i) The visual depiction is not produced, marketed or made available in circumstances such that an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in 18 U.S.C. 2256(8), or,

(ii) The visual depiction is subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent, or profane programming; and

(4) The producer of the visual depiction certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer. (A producer of materials depicting sexually explicit conduct not covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime.)

(b) *Form of certification.* The certification shall take the form of a letter addressed to the Attorney General signed either by the chief executive officer or another executive officer of the entity making the certification, or in the event the entity does not have a chief executive officer or other executive officer, the senior manager responsible for overseeing the entity's activities.

(c) *Content of certification.* The certification shall contain the following:

(1) A statement setting out the basis under 18 U.S.C. 2257A and this part under which the certifying entity and any sub-entities, if applicable, are permitted to avail themselves of this exemption, and basic evidence justifying that basis.

(2) The following statement: ''I hereby certify that [name of entity] [and all sub-entities listed in this letter] regularly and in the normal course of business collect and maintain individually identifiable information regarding all performers employed by [name of entity]''; and

(3) If applicable because the visual depictions at issue were produced outside the United States, the statement that: ''I hereby certify that the foreign producers of the visual depictions produced by [name of entity] either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or have certified to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications.'' The producer may provide the following statement instead: ''I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, or other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area of any person were not minors at the time the depictions were originally produced.'' ''Reasonable steps'' for purposes of this statement may include, but are not limited to, a good-faith review of the visual depictions themselves or a good-faith reliance on representations or warranties from a foreign producer.

(d) *Entities covered by each certification.* A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of all sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entity served as the producer.

(e) *Timely submission of certification.* An initial certification is due June 16, 2009. Initial certifications of producers who begin production after December 18, 2008, but before June 16, 2009, are due on June 16, 2009. Initial certifications of producers who begin production after June 16, 2009 are due within 60 days of the start of production. A subsequent certification is required only if there are material changes in the information the producer certified in the initial certification; subsequent certifications are due within 60 days of the occurrence of the material change. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or federal holiday.

Dated December 9, 2008.

Michael B. Mukasey,

Attorney General.

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To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

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